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I. Definition.—A receiver may be most comprehensively defined as a person standing indifferent between the parties, who is appointed by a court, under its equitable or statutory jurisdiction, as a *quasi* officer or representative of the court, to take the charge and management of the property in controversy, under the direction of the court, during the continuance of the litigation, or in pursuance thereof.[1] Various current definitions are more restricted in character, and applicable only to particular phases of a receiver's functions.[2]

II. Receiver's Functions in General—1. Design of Receivership.—The purpose of a receiver's appointment is the protection of the subject of litigation. Receivership is one of those remedial

1. This definition is modified from the definitions given in Merritt *v.* Lyon, 16 Wend. (N. Y.) 421; Anderson's Law Dict., 860; 3 Pom. Eq. Jur., p. 357, § 1330.

Compare other general definitions in Coleman *v.* Ormond, 60 Ala. 328; Bkaer *v.* Backus, 32 Ill. 95.

2. See Berry *v.* Jones, 11 Heisk. (Tenn.) 210; Waters *v.* Carroll, 9 Yerg. (Tenn.) 102; Booth *v.* Clark, 17 How. (U. S.) 331; Devendorf *v.* Dickinson, 21 How. Pr. (N. Y.) 276; *Ex parte* Walker. 25 Ala. 81. As to when money deposited with a banker subject to order of court will not constitute him a receiver, see Coleman *v.* Salisbury, 52 Ga. 471.

Receiver Pendente Lite.—A receiver *pendente lite*, under which designation would probably come most kinds of receivers, is a person appointed to take charge of the fund or property to which the receivership extends while the case remains undecided. Keeney *v.* Home Ins. Co., 71 N. Y. 401; 27 Am. Rep. 63.

Common Law Receiver.—This misleading expression has been used to designate a person appointed by the court to receive the rents, issues, and profits of land or any other thing in question in the court of chancery pending a suit, where it does not seem reasonable to the court that either party should do it. See Chautauqua Co. Bank *v.* White, 6 Barb. (N. Y.) 597; also in general, Verplanck *v.* Mercantile Ins. Co., 2 Paige (N. Y.) 452.

Manager.—In *England*, the term "receiver" is applied only to those appointed to receive the rents and profits of land and to get in outstanding property; and one selected to carry on or superintend a trade or business is usually denominated a "manager" or a "receiver and manager." 2 Daniel's Ch. Prac. (5th Am. ed.) 1768; but in the *United States*, both classes of officers are called receivers. Foster's Fed. Prac., § 239.

Receiver of National Bank.—The U. S. Rev. Stat. authorize the Comptroller of the Currency to appoint in certain cases a receiver of a national banking association. See Price *v.* Abbott, 17 Fed. Rep. 507, and the powers and duties of such a receiver are in many respects analogous to those of a receiver appointed by a court of equity. Foster's Fed. Prac., § 239.

agencies devised originally in order to preserve the fund or thing in question from removal beyond the jurisdiction, or from spoliation, waste, or deterioration pending the litigation, so that it might be appropriated as the final decree should appoint.[1]

2. Jurisdiction over Receivership—*a.* JURISDICTION IN GENERAL.—By means of the appointment of a receiver, a court of equity takes possession of the property which is the subject of the suit, preserves it from waste or destruction, secures and collects the proceeds or profits, and ultimately disposes of them according to the rights and priorities of those entitled.[2]

1. Myers *v.* Estell, 48 Miss. 401.

See also Chase's Case, 1 Bland Ch. (Md.) 213; 17 Am. Dec. 280. The preservation of the property is asserted as the purpose of the receivership, in Taylor *v.* Philadelphia etc. R. Co., 7 Fed. Rep. 385; Ellis *v.* Boston etc. R. Co., 107 Mass. 28; Latham *v.* Chafee, 7 Fed. Rep. 526. See also Mays *v.* Rose, Freem. Ch. (Miss.) 718, using the word "secure;" Battle *v.* Davis, 66 N. Car. 255, speaking of "protecting and securing;" Lenox *v.* Notrebe, Hempst. (U. S.) 226, also using the word "secure."

Object of Appointing Receivers.—A receiver is appointed (see 3 Pom. Eq. Jur. p. 357, § 1330) in four general classes of cases:

1. Where there is no competent person entitled to hold the property, as in the case of an infant, or in the interval before an executor or administrator of a deceased owner is appointed.

2. Where two or more litigants are equally entitled; but it is not just and proper that either of them should retain it under his control; as, for example, in some suits between partners. See reference in Bank of Mississippi *v.* Duncan, 52 Miss. 743; and as to cotenancy by railroad companies, see Delaware etc. R. Co. *v.* Erie R. Co., 21 N. J. Eq. 304.

3. Where a person is legally entitled, but there is danger of his misapplying or misusing the property; as, for example in some suits against an executor or administrator, or under some particular circumstances, in suits for the enforcement of a mortgage. See Dougherty *v.* McDougald, 10 Ga. 125. *Compare*, as to corporations, French *v.* Gifford, 30 Iowa 159.

4. For the purpose of carrying into effect a decree of the court concerning the property, such as a decree for the winding up and settlement of a corporation, or in a creditor's suit. See, for an instance, where a receiver was appointed in pursuance of judgment against a corporation, Libby *v.* Rosekrans, 55 Barb. (N. Y.) 206.

Various statutory and other grounds for the appointment of a receiver are discussed in the French Bank Case, 53 Cal. 554; Hand *v.* Dexter, 41 Ga. 454; Mapes *v.* Scott, 4 Ill. App. 371; Richards *v.* Barrett, 5 Ill. App. 514.

The ground of the need of preservation of the property is stated in Cheever *v.* Rutland, etc., R. Co., 39 Vt. 657.

The most usual causes for such appointment are mentioned in Baker *v.* Backus, 32 Ill. 95; and a survey of the law as to when a receiver will be appointed, and over what property is given in the note to Cortleyen *v.* Hathaway, 64 Am. Dec. 495.

The requirement that there must be fraud or imminent danger to the property is made in Blondheim *v.* Moore, 11 Md. 374, stating the rules applicable to the appointment of a receiver; and applied in Haight *v.* Burr, 19 Md. 134; Voshell *v.* Hinson, 26 Md. 93. *Compare* Bainbrigge *v.* Baddeley, 3 M. & G. 420. As to danger from actual or expected insolvency, see Ladd *v.* Harvey, 21 N. H. 521. See also under *North Carolina* statute, Twitty *v.* Logan, 80 N. Car. 70.

As to when a receiver will not be appointed, see Mays *v.* Wherry, 3 Tenn. Ch. 35; Cassetty *v.* Capps, 3 Tenn. Ch. 526. *Consult or compare* also Richmond *v.* Yates, 3 Baxt. (Tenn.) 205; Sturch *v.* Young, 5 Beav. 557; State *v.* Allen, 1 Tenn. Ch. 514; Evans *v.* Coventry, 3 Drew. 82.

Receiver's Functions in General.—These will be found stated in Devendorf *v.* Dickinson, 21 How. Pr. (N. Y.) 276; Bank of Mississippi *v.* Duncan, 52 Miss. 743; Battle *v.* Davis, 66 N. Car. 256; Beverley *v.* Brooke, 4 Gratt. (Va.) 209.

2. Beverley *v.* Brooke, 4 Gratt. (Va.)

b. IS OF EQUITABLE COGNIZANCE.—The right to appoint and supervise a receiver is referable solely to the powers which the courts exercise as courts of chancery,[1] and is one of the oldest remedies known under equity jurisdiction.[2]

3. Scope of Receiver's Functions—*a.* RECEIVER AS OFFICER OF COURT.—As an officer of the court, the receiver is subject to its direction and control; and he is not the representative of either or any of the parties to the litigation, but acts for the benefit of all concerned in the controversy.[3]

208. These may be either regular parties in the cause, or only parties in interest coming before the court in a seasonable time, and due course of proceeding, to assert and establish their pretensions. See opinion just cited. *Consult* also in support of text, Lenox *v.* Notrebe, Hempst. (U. S.) 226; *In re* Cohen, 5 Cal. 496.

1. Folsom *v.* Evans, 5 Minn. 419. See also Chicago, etc., Oil Co. *v.* U. S. Petroleum Co., 57 Pa. St. 91; 6 Phila. (Pa.) 523; Bitting *v.* Ten Eyck, 85 Ind. 357.

2. Hopkins *v.* Worcester, etc., Canal Proprs., L. R., 6 Eq. 447.

One of the heads of jurisdiction in a court of equity is to protect property pending litigation in a court of law; and it necessarily follows that upon a proper case, a court of equity will protect proper pending litigation before itself. Stilwell *v.* Williams, 6 Madd. 49. This is said to be "one of the modes by which the preventive justice of a court of equity is administered," in Mays *v.* Rose, Freem. Ch. (Miss.) 718. But such a characterization would apply more especially to an injunction, while the preservation of the property is the more immediate object of receivership, though such preservation, of course, necessarily involves the prevention of injury or destruction.

The power of appointing a receiver has long been considered as being of as great utility as any which belongs to a court of chancery; and it is called into action in a variety of exigencies, either to prevent fraud, to save the subject of litigation from material injury, or to rescue it from inevitable destruction. Williamson *v.* Wilson, 1 Bland Ch. (Md.) 426. A reference to this power as necessarily inherent, in a court which possesses equitable jurisdiction, is made by Dick, J., in Skinner *v.* Maxwell, 66 N. Car. 47, on other points. Skinner *v.* Maxwell, 68 N. Car. 400.

3. See Davis *v.* Gray, 16 Wall. (U. S.) 218; 15 Myer's Fed. Dec. 537; Booth *v.* Clark, 17 How. (U. S.) 331; Meier *v.* Kansas Pac. R. Co., 5 Dill. (U. S.) 479; Morrill *v.* Noyes, 56 Me. 463; 96 Am. Dec. 488; 2 Story Eq. Jur. (12th ed.), p. 36, § 829; *In re* Burke, 1 B. & B. 75; Beverley *v.* Brooke, 4 Gratt. (Va.) 208; Ellis *v.* Boston, etc., R. Co., 107 Mass. 28; Battle *v.* Davis, 66 N. Car. 255; *Ex parte* Dunn, 8 S. Car. 234; Poland *v.* La Moille Valley R. Co, 52 Vt. 175; 4 Am. & Eng. R. Cas. 433; Coburn *v.* Ames, 57 Cal. 203; Runyon *v.* Farmers', etc., Bank, 4 N. J. Eq. 482; Hooper *v.* Winston, 24 Ill. 363; Ellicott *v.* U. S. Ins. Co., 7 Gill (Md.) 320; Bank of Mississippi *v.* Duncan, 52 Miss. 743; *Ex parte* Walker, 25 Ala. 104; Kaiser *v.* Kellar, 21 Iowa 96; King *v.* Cutts, 24 Wis. 629; De Groot *v.* Jay, 30 Barb. (N. Y.) 484; Osborn *v.* Heyer, 2 Paige (N. Y.) 343; Hunt *v.* Wolfe, 2 Daly (N. Y.) 303; Green *v.* Bostwick, 1 Sandf. Ch. (N. Y.) 187; Van Rensselaer *v.* Emery, 9 How. Pr. (N. Y.) 138; Devendorf *v.* Dickinson, 21 How. Pr. (N. Y.) 276; Corey *v.* Long, 43 How. Pr. (N. Y.) 498; 12 Abb. Pr. N. S. (N. Y.) 434; Curtis *v.* Leavitt, 1 Abb. Pr. (N. Y.) 276; Brown *v.* Northrup, 15 Abb. Pr. N. S. (N. Y.) 335.

Compare Chase's Case, 1 Bland Ch. (Md.) 213; 17 Am. Dec. 280; Kellar *v.* Williams, 3 Rob. (La.) 324.

Appointment Determines No Right—A receiver is truly and properly the hand of the court of which he is an officer; but his appointment determines no right. See *In re* Cohen, 5 Cal. 494; nor does it affect the title of the property in any way; and his holding is the holding of the court for him from whom the possession was taken. Williamson *v.* Wilson, 1 Bland Ch. (Md.) 421; Ellicott *v.* U. S. Ins. Co., 7 Gill (Md.) 320; *In re* Colvin, 3 Md. Ch. 302; Ellicott *v.* War-

b. RECEIVER'S CUSTODY.—Receivers are part of the machinery by which equity protects and secures the rights of parties. Their custody is that of the law, and is in its nature provisional and suspensive, leaving the rights of the parties concerned to be controlled by the ultimate judgment of the court,[1] or its further action in the premises.[2]

ford, 4 Md. 85. But still an application for such an appointment can only be made by those who have an acknowledged interest, or where there is strong reason to believe that the party asking for a receiver will recover. Chase's Case, 1 Bland Ch. (Md.) 213; 17 Am. Dec. 279.

Extent of Authority.—The receiver has only such power and authority as are given him by the court, and must not exceed the prescribed limits. Davis *v.* Gray, 16 Wall. (U. S.) 218; 15 Myer's Fed. Dec. 537; at least in the absence of statute regulating the matter. Verplanck *v.* Mercantile Ins. Co., 2 Paige (N. Y.) 452; Chautauqua Co. Bank *v.* White, 6 Barb. (N. Y.) 597. See Booth *v.* Clark, 17 How. (U. S.) 331.

For an instance of statutory regulation of receiver's powers and duties, see Attorney-Gen'l *v.* L. & F. Ins. Co., 4 Paige (N. Y.) 225.

Want of Personal Interest.—The receiver is subject to the orders of the court, and accountable in such manner and to such persons as the court may direct. He has, in his character of receiver, no personal interest but that arising out of his responsibility for the correct and faithful discharge of his duties. It is of no consequence to him how, or when, or to whom, the court may dispose of the funds in his hands, provided the order or decree of the court furnishes to him a sufficient protection. See opinion by Baldwin, J., in Beverley *v.* Brooke, 4 Gratt. (Va.) 208.

Appointment Called an Equitable Execution.—Every kind of property of such a nature that, if legal, it might be taken in execution may, if equitable, be put in the possession of the receiver; and hence the appointment has been said to be an equitable execution. Davis *v.* Gray, 16 Wall. (U. S.) 217; 15 Myer's Fed. Dec. 537. See also Beverley *v.* Brooke, 4 Gratt. (Va.) 208; Hunt *v.* Wolfe, 2 Daly (N. Y.) 303.

For comparison of receiver with sheriff, see *In re* Merchants' Ins. Co., 3 Biss. (U. S.) 165.

Protection by Court.—The court will not allow the receiver to be sued touching the property in his charge, nor for any malfeasance as to the parties, or others, without its consent; nor will it permit his possession to be disturbed by force, nor violence to be offered to his person while in the discharge of his official duties; and in such cases the court will vindicate its authority, and, if need be, will punish the offender by fine and imprisonment for contempt. Davis *v.* Gray, 16 Wall. (U. S.) 218; 15 Myer's Fed. Dec. 538. See 2 Story's Eq. Jur. (12th ed.), § 833*a*, 833*b*; Walling *v.* Miller, 108 N. Y. 177; 2 Am. St. Rep. 402; Wiswall *v.* Sampson, 14 How. (U. S.) 65; 27 Myer's Fed. Dec. 56; Corey *v.* Long, 43 How. Pr. (N. Y.) 499; 12 Abb. Pr. N. S. (N. Y.) 435; De Groot *v.* Jay, 30 Barb. (N. Y.) 484; Albany City Bank *v.* Schermerhorn, 10 Paige (N. Y.) 265; Parker *v.* Browning, 8 Paige (N. Y.) 391; 35 Am. Dec. 717; Noe *v.* Gibson, 7 Paige (N. Y.) 515; Lees *v.* Waring, 1 Hog. 216; Jones *v.* Claughton, Jac. 573; Angel *v.* Smith, 9 Ves. 339; Russell *v.* East Anglian R. Co., 3 Macn. & G. 119.

The same rules are applied to the possession of a sequestrator. 2 Daniel's Ch. Prac. (5th ed.) 1056; Davis *v.* Gray, 16 Wall. (U. S.) 218; 15 Myer's Fed. Dec. 538; Angel *v.* Smith, 9 Ves. 338; Kaye *v.* Cunningham, 5 Madd. 406, or other committee or custodian, who holds the property as an officer of the court. Noe *v.* Gibson, 7 Paige (N. Y.) 516. See as to committee of a lunatic, *In re* Hopper, 5 Paige (N. Y.) 490; *In re* Heller, 3 Paige (N. Y.) 201, and as to lands in charge of custodees, Sweet *v.* Austin, Con. 174.

Concerning course to be pursued by third parties where there is receivership, see Vincent *v.* Parker, 7 Paige (N. Y.) 66.

1. Miller *v.* Bowles, 10 Nat. Bank. Reg. 517.

2. To the effect that money or property in the receiver's hands is in *custodia legis*, see Davis *v.* Gray, 16 Wall. (U. S.) 218; 15 Myers' Fed. Dec. 537; Booth *v.* Clark, 17 How. (U. S.)

c. CONTINUANCE OF FUNCTIONS.—When a fund in the hands of a receiver is in the custody of the court of equity which appointed him, his office as receiver is not *functus officio* until his liability as to the fund is determined, and his subsequent appointment by an insolvent court as permanent trustee for the party whose property he had sold as receiver does not release him from responsibility to the court of equity for the faithful discharge of his trust as receiver.[1]

d. EXTENSION OF FUNCTIONS OF RECEIVERS.—But the original functions of receivers have been considerably extended in modern times and especially of late years.[2]

4. Statutory Regulations.—The necessity for a preventive and preservative remedy has not only led to the interposition of courts of chancery to grant it, but has also induced legislation in many States of the Union, by which the same object is attained through the medium of statutory authorization;[3] but even in those States where such statutes exist the principles governing the court of chancery in relation to receivers are looked upon as the means of guidance.[4] Under these statutes receivers may be

331; Corey *v.* Long, 43 How. Pr. (N. Y.) 498; 12 Abb. Pr., N. S. (N. Y.) 434; Hunt *v.* Wolfe, 2 Daly (N. Y.) 303; Devendorf *v.* Dickinson, 21 How. Pr. (N. Y.) 276; Hooper *v.* Winston, 24 Ill. 363; Bank of Mississippi *v.* Duncan, 52 Miss. 743; Skinner *v.* Maxwell, 66 N. Car. 48; on other points, 68 N. Car. 400; Delaney *v.* Mansfield, 1 Hog. 235.

The receiver is a mere recipient or trustee of the property without power to assign it or to exercise acts of ownership in respect to it, but those of a bailee, and has but a qualified property in it. Hagedon *v.* Bank of Wisconsin, 1 Pin. (Wis.) 63; 39 Am. Dec. 276.

As to the general nature of the receiver's custody, see also Ellicott *v.* Warford, 4 Md. 85; *In re* Colvin, 3 Md. Ch. 302; Coburn *v.* Ames, 57 Cal. 203; Battle *v.* Davis, 66 N. Car. 256; Van Rensselaer *v.* Emery, 9 How. Pr. (N. Y.) 139.

The receiver's custody being that of the court, the law is well settled that no one can lawfully sue him without leave of the court which appointed him. People *v.* Brooks, 40 Mich. 335; 29 Am. Rep. 535.

1. Henry *v.* Kaufman, 24 Md. 11; 87 Am. Dec. 593.

2. **Recent Development of Receiver's Functions.**—In the progress of equity jurisdiction it has become usual to clothe such officers with much larger powers than were formerly conferred. In some of the States receivers, by statute, settle the affairs of certain insolvent corporations, and sue in their own names; and it is not unusual, and, indeed, has become quite customary, for courts of equity to put these officers in charge of railroads financially embarrassed, and to require them to operate such roads until the difficulties are removed, or until the roads can be sold with the least sacrifice of the interests of those concerned. See opinion by Swayne, J., in Davis *v.* Gray, 16 Wall. (U. S.) 220; 15 Myer's Fed. Dec. 538. This matter is discussed in an article on Railway Receiverships in 14 W. N. C. (Pa.) 521 (1884).

Thus, while a receiver is usually appointed to close and wind up an estate or concern, he has in the instance just mentioned the different functions of holding and operating a railroad. See *Ex parte* Dunn, 8 S. Car. 234.

Statutory receivers of railroads are regarded as being, to some extent, agents of the State, in State *v.* Edgefield, etc., R. Co., 6 Lea (Tenn.) 362; 4 Am. & Eng. R. Cas. 91. As to railroad receiver's relation to the company, see Bartlett *v.* Keim, 50 N. J. L. 261; 35 Am. & Eng. R. Cas. 17.

3. See Fellows *v.* Heermans, 13 Abb. Pr. N. S. (N. 7; Connelly *v.* Dickson, 76 Ind. 44

4. Bisp. Eq. (4th ed.), p. 614, par. 576.

invested with more immediate and extensive control over the property than they usually possess.[1]

a. MODE OF EXERCISING.—In the exercise of this summary jurisdiction a court of equity reverses, in a great measure, its ordinary course of administering justice. It begins at the end, and levies upon the property a species of equitable execution, by which it makes a general, instead of a specific appropriation of the issues and profits. Afterwards, it determines who is entitled to the benefit of its *quasi* process.[2]

Furthermore, from the very nature of the power and of the purposes for which it may be invoked, its efficiency depends on the promptness with which it may be exercised; and the appointment need not await the trial of the cause.[3]

III. APPOINTMENT—1. Appointment in General—*a.* PREREQUISITES TO OBTAINING APPOINTMENT.—The appointment of a receiver is reluctantly made, and only upon the clearest proof of its propriety; and various prerequisites of this character must fully appear.[4]

b. GENERAL EFFECT OF APPOINTMENT.—The order of appointment is in the nature, not of an attachment, but of a sequestration; and it gives in itself no advantage over other claimants to the party applying for it;[5] but merely prevents any

1. See Verplanck *v.* Mercantile Ins. Co., 2 Paige (N. Y.) 452.

A statute is, however, unconstitutional which makes the receiver of a corporation a referee to take proof of claims against the corporation, and permits him to determine the materiality of evidence, offered in support of such claims, thus making him a judge in his own case. People *v.* O'Brien, 111 N. Y. 61; 36 Am. & Eng. R. Cas. 103.

2. Beverley *v.* Brooke, 4 Gratt. (Va.) 208. But acting, as it often must of necessity before the merits of the cause have been fully developed, and not infrequently when the proper parties in interest are not all before the court, it proceeds with much caution and circumspection, in order to avoid disturbing unnecessarily or injuriously, legal rights and equitable priorities. Consult also to like general effect, Whitehead *v.* Wooten, 43 Miss. 526.

3. Bitting *v.* Ten Eyck, 85 Ind. 360.

4. The following much quoted propositions upon this subject are laid down by the court by Le Grand, C. J., in Blondheim *v.* Moore, 11 Md. 374: 1st. That the power of appointment is a delicate one, and to be exercised with great circumspection. 2d. That it must appear that the claimant has a title to the property, and the court must be satisfied by affidavit that a receiver is necessary to preserve the property. 3d. That there is no case in which the court appoints a receiver merely because the measure can do no harm. 4th. That "fraud or imminent danger, if the intermediate possession should not be taken by the court, must be clearly proved;" and, 5th. That unless the necessity be of the most stringent character the court will not appoint unless the defendant is first heard in response to the application. See concerning various of these propositions, Clark *v.* Ridgely, 1 Md. Ch. 71; Thompson *v.* Diffendorfer, 1 Md. Ch. 493; Walker *v.* House, 4 Md. Ch. 45, relating to partnership affairs; Latham *v.* Chafee, 7 Fed. Rep. 526; Hyde Park Gas Co. *v.* Kerber, 5 Ill. App. 136; First Nat. Bank *v.* Gage, 79 Ill 209.

It has been fitly said of these rules by a distinguished writer that they must be taken with some reservations, and that they are certainly too strong to be of universal application, especially the fourth, as there are classes of cases in which a receiver is appointed almost as a matter of course, although no fraud or imminent danger is proved. See 3 Pom. Eq. Jur., p. 358, § 1331, note 2.

5. Beverley *v.* Brooke, 4 Gratt. (Va.)

alienation or disposition of the property except with the consent and concurrence of the court.[1]

The appointment involves the decision of no right, but is designed to secure and husband the fund, that it may be appropriated without delay or inconvenience, as the court upon the final trial may adjudge.[2]

c. AUXILIARY AND PROVISIONAL CHARACTER OF APPOINTMENT.—The appointment of a receiver is not the ultimate end and object of the suit, but is merely a provisional remedy or auxiliary proceeding;[3] and the motion for such appointment bears no closer relation to the suit than the attachment in an action does to the action itself.[4]

208. In this case it was held that such order operates retrospectively upon rents and profits which may come to the hands of the receiver, as a lien in favor of those interested, according to their rights and priorities in and to the principal subject out of which those rents and profits issue.

To the effect that the decree of appointment gives no priority or superiority of right to the parties upon whose application or in whose behalf it is made, see Ellis *v.* Boston etc. R. Co., 107 Mass. 28; and to like general purport, see 2 Story Eq. Jur. (12th ed.), § 829, and Adams Eq. (Ralston's 8th Am. ed.) 355.

The erroneous character of an appointment for the benefit of complaining creditors is declared in Nussbaum *v.* Price, 80 Ga. 206.

1. Thornton *v.* Washington Sav. Bank, 76 Va. 433. The appointment has no effect to change the title, or create any lien upon the property; but its purpose, like that of an injunction *pendente lite*, is merely to preserve the property until the rights of all parties can be adjudged. Ellis *v.* Boston, etc., R. Co., 107 Mass. 28. See also, as to failure to effect title to property or rights of parties, *Ex parte* Dunn, 8 S. Car. 233.

2. *Ex parte* Walker, 25 Ala. 81. See also Brown *v.* Northrup, 15 Abb. Pr. N. S. (N. Y.) 335; Ellicott *v.* Warford, 4 Md. 85.

The fact that the ultimate decision is not affected, is brought out in Leavitt *v.* Yates, 4 Edw. Ch. (N. Y.) 162.

The nature of the receiver's functions as a *quasi* trustee holding the fund for the benefit of whoever may eventually establish title thereto, is mentioned in King *v.* Goodwin, 130 Ill. 110; 17 Am. St. Rep. 280.

Concerning the effect of the appointment of a receiver of an insolvent firm, in operating as an assignment of firm assets, see Fletcher *v.* Sharpe (Ind.), 1 Lawy. Rep. Ann. 185.

Concerning the want of liability of the property to attachment, after the appointment of a receiver, see Hagedon *v.* Bank of Wisconsin, 1 Pin. (Wis.) 63; 39 Am. Dec. 276. *Compare In re* Shakopee Mfg. Co., 37 Minn. 93; 17 Am. & Eng. Corp. Cas. 147.

The fact that the affairs of a corporation have been placed in the hands of a receiver neither takes away nor suspends the creditor's right of action against the directors, Patterson *v.* Stewart, 41 Minn. 92; 28 Am. & Eng. Corp. Cas. 644; nor does it interfere with the existence of the corporation or always displace its officers, Gibbes *v.* Greenville etc. R. Co., 17 S. Car. 403; 12 Am. & Eng. R. Cas. 429. The point that the receiver does not take the title to the property is dwelt on in Union Trust Co. *v.* Weber, 96 Ill. 355; 3 Am. & Eng. R. Cas. 589.

3. Hottenstein *v.* Conrad, 9 Kan. 438. The appointment is mentioned as in aid of equity in Chicago, etc., Oil Co. *v.* U. S. Petroleum Co., 57 Pa. St. 91; 6 Phila. (Pa.) 523; and as a provisional remedy in Fellows *v.* Heermans, 13 Abb. Pr. N. S. (N. Y.) 5 and McCarthy *v.* Peake, 18 How. Pr. (N. Y.) 140; 9 Abb. Pr. (N. Y.) 166.

Reference to the fact that an order granting a motion for a receiver would have been a new provisional order, and would not have affected the question between the parties, is made by Lord Chancellor Hardwicke in Cook *v.* Groyn, 3 Atk. 690.

4. Hottenstein *v.* Conrad, 9 Kan. 438, where it is pointed out that the

d. APPOINTMENT OF RECEIVER DOES NOT CONSTITUTE A TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW.—The power possessed by courts of equity of appointing receivers, and ordering them to take possession of the property in controversy, does not conflict with the provision of the fundamental law that no man shall be deprived of his property without due process of law.[1]

e. POWER NOT READILY EXERCISED.—The power to appoint a receiver is of a high and unusual character, and it must be a strong case which will justify this ultimate resort of a court of equity; nor is the power ever exercised, where it is likely to produce irreparable injustice or injury to private rights, or where there exists any other safe or expedient remedy.[2]

f. WHEN POWER UNQUESTIONABLY EXISTS.—But a court of

motion may succeed or fail, and yet the pending suit be in nowise affected.

1. The surrender to the receiver does not affect the right of property or the ultimate decision of the case any more than does the levy of an attachment; but the design is to secure the property, so that it may be handed over to the party who shall be adjudged entitled to the possession: *In re* Cohen, 5 Cal. 496.

2. Speights *v.* Peters, 9 Gill (Md.) 476. See also *In re* Colvin, 3 Md. Ch. 301.

Indeed the exercise of such an extraordinary power involves the performance of a very delicate and responsible duty, which is a serious interference, without the verdict of a jury, and without a regular hearing, with the *prima facie* rights of the citizen; and hence a receivership ought only to be granted to prevent manifest wrong, imminently impending; for nothing short of this would justify the high prerogative act of taking property out of the hands of one person and putting it in pound under the orders of a judge. See opinion by McKay, J., in Crawford *v.* Ross, 39 Ga. 49.

Receiverships are in fact more stringent even than injunctions and should be granted only in cases of pressing apparent necessity. Patten *v.* Accessory Transit Co., 4 Abb. Pr. (N. Y.) 238. Accordingly in the appointment of a receiver *pendente lite*, the court acts with extreme caution, and only under such peculiar circumstances as demand summary relief. Latham *v.* Chafee, 7 Fed. Rep. 526. See, generally, to like effect, Furlong *v.* Edwards, 3 Md. 112; Blondheim *v.* Moore, 11 Md. 374, stating rules regulating appointment of receiver; Pullan *v.* Cincinnati, etc., R. Co., 4 Biss. (U. S.) 47; First Nat. Bank *v.* Gage, 79 Ill. 209; Hyde Park Gas Co. *v.* Kerber, 5 Ill. App. 136.

Where Party Has Title and Possession.—Such an appointment is a strong measure, and not to be exercised doubtingly; but the court must be convinced that it is needful and is the appropriate means of securing a proper end; and where a party is clothed with title and possession such as are conferred by a lease in writing, and is in the enjoyment of rights apparently legal, a receiver will not be appointed unless under urgent and peculiar circumstances. Chicago, etc., Oil Co. *v.* U. S. Petroleum Co., 57 Pa. St. 91; 6 Phila. (Pa.) 523. In such a case the plaintiff must show a clear right, or a *prima facie* right, with such attending circumstances of danger or probable loss as will move the conscience of a chancellor to interfere. Chicago, etc., Oil Co. *v.* U. S. Petroleum Co., 57 Pa. St. 91; 6 Phila. (Pa.) 523.

Where Business Would be Destroyed.—Where the effect of the appointment of a receiver will be to destroy the business, the court will not make the appointment except upon the clearest evidence; and this view has been applied where the business was that of a saloon-keeper, whose license is personal to the holder, and cannot be delegated, assigned nor committed to the care of any receiver by the court. Semple *v.* Flynn (N. J., 1887), 10 Atl. Rep. 178, where the court, however, retained the disposition of any of the property of the business.

chancery undoubtedly has power to take possession of property, the title to which is in dispute, and to hold it through its officer until the controversy is determined; and cases sometimes arise in which the duty to take that course is imperative.[1]

So it is well settled that when there is reasonable ground to apprehend that pending the litigations, property which is the subject of such litigation will be disposed of fraudulently, or in such way as to deprive the complaining party of the fruit of his recovery when had, a court of equity will secure the property, or in a proper case have it sold and secure the fund arising from it, by the appointment of a receiver or by injunction, or when need be, by both, until the action shall be tried upon its merits.[2]

g. REQUISITE SHOWING TO OBTAIN APPOINTMENT.—In order to obtain the appointment of a receiver, the plaintiff must show first, either that he has a clear right to the property itself, or that he has some lien upon it, or that the property constitutes a special fund to which he has a right to resort for the satisfaction of his claim; and secondly that the possession of the property by the defendant was obtained by fraud, or that the property itself, or the income arising from it, is in danger of loss, from the neglect, waste, misconduct, or insolvency of the defendant.[3]

h. RESTS IN DISCRETION OF COURT.—An application for the appointment of a receiver is one which is addressed to the sound discretion of the court,[4] to be exercised as an auxiliary to the

1. Tregaskis *v.* Superior Court, 47 Mich. 511.

2. Ellett *v.* Newman, 92 N. Car. 523.

See as to sequestration and injunction, Parker *v.* Grammer, Phil. Eq. (N. Car.) 30. And as to injunction, Morris *v.* Willard, 84 N. Car. 296. *Compare* Levenson *v.* Elson, 88 N. Car. 185.

3. Mays *v.* Rose, Freem. Ch. (Miss.) 718, where the application for a receiver is based on the alleged fraudulent character of a conveyance, and it is not shown or suggested that the defendant is not able to answer any and all demands that may be established against him, a receiver will not be appointed; nor will the appointment be made in any like case unless it is manifest that the fund is mismanaged and in danger of being lost or where the insolvency of an unfit trustee is present or imminent. Rheinstein *v.* Bixley, 92 N. Car. 309. See also Levenson *v.* Elson, 88 N. Car. 184.

The requirement that the fund must be in danger is dwelt on in Orphan Asylum Soc. *v.* McCartee, Hopk. (N. Y.) 435.

As to fraud combined with danger to the property, see Lloyd *v.* Passingham, 16 Ves. 69.

The need of showing other grounds than a mere conflict of claim to the title and possession of the property which is the subject of litigation is insisted upon in Beecher *v.* Bininger, 7 Blatchf. (U. S.) 173, where the court by Woodruff, J., says: "That there must be shown some emergency, some peril of loss which the court will be unable completely to redress; and the danger must be clear, and the right, in general, free from reasonable doubt."

4. See to the effect that the appointment is discretionary, Mays *v.* Rose, Freem. Ch. (Miss.) 718; Verplanck *v.* Caines, 1 Johns. Ch. (N. Y.) 58; Oakley *v.* Paterson Bank, 2 N. J. Eq. 173; Nichols *v.* Perry Patent Arm Co., 11 N. J. Eq. 126; Orphan Asylum Soc. *v.* McCartee, Hopk. (N. Y.) 435, where it is said that this proposition does not teach much. Chicago, etc., Oil Co. *v.* U. S. Petroleum Co., 57 Pa. St. 91; 6 Phila. (Pa.) 523; *Ex parte* Walker, 25 Ala. 104; 2 Story Eq. Jur. (12th ed.), § 831; Crane *v.* McCoy, 1 Bond (U. S.) 431; Pullan *v.* Cincinnati, etc., R.

attainment of the ends of justice;[1] but though this is the general principle, yet when the matters in dispute have been settled and rights adjusted on appeal, it is not within the power of the lower court to withhold action correcting its error;[2] for the discretion of the court is to be regulated by legal principles,[3] and in all cases where the court interferes by appointing a receiver of property in the possession of the defendant before the title of the plaintiff is established by decree, it exercises a discretion to be governed by all the circumstances of the case,[4] one of the most material of which is the probability of the plaintiff's being ultimately entitled to a decree.[5]

i. WHEN DISCRETIONARY POWER EXERCISED.—As a general rule, the appointment of a receiver, though resting as first stated, in the sound discretion of the court, will be made in all cases where the interests of parties seem to require it,[6] as for the purpose of protecting a fund when the complainant has an equitable interest in the matter,[7] especially where there is danger that the

Co., 4 Biss. (U. S.) 47, referring to authority of courts of chancery to appoint receivers as a discretionary power to be exercised with great caution. Tysen *v.* Wabash R. Co., 8 Biss. (U. S.) 253; 9 Myer's Fed. Dec., p.625; Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 27 Fed. Rep. 158; 24 Am. & Eng. R. Cas. 178; Skip *v.* Harwood, 3 Atk. 564; Greville *v.* Fleming, 2 J. & L. 339.

1. Mays *v.* Rose, Freem. Ch. (Miss.) 718. See Oakley *v.* Paterson Bank, 2 N. J. Eq. 173; Wolfe *v.* Claflin, 81 Ga. 65.

2. Milwaukee, etc., R. Co. *v.* Soutter, 2 Wall. (U. S.) 521. As to review on *certiorari* in *California*, see French Bank Case, 53 Cal. 549. As to the non-appealable character of an order for the appointment of a receiver, *Montana*, see Wilson *v.* Davis, 1 Mont. 100.

3. Lenox *v.* Notrebe, Hempst. (U.S.) 226.

4. Owen *v.* Homan, 4 H. L. Cas. 1033, with discussion of the nature of the discretion generally, at p. 1032.

Speaking generally, it is also said that "all the circumstances of the case are to be taken into consideration." Vose *v.* Reed, 1 Woods (U. S.) 650. See also 3 Pom. Eq. Jur., § 1331; Smith *v.* Port Dover, etc., R. Co., 12 Ont. App. 289; 25 Am. & Eng. R. Cas. 640.

So in a case relating to foreclosure against a railroad, it is remarked that it will be found upon examination of the authorities, that the action of the court has "depended largely upon the peculiar circumstances of each case," and that in no instance has such action in appointing or refusing to appoint a receiver rested exclusively upon the technical legal rights of the parties. Tysen *v.* Wabash R. Co., 8 Biss. (U. S.) 254; 9 Myer's Fed. Dec. 626.

5. Lord Chancellor Truro, in Owen *v.* Homan, 3 M. & G. 412. In the case as affirmed on appeal, 4 H. L. Cas. 1033, this phraseology is not used, but the same idea seems to be entertained. The probability of recovery as one of the elements entering into the question whether a receiver shall be appointed, is noted in Bainbrigge *v.* Baddeley, 3 M. & G. 419; Gregory *v.* Gregory, 33 N. Y. Super. Ct. 39; Cofer *v.* Echerson, 6 Iowa 505; Wilkinson *v.* Dobbie, 12 Blatchf. (U. S.) 300.

Not Matter of Right.—In the appointment of a receiver the court acts only upon a proper case being made out for the exercise of its jurisdiction, according to well-established principles; and in that sense only can a receiver be said to be *ex debito justitiæ*, whether the application be interlocutory or made at the hearing; whether the appointment of the receiver is the sole object of the action or only incidental to other relief, and whether the relief is sought at the instance of a judgment creditor, or of any one else. Smith *v.* Dover etc. R. Co., 12 Ont. App. 290; 25 Am. & Eng. R. Cas. 640.

6. Crane *v.* McCoy, 1 Bond (U. S.) 431.

7. Vose *v.* Reed, 1 Woods (U. S.) 650.

subject-matter of the controversy may be wasted and destroyed, or impaired, injured, or removed, during the progress of the suit;[1] and a sufficient reason for such appointment, aside from the perishable nature of the property in controversy, is found in the existence of a conflict between two authorities, and the apprehension of a violent collision between them, as well as the probability of fierce and long-continued litigation at law.[2] But it is doubtful whether an order for a receiver can be made in an improper case, even with the consent of both parties, more especially where the rights of third persons may be concerned.[3]

j. WHEN DISCRETIONARY POWER NOT EXERCISED.—The discretion of the court to appoint a receiver will not be exercised where no perceptible benefit will result from the appointment, but great confusion and difficulty, and probably great injury to both parties, while no injury will apparently be caused by failing to make the appointment;[4] or if any other considerations of propriety or convenience render the appointment improper or expedient.[5]

Indeed, the dispossession of the owner of property before a final hearing is a severe measure not to be adopted except in an urgent case;[6] and it should never be done unless, without it, the complainant would be in danger of suffering irreparable loss; nor should a receiver be appointed in any case of a mortgage, if it is clear that on a foreclosure the mortgaged property will bring enough money to pay the debt, interest and costs.[7]

1. Lenox *v.* Notrebe, Hempst. (U. S.) 226. See as to the showing required to be made by plaintiff, Mays *v.* Rose, Freem. Ch. (Miss.) 718.

2. Crane *v.* McCoy, 1 Bond (U. S.) 431. So there is a proper exercise of the sound discretion of the court, where it makes an order appointing a receiver and dissolves an injunction against interference with the possession of land, in a case where both parties asserted title and claimed possession, and were interfering with each other in harvesting the crops produced by each on the land and threatening each other with assaults and forcible resistance. Hlawacek *v.* Bohman, 51 Wis. 95.

3. Whelpley *v.* Erie R. Co., 6 Blatchf. (U. S.) 274.

Sufficient Case for Equitable Interference.—While, as a general rule, a party must pursue his legal remedies to their available extent before he can go into equity for relief, yet a case for equitable interference is sufficiently made out where a creditor shows that he sold goods under fraudulent representations and that they are about to be sold under a mortgage given by the buyer to a party in another State, and claimed to be fraudulent, and only a very strong case would justify an appellate court in interfering with the discretion of the court below in making an appointment of a receiver under such circumstances. Wolf *v.* Claflin, 81 Ga. 65.

In Insolvency Proceedings.—In insolvency proceedings it is not an abuse of judicial discretion for the court to appoint a receiver of the business, and to enjoin the debtors from interfering with the property, where it appears that such debtors do an annual business of $5,000; that their assets do not exceed $3,000; that they have executed mortgages on their property to the amount of $6,000, and that their unsecured indebtedness is over $2,000. Pendleton *v.* Johnson, 85 Ga. 841. See also, for like case, Willcox *v.* Dunlap, 83 Ga. 417.

4. Hamburgh Mfg. Co. *v.* Edsall, 8 N. J. Eq. 142.

5. Vose *v.* Reed, 1 Woods (U. S.) 650.

6. See Chicago, etc., Oil Co. *v.* U. S. Petroleum Co., 57 Pa. St. 91; 6 Phila. (Pa.) 52.

7. Pullan *v.* Cincinnati, etc., R. Co., 4 Biss. (U. S.) 50; 9 Myer's Fed. Dec. 424.

So, where funds are in the hands of trustees appointed by the legislature, who as high officers of the State hold *ex officio*, and especially where one part of the trust involves duties of a public character, the court will be very reluctant to take the funds out of their hands, and will not do so except for the most cogent reasons, such as breach of duty on their part.[1]

k. IN CONNECTION WITH INJUNCTION.—A receivership is often allowed in connection with an injunction;[2] but it by no means follows that because an injunction is granted, a receiver should be appointed;[3] and both an injunction and a receiver have been refused where, under a judgment and execution against one partner, his interest in the partnership effects was sold, and the purchaser filed a bill praying for such relief against the partners, but did not show any such gross misconduct by the other partner as would alone justify interference with him in winding up the partnership.[4]

But a receiver may be appointed and an injunction granted at the suit of a judgment creditor, to restrain the debtor from selling his goods, notwithstanding a prior mortgage thereon not yet due to another person.[5]

l. WHEN RIGHTS OF THIRD PARTIES INTERVENE.—While it is competent for a court of chancery by an interlocutory order, to take possession of property which is the subject of litigation, pending the proceedings, yet this will not be done if the rights of third persons, in no manner parties to the record, have inter-

Allegation of Reasonable Belief In Danger Insufficient.—A receiver will not be appointed, *pendente lite*, upon a mere allegation that the party has reason to believe that the property in dispute will be wasted or destroyed; but the application in such case must state the grounds of apprehension, and the judge determines the reasonableness thereof upon the facts found by him. Hanna *v.* Hanna, 89 N. Car. 71.

1. Vose *v.* Reed, 1 Woods (U. S.) 650.

2. See, for instance, Ellett *v.* Newman, 92 N. Car. 523. The power to appoint a receiver is treated as incident to the power to grant an injunction, so that the former power may be exercised by implication in vacation when the latter power is expressly allowed to be then exercised. Penn *v.* Whiteheads, 12 Gratt. (Va.) 83.

3. Oakley *v.* Paterson, 2 N. J. Eq. 179. See also as to distinct nature of these remedies remarks of Lord Chancellor Truro in Hall *v.* Hall, 3 M. & G. 85.

4. Renton *v.* Chaplain, 9 N. J. Eq. 71. So a bill for an injunction and the appointment of a receiver is insufficient if it does not show that the complainants have any lien as judgment creditors or otherwise upon the defendant's property, but alleges only that the defendant is indebted to the complainants for a large amount of goods, and that he is disposing of his property and collecting money due him, and secreting the same with intent to abscond and defraud the complainants. Uhl *v.* Dillon, 10 Md. 503; 69 Am. Dec. 173.

5. Rose *v.* Bevan, 10 Md. 469; 69 Am. Dec. 171; followed as to requisites of bill on application for injunction and other relief, in Myers *v.* Amey, 21 Md. 305; and on mere application for injunction, in Bruce *v.* Leving, 23 Md. 295. See also as to injunction alone an instance of creditor before judgment, Moran *v.* Dawes, 1 Hopk. (N. Y.) 366; 14 Am. Dec. 551; and as to injunction with *ne exeat*, by one who had no judgment and was not even a creditor, see Rhodes *v.* Cousins, 6 Rand. (Va.) 189; 18 Am. Dec. 716.

vened. Thus, if third parties have purchased the property in good faith, the master or chancellor will not exercise such a supervisory control as to order the property into the possession of a receiver; for these purchasers have rights which cannot be adjudicated in this summary and collateral method.[1]

m. CONSTITUTIONALITY OF LEGISLATIVE APPOINTMENTS.—The appointment of a receiver by the legislature to settle the affairs of an insolvent bank is not a judicial act, nor is it otherwise unconstitutional as impairing the obligation of a contract.[2]

n. PARTICULAR EFFECTS OF APPOINTMENT—(1) *Where Mortgagee Might Become Absolute Owner.*—Where a party is appointed receiver of property and accepts the appointment, he must be deemed to have assumed the duties and responsibilities of a receiver, unqualified by the fact that he had been declared to be a mortgagee in possession of the same property, and that he was the absolute owner thereof, and finally might be held to be such.[3]

(2) *Where Order of Appointment Afterwards Reversed.*—So a receiver who has been appointed in an oderly and legal way and by a court having jurisdiction, and who has in good faith entered upon his duties as such, should be protected by the court in his proper action under the order while it is in force, and be fully allowed and indemnified, out of the fund intrusted to his guardianship, for legal charges and disbursements reasonably incurred, although the order should be afterwards reversed for error; but it is otherwise if his appointment was entirely unwarranted and obtained through his intrusion into the office.[4]

1. Levi *v.* Karrick, 13 Iowa 352.
2. Carey *v.* Giles, 9 Ga. 256.
3. Bolles *v.* Duff, 54 Barb. (N. Y.) 216; 37 How. Pr. (N. Y.) 163.
4. O'Mahoney *v.* Belmont, 37 N. Y. Super. Ct. 233.

Subsequent Appointment of Another Receiver.—When a receiver has been appointed by one court and has obtained possession of the property or fund over which he was appointed, he cannot be in any manner interfered with by a receiver subsequently appointed, or by any proceeding whatever had in any other action brought in any other court. O'Mahoney *v.* Belmont, 37 N. Y. Super. Ct. 385. But see, as to appointment of another receiver in a subsequent action in the same court, Bailey *v.* O'Mahoney, 33 N. Y. Super. Ct. 242.

Sureties on Insolvent's Bond Not Concluded by Appointment.—A decree appointing a receiver does not so far conclude the sureties on the bond of an insolvent debtor as to prevent them from resisting the enforcement of the bond against them at the suit of the receiver, where they were not parties to the proceedings for his appointment. State *v.* Sullivan, 120 Ind. 200.

Appointment Does Not Divest Execution Liens, etc.—Nor does the appointment of a receiver of a debtor's property, and the sale of such property under order of the court divest the execution liens of judgment creditors not made parties or notified of the proceedings for the appointment. Dann Mfg. Co. *v.* Parkhurst, 125 Ind. 317.

As to appointment not affecting foreclosure, see Preston *v.* Loughran, 58 Hun (N. Y.) 216. As to effect of appointment pending accounting between partners, see Schurtz *v.* Romer, 82 Cal. 479.

Right to Gain Priority by Attachment Suspended.—After the appointment of a receiver for an insolvent, there is a suspension of the right of a creditor to sequester property by an attachment, and thus gain priority. Baring *v.* Galpin (Conn. 1888), 18 Atl. Rep. 272.

2. Prerequisites to Appointment—*a.* SUIT MUST BE PENDING.—It is the general rule, pursuant to the doctrine of the English court of chancery, that in order to authorize the appointment of a receiver there must be a suit pending,[1] except possibly in peculiar cases, such as infancy or lunacy,[2] and accordingly, a court of chancery will not ordinarily be justified in appointing a receiver before the commencement of a suit by the filing of a bill;[3] nor will a receiver be appointed after the action has been dismissed and ended;[4] nor where there is nothing but an appeal pending from a proceeding in a lower court;[5] but though there be no litigation actually pending, yet a receiver may be appointed to protect the property where litigation is unquestionably impending, to determine who ought to be the legal personal representative of a testator, and a *caveat* has been entered against the granting of letters of administration to a particular person.[6] And there may be a pending action, so as to authorize the appointment of a receiver, although the notice or service is defective, as was held where the defendant entered a special appearance to quash the notice.[7]

b. NOTICE MUST ORDINARILY BE GIVEN.—Ordinarily receivers should not be appointed upon an *ex parte* application, but after due notice to the opposite party and opportunity given him to be heard on the matter,[8] and such notice is sometimes expressly

1. Crowder *v.* Moore, 52 Ala. 221; Hardy *v.* McClellan, 53 Miss. 511, Merchants', etc., Nat. Bank *v.* Kent, 43 Mich. 296; Jones *v.* Schall, 45 Mich. 380; Jones *v.* Bank of Leadville, 10 Colo. 473; *Ex parte* Mountfort, 15 Ves. 447; Anonymous, 1 Atk. 578; *Ex parte* Whitfield, 2 Atk. 315.

This is sometimes required by the phraseology of the statute. Davis *v.* Flagstaff, etc., Co., 2 Utah 93; French Bank Case, 53 Cal. 551.

2. See Baker *v.* Backus, 32 Ill. 96.

But see *contra*, formerly, as to infants, Anonymous, 1 Atk. 578; *Ex parte* Whitfield, 2 Atk. 315, declaring the case of idiots and lunatics to be exceptional, and noted in Jones *v.* Bank of Leadville, 10 Colo. 473; *Ex parte* Mountfort, 15 Ves. 449. The modern English practice allowing appointment of receiver for infant, though no suit pending, is noted in 2 Daniel's Ch. Prac. (5th Am. ed.) 1354, and more particularly in Seton on Decrees (4th Eng. ed) 723, with references to cases apparently unreported except *In re* Leeming and *In re* Gascoyne, 20 Law J. Ch. 551 (1851), where a receiver of the rents of real estate descended on an infant was appointed on petition, without suit.

The Lord Chancellor of Ireland has statutory power to appoint a receiver over the estate of a minor upon petition, and without the filing of a bill for that purpose. *In re* Goods, 1 Ir. Ch. Rep. 266.

3. Crowder *v.* Moore, 52 Ala. 221.

But Lord Thurlow, in a case where the defendant had absconded, and the property appeared to be in danger of being lost for want of being got in, said he would have ordered a receiver even if there had been no will. Pitcher *v.* Hellier, 2 Dick 581.

So a receiver for a lunatic has been appointed on petition. *Ex parte* Radcliffe, 1 J. & W. 640; *Ex parte* Warren, 10 Ves. 622.

Yet the general rule applies, under the statutes of *Colorado*, to the appointment of a receiver upon the petition of an insolvent corporation, asking to be dissolved, where no action is pending. Jones *v.* Bank of Leadville, 10 Colo. 473

4. Dale *v.* Kent, 58 Ind. 585.

5. *In re* Macaulay, 27 Hun (N. Y.) 576.

6. Grimston *v.* Turner, 18 Week. Rep. 725.

7. Hellebush *v.* Blake, 119 Ind. 351.

8. Jones *v.* Schall, 45 Mich. 380;

required by statute;[1] but the rule is subject to exceptions in special cases,[2] particularly where irreparable injury would be sustained by the delay.[3]

Field *v.* Ripley, 20 How. Pr. (N. Y.) 26; Moritz *v.* Miller & Co., 87 Ala. 332; Ruffner *v.* Mairs, 33 W. Va. 655. See also, as to need of notice, Moyers *v.* Coiner, 22 Fla. 425; Fincker *v.* Peters, etc., Co., 21 Fla. 256; State *v.* Jacksonville, etc., R. Co., 15 Fla. 211; Mays *v.* Rose, Freem. Ch. (Miss.) 720; Blondheim *v.* Moore, 11 Md. 374; Friebert *v.* Burgess, 11 Ind. 461; Nusbaum *v.* Stein, 12 Md. 322; Johns *v.* Johns, 23 Ga. 36; Furgeau *v.* Brady, 24 La. Ann. 349; Weems *v.* Lathrop, 42 Tex. 211; Crowder *v.* Moore, 52 Ala. 221; People *v.* Norton, 1 Paige (N. Y.) 17; Devoe *v.* Ithaca, etc., R. Co., 5 Paige (N. Y.) 521; French *v.* Gifford, 30 Iowa 160; Buxton *v.* Monkhouse, Coop. 42.

Indeed, as is fitly said by Judge Cooley, a court of chancery has no more power than any other to condemn a man unheard, and to dispossess him of property *prima facie* his, and hand over its enjoyment to another on an *ex parte* claim to it. Arnold *v.* Bright, 41 Mich. 210. It is similarly pointed out that it is a necessary implication from the requirement that a suit should be pending, and the character of a receiver as appointed for all the parties, that the person whose property is to be taken from him and placed in the power of a receiver, should be a party to the pending suit, so that he may resist the application, the granting of which may work him irretrievable injury. Baker *v.* Backers, 32 Ill. 96.

1. See Whitehead *v.* Wooten, 43 Miss. 527; Moritz *v.* Miller, 87 Ala. 332.

2. See Moritz *v.* Miller, 87 Ala. 332.

3. Crowder *v.* Moore, 52 Ala. 221; People *v.* Norton, 1 Paige (N. Y.) 17; Fricker *v.* Peters, etc., Co., 20 Fla. 256. See also Jones *v.* Dougherty, 10 Ga. 273; Johns *v.* Johns, 23 Ga. 36.

Appointment Without Notice.—Thus a receiver will be appointed without notice, upon the application of the complainant, where the defendant has absconded to prevent service of the subpœna to appear and answer the bill, and his land and law agents, and the tenants of his estate have been served. Maguire *v.* Allen, 1 B. & B. 75, 76; or where the defendant has absconded and is in contempt to a commission of rebellion, for want of his answer, and it appears that the property is in danger of being lost if not got in. Pitcher *v.* Hellier, 2 Dick. 580; or in a strong case of waste, before the defendant has answered, but where he has made an affidavit which the court takes to amount to an appearance. Vann *v.* Barnett, 2 Bro. C. C. 158; or where the defendant has left the State, and is not expected to return for several months, and has no residence or place of business where a subpœna can be served. People *v.* Norton, 1 Paige (N. Y.) 17 (where the defendant's solicitor refused to appear or to do anything, on the ground that he was not authorized, and the rents might be lost by a delay of a few days); or where it is necessary to appoint a receiver of the property of an absentee to prevent its being wasted or removed beyond the jurisdiction of the court. Sandford *v.* Sinclair, 8 Paige (N. Y.) 375; or where the defendant is out of the jurisdiction (Gibbons *v.* Mainwaring, 9 Sim. 77) and has not appeared, and a second mortgagee applies for the receiver against such mortgagor defendant. Tanfield *v.* Irvine, 2 Russ. 152 (but see Coward *v.* Chadwick, 2 Russ. 150, note; and *compare* Holmes *v.* Bell, 2 Beav. 299); or where the defendant absconded to avoid the proceedings, and went to reside abroad, but it was not known where. Dowling *v.* Hudson, 14 Beav. 424. So, though it is true as a general rule, applicable in cases of interpleader, that notice should be required of the time and place of making application for the appointment of a receiver, yet there are recognized exceptions to the rule in cases where immediate action is or may be necessary to prevent great injury, and especially when it is not sought to dispossess a party of his own property. Oil Run Petroleum Co. *v.* Gale, 6 W. Va. 545.

A receiver may also be appointed without notice under a bill for foreclosure of a mortgage on defendant's crop, which alleges that the defendant refuses to deliver up the property on demand, claiming prior liens upon it; that he has already appropriated a portion of it to the payment of other debts; that he is insolvent; that the

security is inadequate unless the property is preserved and applied to the mortgage debt, and that it is in danger of being lost or destroyed unless promptly taken into the custody of the court. Ashhurst *v.* Lehman, 86 Ala. 371, dwelling on the nature of the property in controversy. See also, in justification of appointment without notice, where it is asserted that insolvent defendants are disposing of the property, etc. Sims *v.* Adams, 78 Ala. 397.

In these and like cases, the court may, in the exercise of a sound discretion, dispense with the formality of notice, though it should save to the defendant the right thereafter to apply, upon meritorious grounds, for relief against the order. People *v.* Norton, 1 Paige (N. Y.) 18.

When Notice Necessary.—But a receiver will not, in the absence of special circumstances, be appointed *ex parte* and before appearance. Caillard *v.* Caillard, 25 Beav. 512. (See also as to denial of receivers and injunction before appearance where there was no impending and irreparable mischief to arise from delay, Ogden *v.* Kip, 6 Johns. Ch. (N. Y.) 161), or, where there is no emergency requiring it until the defendant has made default, after service of process. Field *v.* Ripley, 20 How. Pr. (N. Y.) 26, nor where it is not shown that the defendant has any property of a perishable nature, or any choses in action which would be in danger of being lost if not collected immediately, or that any other special circumstances existed to render it necessary or proper to put a receiver upon the defendant's property, without giving him an opportunity to be heard. Sandford *v.* Sinclair, 8 Paige (N. Y.) 375, nor where the defendant is not proceeded against as an absentee or in default for not appearing, and there is no such emergency as the likelihood of the destruction of the property the application could be heard on notice, at least so far as concerns the whole of the crops and farming property covered by the application. Gibson *v.* Martin, 8 Paige (N. Y.) 483; nor where the care and preservation of the property is not attended with expense, and the property itself is not perishable, and it does not appear that delay will be attended with loss or harm to any one, or that the remedy asked will be in any way especially efficacious, as the disposal of the property is protected by injunction, and the property seems to be without the jurisdiction of the court. Field *v.* Ripley, 20 How. Pr. (N. Y.) 27. So where there was no obstacle to giving notice to a railroad company, and no fraud or insolvency was charged against any of the parties, nor the property of the company, alleged to be in danger of removal beyond the jurisdiction of the court, or of otherwise being lost, but the controversy was solely as to the effect of an attempted consolidation of two companies, the appointment of a receiver was held an unwarranted exercise of power, which it was the duty of the reviewing court to reverse and set aside. Railway Co. *v.* Jewett, 37 Ohio St. 659; 8 Am. & Eng. R. Cas. 709. And while an order for the appointment of a receiver without notice to the defendant and before service of summons upon him, may be made in peculiar cases like those where the party to be restrained is an idiot or lunatic, or where for any cause the immediate action of the court is required to save the property from destruction, yet where an injunction is ample to protect the property from loss until a motion can be made for a receiver, it is manifestly improper to deprive a partner of the possession of partnership property without any notice whatever. McCarthy *v.* Peake, 18 How. Pr. (N. Y.) 140; 9 Abb. Pr. (N. Y.) 166.

Nor will the appointment of a receiver without notice be justified where there is no imperious necessity therefor, especially where the defendants resided but a short distance from the court in which the order was made. Triebert *v.* Burgess, 11 Md. 452, 461. In short, it may be generally said that courts of equity are always so averse to appointing receivers upon an *ex parte* application without notice to defendants whose rights are to be affected that it must be an extraordinary case which would justify such appointment; and that some special circumstances must be shown to exist which would render it necessary to put a receiver in possession of the defendant's property to prevent irreparable loss. Turnbull *v.* Prentiss Lumber Co., 55 Mich. 396.

And sufficient reasons for failure to give notice are not found in the allegations of a mere suspicion, opinion, or belief that defendants may spirit away the effects, and place them beyond the

c. APPOINTMENT MAY BE MADE BEFORE ANSWER.—The same reasons which permit the appointment of a receiver in cases of special emergency requiring it, without notice and before appearance, apply more strongly to authorize such appointment before answer.[1]

power of the court to compel delivery, or in a statement, merely on information and belief, that to give notice would cause delay and so probably defeat the receiver and prevent him from taking possession of and preserving the books, accounts, and choses in action. Moritz *v.* Miller & Co., 87 Ala. 333. Nor should a receiver be appointed without notice on the *ex parte* affidavits of complainants' solicitors, stating their belief that the appointment *instanter* is necessary for the protection of complainants, and that notice would allow a disposition of the property by the defendants which was already attempted. Thompson *v.* Tower Mfg. Co., 87 Ala. 734.

General Doctrine on Subject of Dispensing with Notice.—It appears from the language of Walworth, Ch., in a leading American case on this subject that by the settled practice in ordinary suits a receiver cannot be appointed, *ex parte*, before the defendant has had an opportunity to be heard in relation to his rights, except in those cases where he is out of the jurisdiction of the court or cannot be found, or where, from some other reason it becomes absolutely necessary for the court to interfere before there is time to give notice to the opposite party to prevent the destruction or loss of property; and that in every case where the court is asked to deprive the defendant of the possession of his property without a hearing or without an opportunity to oppose the application, the particular facts and circumstances which render such a summary proceeding proper should be set forth in the bill or petition on which such application is founded. Verplanck *v.* Mercantile Ins. Co., 2 Paige (N. Y.) 450; *quoted* in French *v.* Gifford, 30 Iowa 160, which emphasizes the latter proposition as to the need of alleging special grounds. See also full exposition of subject in Moritz *v.* Miller, etc., Co., 87 Ala. 332.

After Death of Old Receiver.—The appointment of a receiver to succeed a deceased predecessor, without notice to the defendants in suits afterwards instituted by the new receiver has been sustained upon the ground that they were not interested parties at the time of the appointment and so could not complain of the irregularity. Nicoll *v.* Boyd, 90 N. Y. 520.

Receiver of Corporation.—As to untenable objection to appointment of receiver for corporation that stockholders or lienholders were not before the court, and had not been impleaded or cited in the cause, see East Line, etc., R. Co. *v.* State, 75 Tex. 451.

1. Accordingly, on a proper case made, it is competent for the chancellor to appoint a receiver, on the *ex parte* application of the complainant, before answer, where the facts are verified by the complainant's affidavit, Williams *v.* Jenkins, 11 Ga. 597; and where the emergency is such as to render it essential to justice that a receiver should be immediately appointed, the appointment will be made before answer, since to delay it might enable the defendant to defeat the object of the application, Johns *v.* Johns, 23 Ga. 36. But the rule is said to be, that a receiver will not be appointed before answer, unless it appears that there is danger to the property or fund by the insolvency of the party having possession of it, or from some other cause, Turnbull *v.* Prentiss Lumber Co., 55 Mich. 387; especially where a receiver is not prayed for in the bill, West *v.* Swan, 3 Edw. Ch. (N. Y.) 420; though a receiver will be appointed when justice requires it and the merits appear to demand it, Turnbull *v.* Prentiss Lumber Co., 55 Mich. 397.

Change in Practice.—It is stated now to be the common practice to grant a receiver before answer, where fraud is clearly proved by affidavit, or where it is shown that imminent danger would ensue unless the property were taken under the care of the court. See Jones *v.* Dougherty, 10 Ga. 282; Baker *v.* Backus, 32 Ill. 115; Whitehead *v.* Wooten, 43 Miss. 526.

Thus, though a strong case is required against an executor before the administration of his testator's assets will be taken from him, yet the court

has interfered by appointing a receiver before answer, upon a residuary legatee's affidavit of danger, of loss, or misapplication of the property, particularly where the other executors consented to the application, and where the defendant appeared by counsel and commented on the affidavit, though not interposing one himself, Middleton *v.* Dodswell, 13 Ves. 269. (As to need of more than mere allegation that executrix is in mean circumstances, see Anonymous, 12 Ves. 5.)

Indeed, it has been broadly said that the practice of appointing a receiver before answer has been followed where justice required it, and the merits appeared by affidavit, Lord Chancellor Eldon in Duckworth *v.* Trafford, 18 Ves. 283.

But formerly the appointment of a receiver was not usually made until after answer. French *v.* Gifford, 30 Iowa 161; Verplanck *v.* Mercantile Ins. Co., 2 Paige (N. Y.) 450. See Vann *v.* Barnett, 2 Bro. C. C. 158; Coward *v.* Chadwick, 2 Russ. 150, note.

Indeed, strictly speaking, a receiver should only then be appointed. See 2 Daniel's Ch. Prac. (5th ed.) 1734; Clark *v.* Ridgely, 1 Md. Ch. 71.

But the rule that a receiver could not be granted before answer, was broken through by Lord Kenyon in Vann *v.* Barnett, 2 Bro. C. C. 158, where the master of the rolls, who sat for the lord chancellor, declared that although the motion for a receiver before answer was unusual, yet had it been necessary he would have made a precedent. It seems, however (see Jones *v.* Dougherty, 10 Ga. 281), that he was not reduced to that alternative as Lord Thurlow had, several years previously, appointed a receiver of an infant's estate, upon the filing of the bill, and before a subpœna to appear and answer had been served. Pitcher *v.* Hellier, 2 Dick. 580; and it appears from the reporter's note to the later of the two English cases that in a still earlier case than either of them, Lord Bathurst had granted a motion for a receiver before answer. Compton *v.* Bearcroft, 2 Brown's Ch. Cas. 158, note (Trinity Term, 1773).

Strong Special Ground Necessary.—There must, however, be a strong special ground to induce the court to interfere in this way before an answer; Baker *v.* Backus, 32 Ill. 116; Middleton *v.* Dodswell, 13 Ves. 269; Clark *v.* Ridgely, 1 Md. Ch. 71; 2 Daniel's Ch. Prac. (5th Am. ed.) 735, note; Whitehead *v.* Wooten, 43 Miss. 526; and when a default is entered, the rule would doubtless lie to require affidavit of this character before the property shall be taken out of the custody of those who appear to be its true owners, Baker *v.* Backus, 32 Ill. 116; nor will a receiver be appointed before answer, when the bill sets forth the complainant's title, and states that a party had wrongfully taken possession of the property, but does not state that such party is insolvent, or unable to account for the property or its rents and profits, or that such rents and profits are in danger of being lost; Clark *v.* Ridgely, 1 Md. Ch. 72; or where there is no showing of insolvency or of infringement of an injunction. West *v.* Swan, 3 Edw. Ch. (N. Y.) 421.

What Constitutes Sufficient Ground.—It now appears to be well settled, both in this country and in *England*, that a receiver may be appointed before answer, provided the complainant can satisfy the court that he has an equitable claim to the property in controversy (see Metcalfe *v.* Pulvertoft, 1 Ves. N.B. 183); and that a receiver is necessary to preserve the same from loss; Bloodgood *v.* Clark, 4 Paige (N. Y.) 577. See also Clark *v.* Ridgely, 1 Md. Ch. 71. In cases of creditors' bills, where the return of the execution unsatisfied presupposes that the property of the defendant, if he has any, will be misapplied, and entitles the complainant to an injunction in the first instance, it seems to be almost a matter of course to appoint a receiver to collect and preserve the property pending the litigation, Bloodgood *v.* Clark, 4 Paige (N. Y.) 577; and indeed it is declared to be the duty of a complainant, who has obtained an injunction upon such a bill, to 'apply to the court and have a receiver appointed without any unreasonable delay. Osborn *v.* Heyer, 2 Paige (N. Y.) 343.

A receiver of an intestate's personal estate has even been granted, when the administrator was sworn to be insolvent, before his answer came in, although the fact of his being abroad, stated in the plaintiff's affidavit, was denied. Scott *v.* Becher, 4 Price 348.

A receiver has also been appointed, before answer, in case of a devise to four trustees, two of whom declined to act, where it was alleged that all the defendants had appeared and where

d. APPOINTMENT MAY BE MADE WHILE DEMURRER IS PENDING.—A receiver may also be appointed while the issue stands on demurrer.[1]

e. EXPEDITION MUST BE SHOWN.—As a condition of interference by appointing a receiver, the court would expect it to be shown, that the party applying was proceeding with all due expedition to bring the matter to a decision.[2]

f. PERSON IN POSSESSION MUST BE MADE PARTY.—A re-

all the parties consented to the application. Brodie *v.* Barry, 3 Meriv. 696; but a receiver has been thought improperly appointed before answer, on an *ex parte* application where there was a trustee with power of entry and distress on leasehold estates. Buxton *v.* Monkhouse, Coop. 42.

The cases in which a motion, in behalf of a purchaser of real estate, for a receiver before answer has been refused, have turned upon the fact, that the party making the application could not state that he had, strictly speaking, an equitable title; but where the purchaser can compel an execution of the contract, he is entitled to a receiver before answer. Metcalfe *v.* Pulvertoft, 1 Ves. & B. 183. A conditional order to appoint a receiver will be granted before answer in a foreclosure suit, and where there was not process against the defendant, upon an affidavit stating that the head landlord was threatening an eviction from the premises for non-payment of rent. Barrett *v.* Mitchell, 5 Ir. Eq. Rep. 501. See also Whitelaw *v.* Sandys, 12 Ir. Eq. Rep. 394.

1. Turnbull *v.* Prentiss Lumber Co., 55 Mich. 396.

This cannot, however, be justifiably done *ex parte*, while the defendant railroad alleged to be insolvent is exercising its corporate functions and conducting its business as usual, and in conjunction with sequestration of the property of the company. Cook *v.* Detroit, etc., R. Co., 45 Mich. 454; 12 Am. & Eng. R. Cas. 461, and it seems that if the defendant opposes the special motion for a receiver on the ground of the pending demurrer, the court would, in case of doubt, order the motion to stand over until the demurrer was disposed of. Howard *v.* Palmer, Walk Ch. (Mich.) 391.

2. Jones *v.* Jones, 3 Meriv. 173.

Delay on the part of a complainant who seeks to take the control of property from those having the legal right of possession, whether in making his application or in advancing his cause, is an objection to the appointment of a receiver. Tibbals *v.* Sargeant, 14 N. J. Eq. 451.

Acquiescence for forty-seven years in an agreement relating to canal tolls, bars application for receiver by shareholders. Gray *v.* Chaplin, 2 Russ. 142. After the lapse of twenty-four years during which period an insolvent had remained in possession undisturbed, the court thought no specially favorable consideration should be given to an applicant for a receivership who had thus lain by. Fogarty *v.* Burke, 2 D. & W. 584.

As to disinclination to disturb possession and appoint receiver on ground that there is a breach of trust, where property has been administered and applied without complaint according to a uniform course of management for a long series of years, see Skinner's Co. *v.* Irish Soc., 1 M. & C. 165; and for refusal to appoint a receiver where the defendants had been for seventy years in the enjoyment of a common of pasturage which was in litigation, and where no danger to the property was proved, see Comrs. of Carrickfergus *v.* Lockhart, Ir. Rep., 3 Eq. 517.

The statement that "delay is often fatal to the application for a receiver" was made in a case where it was pointed out that the complainant was in no more danger in reference to the title to the property than he had been for years. Hager *v.* Stevens, 6 N. J. Eq. 446.

Delay in Objecting by Corporation Over Whose Property Receiver Appointed.—Good faith and early assertion of rights are as essential on the part of the defendant as of the complainant, and this doctrine has been applied to an insolvent corporation assenting to the appointment of a receiver over its property and laying for nine months before objecting on the ground of want of jurisdiction to make the appointment. Brown *v.* Lake Superior Iron Co., 134 U. S. 534.

ceiver will not be appointed where the person in possession is no party to the suit,[1] for the party in possession must be before the court, so that the court may not only see that he is a defendant in the suit, but also that he has had due notice of the application, unless he is in default for not appearing in the cause;[2] but it is immaterial to the exercise of the power which courts of equity unquestionably have, to appoint receivers, and to order them to take possession of the property in controversy, whether it is in the immediate possession of the defendant or of his agent;[3] and in proper cases they can also order the defendant's agents or employés, although not parties to the record, to deliver the specific property to the receiver.[4]

g. SUBSISTING INTEREST IN PROPERTY NECESSARY.—A party cannot demand the appointment of a receiver of property in which he has no interest,[5] and accordingly a receiver will be denied to a plaintiff whose interest in the property of an association like an express company has terminated by the sale of all his shares in such association.[6]

h. JUDGMENT BY CREDITOR.—It is a general rule that creditors, without a judgment at law, have no right to apply in equity for the appointment of a receiver; but to this rule there are apparently distinct exceptions, as when the law-making power has enacted in terms that the debt need only be mature, with payment demanded and refused.[7]

3. When Receiver Appointed or Refused—*a.* IN GENERAL.—The power of a court of equity to take into its own hands from a party in possession, funds or property, whereof the title is ultimately to be decided or distribution made by the court, for the purpose of preserving the property pending the litigation, is a power fully recognized, and in proper cases one of great usefulness;[8] but at the same time its exercise is attended with such incidents and consequences as to render it one of the most delicate duties which devolve upon a court of equity, and it is never to be resorted to except in a clear case, and with great caution and circumspection,[9] in the absence of any other safe or expedient remedy, and where irreparable injustice will not follow.[10]

1. Sawyer *v.* Moran, 3 Tenn. Ch. 34; Searles *v.* Jacksonville, etc., R. Co., 2 Woods (U. S.) 626.

2. Sea Ins. Co. *v.* Stebbins, 8 Paige (N. Y.) 565.

3. *In re* Cohen, 5 Cal. 496. See also Sea Ins. Co. *v.* Stebbins, 8 Paige (N. Y.) 567.

4. *In re* Cohen, 5 Cal. 496.

5. See O'Mahoney *v.* Belmont, 62 N. Y. 143.

6. Smith *v.* Wells, 20 How. Pr. (N. Y.) 166.

7. Fechheimer *v.* Baum, 37 Fed. Rep. 175.

8. See State *v.* Northern Cent. R. Co., 18 Md. 214.

9. Hyde Park Gas Co. *v.* Kerber, 5 Ill. App. 136. A receiver should be appointed in no case, unless it is made to appear that there is an imperative necessity for the step, to preserve some particular property for such parties as shall be entitled to the benefit. First Nat. Bank *v.* Gage, 79 Ill. 209. See also Blondheim *v.* Moore, 11 Md. 374; Heflebower *v.* Buck, 64 Md. 22.

10. Corey *v.* Long, 12 Abb. Pr. N. S. (N. Y.) 427; 43 How. Pr. (N. Y.) 497. A receiver will not be granted where

b. REGULATING STATUTE CONTROLS.—Where the legislature has prescribed the cases in which a receiver may be appointed, and other provisional remedies granted, the specification of the cases in which a receivership may be had excludes every other case and prohibits the appointment except as authorized.[1]

the party has power to help himself Sallory *v.* Leaver, L. R., 9 Eq. 25. Concerning the general or usual grounds for the exercise of the power of appointment, see Baker *v.* Backus, 32 Ill. 95; Mays *v.* Rose, Freem. Ch. (Miss.) 718. Where the party has a remedy by creditor's bill to reach patents as equitable assets, a receiver will not be appointed. Thayer *v.* Hart, 24 Fed. Rep. 558.

Instances Where Appointment Made.—The power to appoint receivers has been exercised in regard to a railroad line tolls and revenue. State *v.* Northern Cent. R. Co., 18 Md 214.

A bridge and its tolls. Covington Drawbridge Co. *v.* Shepherd, 21 How. (U. S.) 123.

And market tolls, dues, etc. De Winton *v.* Mayor, etc., of Brecon, 26 Beav. 539. See note to Cortleyeu *v.* Hathaway, 64 Am. Dec. 484.

So a receiver has been appointed of the debts due to a lawyer's business. Candler *v.* Candler, Jac. 229.

Of the profits of an office like that of clerk of the peace. Palmer *v.* Vaughan, 3 Swanst. 173.

Or royal master forester. Blanchard *v.* Cawthorne, 4 Sim. 572. But see *contra*, as to flour inspector, Tappan *v.* Gray, 9 Paige (N. Y.) 509.

And of pensions not of a military character, Heald *v.* Hay, 3 Giff. 472. See note to Cortleyeu *v.* Hathaway, 64 Am. Dec. 484.

Appointment of receivers has also been made to take charge of the machinery of a ship, Brenan *v.* Preston, 2 De G. M. & G. 838; and of coupon bonds and other investments not earmarked as trust property, although no fraud or misconduct of the *de facto* custodian was established, Fidelity Ins., etc., Co. *v.* Huber, 13 Phila. (Pa.) 53; of partnership property, Sloan *v.* Moore, 37 Pa. St. 221; and of real estate during the pendency of an action for partition, Pignolet *v.* Bushe, 28 How. Pr. (N. Y.) 9; and of property transferred by a failing debtor to an insolvent assignee, Haggarty *v.* Pittman, 1 Paige (N. Y.) 299; and, it seems, of mortgaged property upon maturity of the debt and failure to pay, where the debt is very large, and bearing interest, Hill *v.* Robertson, 24 Miss. 375; and consult further, FORECLOSURE OF MORTGAGES, vol. 8, p. 234, *et seq.*

A receiver will likewise be appointed where it is necessary to enforce the collection of a debt before final hearing. Mills *v.* Pittman, 1 Paige (N. Y.) 491; and where the parties to a suit in chancery have claims against certain property equally just, and the question which arises is, who is entitled to prior satisfaction in the event that the property is not sufficient to pay both. Hamberlain *v.* Marble, 24 Miss. 587. See like enumeration in note to Cortleyeu *v.* Hathaway, 64 Am. Dec. 484.

A receiver may also be appointed of books and papers necessary to the winding up of a transaction, irrespective of any question of partnership, where the plaintiff has an interest in profits as such under a business arrangement between him and the defendant. Daridge *v.* Coe, 54 N. Y. Super. Ct. 363.

When Receiver Refused.—The court will interpose for the appointment of a receiver only when it is manifest that the fund is mismanaged, and in danger of being lost, or when the insolvency of an unfit trustee is present or imminent, or in like cases; and in the absence of such circumstances, a receiver is properly refused to take charge of goods alleged to have been bought by a debtor and title taken in his wife's name, to defraud creditors. Venable *v.* Smith, 98 N. Car. 524.

Even when a case would be made for a receiver pending litigation between ordinary parties, it will be refused where complainant is practically a trust, organized to monopolize the bakery business, and has already secured control of thirty-five leading bakeries in twelve different States; for equity will not encourage a continuation in restraint of trade, which is probably illegal under Federal and State enactments. American Biscuit, etc., Co. *v.* Klotz, 44 Fed. Rep. 723.

1. Fellows *v.* Herrmans, 13 Abb Pr. N. S. (N. Y.) 7.

c. LIKELIHOOD OF RECOVERY REQUISITE FOR APPOINTMENT. —The court will not appoint a receiver, unless it believes, so far as matters appear, that the applicant will recover.[1]

Under Georgia Code.—In *Georgia* the Code in its specifications does not materially alter the equitable jurisdiction of the courts to appoint receivers, Skinner *v.* Maxwell, 66 N. Car. 48. See also, as to want of change in practice there, Battle *v.* Davis, 66 N. Car. 256.

Under English Judicature Act.—Under the English Judicature Act of 1873, a mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the court in all cases in which it shall appear to the court to be just or convenient that such order should be made, and any such order may be made either unconditionally or upon such terms and conditions as the court shall think just. See Anglo-Italian Bank *v.* Davies, L. R., 9 Ch. 286; and this provision applies after judgment as well as before, Anglo-Italian Bank *v.* Davies, L. R. 9 Ch. 286; Smith *v.* Cowell, L. R., 9 Q. B. Div. 79, and so as to allow a receiver where a sequestration is ineffectual, Bryant *v.* Bull, L. R., 10 Ch. Div. 155; and so as to authorize the appointment of a receiver where the estates of which the plaintiffs were legal and equitable mortgagees were mixed up together, and there was no adverse possession, Pease *v.* Fletcher, L. R., 1 Ch. Div. 275; and until the hearing, in an action of partition, where one of the co-owners is in occupation of the property, though not in exclusive occupation thereof, Porter *v.* Lopes, L. R., 7 Ch. Div. 359; and against a defaulting trustee who has failed to pay money into court as ordered, and who is out of the jurisdiction of the court so that he cannot be attached, *In re* Coney, L. R., 29 Ch. Div. 955; and see Stanger Leathes *v.* Stanger Leathes, Week. Notes 1882, p. 71; and in favor of a plaintiff who had obtained judgment against husband and wife, over the income of the wife's reversionary interest under a will, Fuggle *v.* Bland, L. R., 11 Q. B. Div. 711; and of property seized on execution pending an interpleader issue order to try the title to the goods, Howell *v.* Dawson, L. R., 13 Q. B. Div. 68; and under the special circumstances that the property was wasting and was insufficient security, in favor of the plaintiff in an ejectment action, Real, etc., Advance Co. *v.* McCarthy, 27 Week. Rep. 706.

Under Minnesota Insolvency Act.—Where an assignment for the benefit of creditors was made under the *Minnesota* insolvency act, pending an application for a receiver, and the court was satisfied that no preferences were secured by such assignment, and the purposes of the application were fully answered by the assignment, since the statute provided that the assignee should be treated as an officer of the court having the same powers and duties as a receiver, it was held on appeal that the court was justified in refusing the application for a receiver. Weitzer *v.* Hyde (Minn. 1890), 47 N. W. Rep. 311.

Under Texas Statute as to Creditors.—The *Texas* statute providing that a receiver may be appointed in an action "by a creditor to subject any property or fund to his claim" (1 Sayles Civil St., art. 1461) applies only to a creditor having a specific lien, and not to every case in which a creditor seeks to secure the satisfaction of a debt, and in which there is danger that the funds or property belonging to the debtor will be lost or destroyed. Carter *v.* Hightower, 15 S. W. Rep. 224.

Under Indiana Act as to Securing Justice.—Under the *Indiana* statute which empowers the courts to appoint receivers whenever it may be necessary to secure ample justice to the parties (*Indiana*, Rev. St. 1881, § 1222), it is sufficient reason for appointing a receiver in a suit by a stockholder against a corporation, that the directors have allowed the corporate property to remain out of repair, and thus become unproductive. Wayne Pike Co. *v.* Hammons (Ind. 1891), 27 N. E. Rep. 491.

1. Cofer *v.* Echerson, 6 Iowa 505. See also Wilkinson *v.* Dobbie, 12 Blatchf. (U.S.) 300; Gregory *v.* Gregory, 33 N. Y. Super. Ct. 39; Bainbrigge *v.* Baddley, 3 M. & G. 419.

Compare language of Lord Chancellor Truro in Owen *v.* Homan, 3 M. & G. 378; *affirmed* on appeal, 4 H. L. Cas. 997.

d. PROBABLE INTEREST AND DANGER OF LOSS MUST BE SHOWN.—So a party applying to have property in the hands of a receiver, pending the litigation, must show a probable interest in the property, and that there is danger of its being lost without such protection;[1] and to authorize the appointment of a receiver in connection with an injunction, there must be a well-grounded apprehension of injury about to be done.[2]

e. NO APPOINTMENT WHERE PROPERTY OR CLAIM OTHERWISE PROTECTED.—A receivership will not be granted in connection with an injunction when a *lis pendens* has been filed, and the rights and interests of the plaintiff in the property have been thereby as effectually protected as they would be by an injunction and receiver.[3]

1. Goodyear *v.* Betts, 7 How. Pr (N. Y.) 189. See also Flagler *v.* Blunt, 32 N. J. Eq. 523. The interest must be a present interest, such as is not possessed by the seller of goods who has not expressly reserved the title. Steele *v.* Aspy (Ind. 1891), 27 N. E. Rep. 739, and not have been parted with. Smith *v.* Wells, 20 How. Pr. (N. Y.) 166, and a stranger entirely disconnected with the subject-matter of the litigation cannot propose a receiver. Attorney-Gen'l *v.* Day, 2 Madd. 256, or participate in the motion for the appointment. O'Mahoney *v.* Belmont, 62 N. Y. 143; *affirming* 37 N. Y. Super. Ct. 223, nor is the appointment for the benefit of a stranger though his rights will be protected. Howell *v.* Ripley, 10 Paige (N. Y.) 46. A receiver is said to be proper when the fund is in danger, in Orphan Asylum Soc. *v.* McCartee, Hopk. (N. Y.) 435, but the additional requirement that the party in possession must be shown to be irresponsible, is supported by Haines *v.* Carpenter, 1 Woods (U. S.) 266. See also Willis *v.* Corlies, 2 Edw. Ch. (N. Y.) 286; Clark *v.* Ridgely, 1 Md. Ch. 71; Blondheim *v.* Moore, 11 Md. 374; State *v.* Northern Cent. R. Co., 18 Md. 215.

2. Kean *v.* Colt, 5 N. J. Eq. 379.

The danger must be clear, and the right in general, free from reasonable doubt. Beecher *v.* Bininger, 7 Blatchf. (U. S.) 174.

And the party in possession must not have a clear right to such possession. Lenox *v.* Notrebe, Hempst. (U. S.) 226.

Even where a party has a good equitable lien upon lands, another ground for the appointment of a receiver is that there is danger of eviction, and that the party has a legal title to a judgment, though there may be ultimately a question to be decided upon its validity. Fetherstone *v.* Mitchell, 9 Ir. Eq. 481.

But in a creditor's suit for administration of assets, a receiver will not be appointed for a party found to be heiress-at-law, where her title as such was disputed, and it has not been established that the personal estate is deficient. Topping *v.* Searson, 6 L. T., N. S. 450.

Where, however, it appeared in an action for a partnership accounting that by reason of the uncollected and unconverted firm assets, no final decree determining the rights of the parties could then be made, it was nevertheless held that danger of loss or waste to the property was sufficiently shown to warrant the appointment of a receiver under the statute (*New York* Code Civ. Proc., § 713) providing that a receiver may be appointed on the application of a party establishing an apparent right to the property, and that there is danger of loss or injury. Smith *v.* Fitchett (Supreme Ct.), 2 N. Y. Supp. 262. But it was ruled that as the insolvency of neither of the parties sued was alleged or shown, they would not be required to pay over money of the firm in their hands to the receiver. Under the same statute a receiver was refused in an action on agreement made with a theatrical manager, in Gillig *v.* Barrett (Supreme Ct.), 5 N. Y. Supp. 380.

3. Gregory *v.* Gregory, 33 N. Y. Super. Ct. 34. To like effect is Clay *v.* Clay (Ga. 1890), 2 S. E. Rep. 1064.

See as to *lis pendens* dispensing with injunction, Waddell *v.* Bruen, 4

f. DEFENDANT'S POSSESSION RELUCTANTLY INTERFERED WITH.—The fact that the defendant is in the possession and enjoyment of the property in question is often a controlling consideration in causing a court of chancery to be slow to exercise its discretionary power to appoint a receiver, as by such interference it may work irreparable injury to the party whom it has deprived of his possession,[1] and such reluctance may be increased where the defendant's possession is long continued;[2] and especially where the possession is under the legal title.[3]

g. INDISPOSITION TO DISPLACE DIRECTORS OF CORPORATIONS.—So, as a rule of equity practice, the courts are very reluctant to appoint receivers for corporations, upon the idea that it is a practical displacement of the board of directors.[4]

h. DEFENDANT'S RESIDENCE WITHIN JURISDICTION NOT NECESSARY.—The right of the court to appoint a receiver to take charge of personal property within its jurisdiction is, however, not affected by the fact that the defendant is not a resident of the State.[5]

i. TIME FOR OTHER RELIEF NEED NOT HAVE ARRIVED.—And while it is true that in general a receivership is ancillary or

Edw. Ch. (N. Y.) 671; Osborn *v.* Taylor, 5 Paige (N. Y.) 516; Mills *v.* Mills, 21 How. Pr. (N. Y.) 437; Stevenson *v.* Fayerweather, 21 How. Pr. (N. Y.) 449.

Receiver Over Building of Patrons of Husbandry.—A receiver will not be appointed to sell a building at the instance of some of the members of an unincorporated joint-stock company, and to divide the proceeds among the members, where the building seems to answer the purpose for which it was erected, that of headquarters for the Patrons of Husbandry, and it would be unjust to deprive a large majority of its members of their interest in it to gratify the wishes of a small minority, who could accomplish their object less expensively by selling their interest in the building. Hinkley *v.* Blethen, 78 Me. 223.

1. Owen *v.* Homan, 4 H. L. Cas. 1032.

2. Comrs. of Carrickfergus *v.* Lockhart, Ir. Rep., 3 Eq. 517. As against a mortgagee in possession, the general rule is, not to appoint a receiver in favor of subsequent lien holders; and where the lien claimed is by seizure on execution the court will, instead, compel by injunction the application of the rents and profits of the property to the satisfaction of the judgment. U. S. *v.* Masich, 44 Fed. Rep. 11.

3. American Biscuit Co. *v.* Klotz, 44 Fed. Rep. 723.

4. But where the directors themselves in effect have abdicated their functions by placing the embarrassed corporation in the hands of a trustee for certain of the creditors, the court may interpose, at the instance of non-preferred creditors, to manage the property of the corporation through a receiver. Consolidated Tank Line Co. *v.* Kansas City Varnish Co., 43 Fed. Rep. 204.

So where an association of several corporations, known as the "Sugar Trust" had been declared illegal (People *v.* Schoharie Co., 121 N. Y. 345), and the holders of the trust certificates, which were issued to the stockholders of the several corporations in lieu of their stock, sued the trustees for an accounting for the property in their hands, and a motion for a receiver was also made, it was held that the "trust" was not a corporation, governed by the laws relating to the reorganization of corporations, but more like a partnership; and that each certificate holder had a right to demand a settlement of the affairs of the trust and the appointment of a receiver, though the trustees were endeavoring to effect a reorganization on a legal basis. Cameron *v.* Havemeyer (Supreme Ct.), 12 N. Y. Supp. 126.

5. Hellebush *v.* Blake, 120 Ind. 350.

incidental to the main purpose of the bill, yet it does not follow that where a case is presented which demands the relief that can best be given by a receivership, such relief must be refused, because the time has not arrived when other substantial relief can be asked.[1]

j. LEGAL RIGHT OR REMEDY AS PRECLUDING APPOINTMENT. —It does not seem to be the practice of the courts to appoint a receiver,[2] when the controversy is upon a mere question of legal right,[3] or when the party can assert his right by a direct action at law,[4] as for possession;[5] and such is the reluctance of the

1. Brassey *v.* New York, etc., R. Co., 19 Fed. Rep. 669; 17 Am. & Eng. R. Cas. 285, applying qualification to authorize appointment of receiver for railroad company before its actual default on its obligations.

2. Cofer *v.* Echerson, 6 Iowa 505.

3. See 2 Story Eq. Jur. (12th ed.), p. 44, § 843.

4. Daniel's Ch. Prac. (5th Am. ed.) 1725.

Remedy at Law.—It is a familiar rule that a receiver will not be appointed at the instance of a party who has a complete and adequate remedy at law. Rice *v.* St. Paul, etc., R. Co., 24 Minn. 467. See also as to remedy at law, Cramer *v.* Hawkes, 2 Jones & La Tour 680; Sallory *v.* Leaver, L. R., 9 Eq. 25; Drewry *v.* Barnes, 3 Russ. 106; Parker *v.* Moore, 3 Edw. Ch. (N. Y.) 236; Spooner *v.* Bay St. Louis Syndicate, 44 Minn. 403.

5. **Rule and Its Exceptions.**—The rule seems to be universal in this country and in *England*, that whenever the contest is simply a question of disputed title to the property the plaintiff asserting a legal title in himself against a defendant in possession who is receiving the rents and profits under a claim of legal title, equity refuses to lend its extraordinary aid by interposing a receiver just as it refuses an injunction under similar circumstances, but leaves the plaintiff to assert his title in the ordinary forms of procedure at law. Rollins *v.* Henry, 77 N.Car. 469.

Nor does the fact that such defendant is insolvent, at all affect the rule. Rollins *v.* Henry, 77 N. Car. 469.

Yet there are exceptions to this general rule; but they are only where the relief is granted upon special circumstances of an equitable nature, appealing strongly to the conscience of the court; and the furthest the courts have ever gone in taking jurisdiction to appoint a receiver in actions of ejectment against a tenant in possession of real property is where the plaintiff shows a probable title and danger of the rents being lost. Rollins *v.* Henry, 77 N. Car. 469. See Scott *v.* Scott, 13 Ir. Eq. 213; Mordaunt *v.* Hooper, Ambl. 311. And generally Earl of Fingal *v.* Blake, 2 Mall. 79; Buckland *v.* Soulter, reported in note to Middleton *v.* Sherburne, 4 Y. & C. 373; Bainbrigge *v.* Badderly, 3 M. & G. 419; Clark *v.* Den, 1 R. & M. 109.

Rights of Claimant of Realty Out of Possession.—As to real estate, it seems to be the established doctrine, according to another statement of the rule on the subject, that a court of equity will not interfere by the appointment of a receiver to take the property from the party in possession, on the application of a party out of possession, claiming a dry legal title only, but will leave him to his remedy at law. Mapes *v.* Scott, 4 Ill. App. 270. (See Talbot *v.* Hope Scott, 4 K. & J. 111, emphatically stating doctrine.) And it is only in cases where some special circumstances arise of an equitable nature, and in aid of an equitable title, that the court will appoint a receiver over real estate in behalf of a claimant out of possession. Mapes *v.* Scott, 4 Ill. App. 271. See Talbot *v.* Hope Scott, 4 K. & J. 112; Carrow *v.* Ferrior, L. R., 3 Ch. App. 728; Schlecht's Appeal, 60 Pa. St. 176.

Change by English Judicature Act.—In *England*, however, a change in the law on this subject has been made by the Judicature Act; and the English decisions just cited have been regarded as no longer law, because overruled by that enactment, in a case in which the title pleaded was not a legal but an equitable one. Berry *v.* Keen, 51 L. J. Ch. 912.

court to interfere against the legal title by the appointment of a receiver,[1] that it will do so only in cases of fraud clearly proved, and imminent danger to the property or its rents and profits, or on like strong grounds.[2]

k. APPOINTMENT WHEN NO COMPETENT PERSON ENTITLED.—The power to appoint a receiver, necessarily inherent in a court which possesses equitable jurisdiction, is exercised when an estate or fund is in existence, and there is no competent person entitled to hold it; or when the person so entitled is in the nature of a trustee and is misusing or misapplying the property.[3]

l. APPOINTMENT ONLY IN CASE OF DANGER TO FUND OR PROPERTY.—The peril of a fund in litigation, is cause for the interference of the court to secure and protect it by the appointment of a receiver.[4]

When a disputed fund is in possession of the court and under its control, and the right of a claimant is doubtful, such fund will be retained until the determination of the controversy and the ascertainment of the party to whom it belongs;[5] and the

Ejectment Under New York Code.—Under the *New York* Code a receiver cannot be appointed before judgment, in an action of ejectment. Guernsey *v.* Powers, 9 Hun (N. Y.) 79; following views in Thompson *v.* Sherrard, 35 Barb. (N. Y.) 593, and *followed* in Burdell *v.* Burdell, 54 How. Pr. (N. Y.) 91; also refusing to follow Ireland *v.* Nichols, 37 How. Pr. (N. Y.) 230.

Partial Equitable Title.—A receiver will be appointed in a case where the plaintiff shows equitable title to a part of the property in dispute, and a legal and equitable title to the rest, while the defendant, as the matter then stands, makes out no title, legal or equitable, and the preservation of the property requires that it should be taken under the control of the court. Cole *v.* O'Neill, 3 Md. Ch. 185.

1 See Overton *v.* Memphis, etc., R. Co., 3 McCrary (U. S.) 437; Peay *v.* Schenck, 1 Woolw. (U. S.) 185; 15 Myer's Fed. Dec. 821.

2. Thompson *v.* Diffenderfer, 1 Md. Ch. 493; Kipp *v.* Hanna, 2 Bland Ch. (Md.) 31; Williamson *v.* Wilson, 1 Bland Ch. (Md.) 422; Stilwell *v.* Williams, Jac. 283; below, 6 Madd. 49; Lloyd *v.* Passingham, 16 Ves. 59, 70; note to Maguire *v.* Allen, 1 B. & B. 76; Huguenin *v.* Baseley, 13 Ves. 106; Lancasline *v.* Lancasline, 9 Beav. 127.

Compare also Lenox *v.* Notrebe, Hempst. (U. S.) 225; Speights *v.* Peters, 9 Gill (Md.) 479; Rollins *v.* Henry, 77 N. Car. 467; and generally, Chase's Case, 1 Bland Ch. (Md.) 213; 17 Am. Dec. 279; Morrison *v.* Buckner, Hempst. (U. S.) 443; 9 Myer's Fed. Dec. p. 347.

But a case is made out for the exercise of the discretion of the chancellor to appoint a receiver and grant an injunction upon the giving of bonds against damages, where the complainant, though not a judgment creditor, shows that his rights are in peril, and that he is in danger of losing them; that he has sold goods to the defendant upon the faith of the latter's representations, which were false and fraudulent; that he afterwards rescinded the contract, and claimed the goods as his own; and that the defendant had given certain mortgages on the goods to persons residing in another State. Wolfe *v.* Claflin, 80 Ga. 65.

3. Skinner *v.* Maxwell, 66 N. Car. 47; Adams' Eq. (Ralston's 8th Am. ed.), p. 352.

See, as to reluctance in making appointment in latter case where trustees are public officers, Vose *v.* Reed, 1 Woods (U. S.) 650.

As to case where no one appointed to take charge of estate of decedent, and there is danger of its removal from the State, see Flaglor *v.* Blunt, 32 N. J. Eq. 522.

4. Parkhurst *v.* Kinsman, 2 Blatchf. (U. S.) 82.

5. Levenson *v.* Elson, 88 N. Car. 184. See Morris *v.* Willard, 84 N. Car. 296; Ponton *v.* McAdoo, 71 N. Car. 105;

rule is equally well settled, and applicable to attempts to obtain receiverships, that unless in case of threatened irreparable damage or loss of the fund, it will be suffered to remain in the hands of the party who is legally entitled to its custody and care.[1]

m. OVER RENTS AND PROFITS.—When suit in equity is brought for a foreclosure sale of the mortgaged property, or even after the sale it is competent for the court to appoint a receiver to take possession of the rents and profits, for the benefit of the mortgagee, upon its being shown that the land mortgaged is not an adequate security, and that the mortgagor, or other party in possession is insolvent.[2]

So the court may appoint a receiver of the rents and profits of real estate sold on execution or under decree of foreclosure, during the period allowed for redemption when necessary to secure ample justice to the parties.[3] And in general where a party

Crayeroff *v.* Morehead, 67 N. Car. 424.

1. Levenson *v.* Elson, 88 N. Car. 184. See, as to application of general rule to injunctions, Thompson *v.* McNair, Phill. Eq. (N. Car.) 124; and as extension of rule to operate against plaintiff who takes property from defendant, see Horton *v.* White, 84 N. Car. 299.

Under the *North Carolina* statute a receiver may be appointed to take charge of the property in litigation pending the suit, before judgment, on the application of either party, when he establishes an apparent right to property which is the subject of the action, and which is in possession of an adverse party, and the property or its rents and profits are in danger of being lost or materially injured or impaired. Twitty *v.* Logan, 80 N. Car. 70.

But a receiver will not be appointed on a bill filed by one stockholder of a company, against a director thereof, to take charge of money alleged to have been improperly received and retained by the said director where no apprehension of loss is alleged in the bill, and the answer alleges that the money was bound to the director by the board of directors. Hager *v.* Stevens, 6 N. J. Eq. 374.

Danger to Property in General.—So where real estate has been in the use of a local corporation for a number of years, and the situation of it in reference to the legal title, has been the same during all that time, and the company is in no more danger in reference to the title, than it has been during that time, and no apprehension of danger is alleged as to the person who has the title, a receiver will not be appointed to take charge of such real estate on the application of a party who has been a stockholder of the corporation during all the time. Hagar *v.* Stevens, 6 N. J. Eq. 446.

Danger of Fraudulent or Other Disposition of Property.—But the appointment of a receiver, or the granting of an injunction, or both, will be authorized by a court of equity, where there is reasonable ground to fear that the property which is the subject of the litigation will, pending such litigation, be fraudulently or otherwise disposed of, so as to deprive the complaining party of the fruit of his recovery. Ellett *v.* Newman, 92 N. Car. 523.

2. See Hughes *v.* Hatchett 55 Ala. 634; Warner *v.* Gouverneur, 1 Barb. (N. Y.) 38; Syracuse City Bank *v.* Tallman, 31 Barb. (N. Y.) 208; Kerchner *v.* Fairley, 80 N. Car. 25; Durant *v.* Crowell, 97 N. Car. 373. As to effect of appointment, see Rider *v.* Bagley, 84 N. Y. 465. As to distinction where whole of mortgage debt not due, see Bank of Ogdensburgh *v.* Arnold, 5 Paige (N. Y.) 40. Consult further FORECLOSURE OF MORTGAGES, vol. 8, p. 234, *et seq.*

3. Connelly *v.* Dickson, 76 Ind. 444, *et seq.* See also full discussion in Merritt *v.* Gibson (Ind. 1891), 27 N. E. Rep. 136.

Against Tenants.—So under the Landlord and Tenant Act of *North Carolina* a receiver may be appointed upon the basis of an affidavit that tenants held over after expiration of their term, and insolvent, and that there is

establishes an apparent right to land and the person in possession is insolvent, so that the rents and profits are likely to be lost, a receiver will be appointed to take charge of the rents and profits during the pendency of the action.[1]

In a proper case, upon the petition of creditors, the court may appoint a receiver of the rents and profits of real estate, notwithstanding the suit is pending on appeal upon a *supersedeas*;[2] and pending a chancery suit to subject the debtor's real estate to the discharge of liens upon it the court has a discretion to sequester the rents and profits of such real estate and appoint a receiver for the same.[3] But a receiver of rents and profits in a foreclosure action will not be appointed except in a case clearly invoking the equitable power of the court to grant that relief;[4] and the application will be refused, although the mortgagors are non-resident and insolvent where it appears that the mortgagee has precisely the security that he had when he made the contract, but seeks to intercept the rents and profits and divert them to his own use to the prejudice of prior mortgagees, and there is no evidence of mismanagement of the property.[5]

n. SELDOM APPOINTED OVER DECEDENTS' ESTATES.—There can but seldom be a necessity for the exercise of any other preventive or protective remedy in regard to the estates of deceased persons than such as the probate court can afford; and hence, though a court of equity has the jurisdiction to appoint a receiver of the assets of such persons, thereby practically taking the administration of those assets into its hands,[6] yet the jurisdiction is not exercised, unless there is manifest danger of loss which may be irreparable.[7]

no security for the rents. Nesbitt *v.* Turrentine, 83 N. Car. 538.

Mines.—In the case of mines it is the settled doctrine in the same State that an injunction ought not to be issued so as to stop their workings, but that the issues and profits should be secured by the appointment of a receiver. Parker *v.* Parker, 82 N. Car. 168. See Falls *v.* McAfee, 2 Ired. (N. Car.) 239; Deep River Gold Min. Co. *v.* Fox, 4 Ired. Eq. (N. Car.) 75.

1. McNair *v.* Pope, 96 N. Car. 506. See also Durant *v.* Crowell, 97 N. Car. 373.

2. Beard *v.* Arbuckle, 19 W. Va. 147.

3. Grantham *v.* Lucas, 15 W.Va. 431.

4. Sales *v.* Lush, 60 Wis. 491. See as to such equitable power, full discussion in Schreiber *v.* Carey, 48 Wis. 211; and for review of various cases showing when a receiver of mortgaged premises will be appointed, see Morris *v.* Branchaud, 52 Wis. 190. Concerning misappropriation of rents, see Stockman *v.* Wallis, 30 N. J. Eq. 450; Chetwood *v.* Coffin, 30 N. J. Eq. 451. As to various circumstances *prima facie* justifying appointment of receivers of rents and profits of mortgaged property, see Finch *v.* Houghton, 19 Wis. 158.

5. Sales *v.* Lusk, 60 Wis. 493. Consult further in general as to receivers of mortgaged premises, FORECLOSURE OF MORTGAGES, vol. 8, pp. 234–240; Cortleyen *v.* Hathaway, 11 N. J. Eq. 40; 64 Am. Dec. 478, and note 492–94.

When Refused to Creditors of Deceased Persons.—If the real and personal estate combined, of a deceased person, be sufficient to pay his debts, his creditors have no reason to apply to have a receiver appointed to take charge of the rents and profits of the real estate and appropriate the same to the payment of such debts. McKaig *v.* James, 66 Md. 584.

6. See *Ex parte* Walker, 25 Ala. 104.

7. Randle *v.* Carter, 62 Ala. 103. A

o. POVERTY OF DEFENDANT NOT GROUND FOR APPOINTMENT.—Mere poverty of the defendant is not, of itself, sufficient ground for the appointment of a receiver,[1] but there must be other grounds to justify the appointment.[2]

p. DEFENDANT'S INSOLVENCY GENERALLY INSUFFICIENT GROUND.—Where the plaintiff's claim to real estate is not clearly made out, a receiver will be refused if the only reason urged for the appointment is the insolvency of the party in possession.[3] Defendants' insolvency, however, may or may not be cause for the appointment of a receiver, in the sound discretion of the court,[4] and while it is not easy to prescribe limits to discretionary action, yet as a general rule it would be safe to say that a receiver should be appointed when insolvency is alleged, and not denied upon the hearing of the application, and it is made to appear that there is danger that the assets will be misappropriated or wasted.[5]

It has even been said that the appointment of a receiver will unhesitatingly be made, where the party in the actual receipt of the rents and profits is shown to be insolvent, as in such case the rents and profits are exposed to imminent danger, or, indeed, to inevitable loss;[6] and it appears, at any rate, that in foreclosure cases, and others relating to the rents and profits of real estate, the insolvency of the defendant is sufficient ground for the appointment of a receiver, when coupled with the inadequacy of the security in general.[7] On the other hand, insolvency of the defendant may sometimes be regarded as a prerequisite to the appointment of a receiver;[8] and the technical insolvency of the defendant may be the special ground or occasion for the appointment of a receiver.[9]

receiver will not be appointed in a proceeding to establish a will. Bryan *v.* Moring, 94 N. Car. 699.

As to need of charging specific misconduct in cross-bill against executor, see Blair *v.* Green, 45 N. J. Eq. 676.

1. Cofer *v.* Echerson, 6 Iowa 504. See 2 Daniel's Ch. Prac. (5th Am. ed.), 1722.

2. 2 Story Eq. Jur. (12th ed.), p. 42, § 836.

3. Cofer *v.* Echerson, 6 Iowa 504.

4. Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 27 Fed. Rep. 158.

5. Turnbull *v.* Prentiss Lumber Co., 55 Mich. 397.

6. Chase's Case, 1 Bland Ch. (Md.) 213; 17 Am. Dec. 280.

7. See Hughes *v.* Hatchett, 55 Ala. 634, as to mortgages. Connelly *v.* Dickson, 76 Ind. 444, as to purchaser under foreclosure of his own mortgage. Nesbitt *v.* Turrentine, 83 N. Car. 538, against tenants.

8. See Bryan *v.* Moring, 94 N. Car. 699. Thus it has been considered that a receiver ought not to be appointed in a proceeding for the partition of property theretofore left in the hands of one of the parties to manage in the common interest, if there is no allegation of insolvency against him. Pierce *v.* Pierce, 55 Mich. 629 (per Cooley, C. J.). So the fact that it is not shown or suggested that the adverse party is not able to answer any demands that may be established against him, is given as a reason for not granting an application for a receiver based on the fraudulent character of a conveyance. Rheinstein *v.* Bixby, 92 N. Car. 309.

9. **Bankruptcy in England.**—As to appointment of receiver after return of execution unsatisfied, in *England*, see Smith *v.* Cowell, L. R., 6 Q. B. Div. 76, and as to conflict of such appointment with that of receiver in bankruptcy, see Salt *v.* Cooper, L. R., 16 Ch. Div.

q. REFUSAL TO APPOINT WHERE EQUITY OF BILL IS DENIED.—The motion for a receiver, if made on bill and answer, will be refused when the answer is a denial of the equity of the bill; and in such a case, if the plaintiff wishes to succeed, he must introduce evidence to disprove the answer.[1]

So the discretion of the lower court in refusing to appoint a receiver, and in dissolving an injunction will not be interfered with where all the equity of the bill is successfully avoided by the answer, and the affidavits filed on the one side but feebly support the bill, while those on the other strongly corroborate the answer.[2] Nor is the rule that the answer, when responsive to the averments of the bill for a receiver, or for any other purpose, shall be taken as true, unless discredited by two witnesses, or by one witness with pregnant circumstances, subject to modification because proof in support of the answer is within the reach of the defendants while it is inaccessible to the complainants.[3]

548. Consult further as to English receiver in bankruptcy or liquidation, *Ex parte* Browne, L. R., 16 Ch. Div. 499; *Ex parte* Rylands, L. R., 6 Ch. Div. 61; *Ex parte* Cooper, L. R., 6 Ch. Div. 256.

1. Simmons *v.* Henderson, Freem. Ch. (Miss.) 500.

2. Rhodes *v.* Lee, 32 Ga. 471.

The denial of the entire equity of the complaint by the defendant is treated as one of the reasons for refusing to appoint a receiver of partnership property, in Buchanan *v.* Comstock, 57 Barb. (N. Y.) 580. See also references to denial of bill by answer in Fairbairn *v.* Fisher, 4 Jones Eq. (N. Car.) 394; Heim *v.* Walsh, 2 Edw. Ch. (N. Y.) 130. Judicial action on a motion to revoke an order appointing a receiver, on the ground that the answer of the defendants, with the supplemental affidavits "swears off" the equity of the bill, rests in the discretion of the court under all the circumstances of the case, and the exercise of such discretion by granting or refusing the motion will not be controlled except for clear error. Cohen *v.* Meyers, 42 Ga. 49. Concerning the exclusion of affidavits, except on particular points, where an injunction and a receiver were asked and title was denied by the answer, see Norway *v.* Rowe, 19 Ves. 153. But *compare* Peacock *v.* Peacock, 16 Ves. 51.

In an action by a judgment creditor to set aside conveyances alleged to be fraudulent, a motion for a receiver and an injunction will be denied, where the allegations made are overcome by positive denials in the answer, and the supporting affidavit is insufficient to make a case reasonably well sustained by proofs. Empire Pav., etc., Co. *v.* Robinson, 58 Hun (N. Y.) 603. As to receiver for mortgagor's homestead, where denials leave matter in doubt, see Callanan *v.* Shaw, 19 Iowa 184.

3. Thompson *v.* Diffenderfer, 1 Md. Ch. 495.

Same Rule on Discharge of Receiver, Etc.—The rule as to the effect of denial of the equity of the bill by the answer, as precluding the appointment of a receiver, applies also on a motion to dissolve an injunction and discharge a receiver. Drury *v.* Roberts, 2 Md. Ch. 159; and see Voshell *v.* Hynson, 26 Md. 93.

And the same general rule applies, subject to exceptional exercise of discretion, to the dissolution of injunctions alone, Roberts *v.* Anderson, 2 Johns. Ch. (N. Y.) 205; Hoffman *v.* Livingston, 1 Johns. Ch. (N. Y.) 212; Hatch *v.* Daniels, 5 N. J. Eq. 15; Washer *v.* Brown, 5 N. J. Eq. 88; Hollister *v.* Barkley, 9 N. H. 238; Parkinson *v.* Trousdale, 4 Ill. 370; Clapham *v.* White, 8 Ves. 36.

Concerning the exclusion of affidavits to contradict the answer, on motion to dissolve an injunction, see further note to Berkeley *v.* Brymer, 9 Ves. 356, and to Isaac *v.* Humpage, 1 Ves. 431; Eastburn *v.* Kirk, 1 Johns. Ch. (N. Y.) 445.

Compare Strathmore *v.* Bowes, 2 Bro. C. C. 89; Gibbs *v.* Cole, 3 P. Wms. 255.

4. Special Objects for Which Appointment Made—*a.* NO COMPETENT PERSON.—The first general class of cases in which a receiver may be appointed, according to the arrangement adopted by an eminent writer on equity, covers those instances where there is no person entitled to the property who is at the same time competent to hold and manage it during the judicial proceeding.[1]

(1) *Infants' Estates.*—Under this first class are included (1) Infants' Estates;[2] and here a court of equity exercises control over the property of its infant ward, where there is no trustee by a receiver,[3] even though there is a guardian, upon the ground, mainly, that the guardian at common law, or under early statutes, had not full power of control and management;[4] but the necessity for a receiver in such cases may have been obviated in many States by statutes enlarging the powers of guardians.[5]

1. 3 Pom. Eq. Jur., p. 359, § 1332, where it is remarked that in instances of this class a receiver is appointed perhaps more readily than in any other, and without proof of imminent danger. See also, in support of the jurisdiction to appoint a receiver in this class of cases, Skinner *v.* Maxwell, 66 N. Car. 48; in other points, 68 N. Car. 400; Adams Eq. (Ralston's 8th Am. ed.) 352.

2. See *Ex parte* Whitfield, 2 Atk. 315; Dillon *v.* Cashell, 4 Brown's Parl. Cas. 312.

3. See Skinner *v.* Maxwell, 66 N. Car. 48; Adams' Eq. (Ralston's 8th Am. ed.) 352.

4. See Gardner *v.* Blan, 1 Hare 382. As to general control of chancery in such cases, see Duke of Beaufort *v.* Berty, 1 P Wms. 705; and reference to appointment of receiver at p. 705.

5. Pom. Eq. Jur., p. 359; § 1532, and note.

When Receiver for Infant's Property Appointed.—There is a clear case for the appointment of a receiver of an infant's property at his instance when there is a mixture of property and the defendant is in possession, and claims the right to dispose of the whole stock of goods for his own benefit, and the different interests of the parties cannot be ascertained until proper invoices are made, and a division effected under the direction of the court, Skinner *v.* Maxwell, 66 N. Car. 48; on other points, 68 N. Car. 400; and though the rule certainly is that the administration will not be taken from an executor without strong reasons, yet when an executrix marries a second husband in necessitous circumstances, and there are infant children of the first marriage, the court will appoint a receiver, if it appears from the evidence that such husband is manifestly incapable of managing the estate in a judicious manner, and the estate is diminished and jeopardized by his want of experience and aptitude for the trust. Stairly *v.* Rabe, McMull. Eq. (S. Car.) 23; nor, as it seems, must a suit be pending. See *infra*, this title, *Prerequisites to Appointment.*

On a bill for the sale of real estate for the payment of debts where the heir-at-law was an infant, and the parol might or did demur, the court appointed a receiver as in other cases, Sweet *v.* Partridge, 2 Dick. 696; 1 Cox C. C. 433. A receiver of an infant's estate has been ordered upon filing the bill and before a subpœna to appear had been served, where it could not be served at all because the defendant was out of the kingdom, Pitcher *v.* Hellier, 2 Dick. 81. See also, as to appointment of receiver over lands of a minor defendant before his appearance or answer, Whitelaw *v.* Sandys, 12 Ir. Eq. Rep. 394.

An infant heir in *Scotland* of copyhold premises in *England* was required to answer by a certain time, or show cause why a receiver should not be appointed, in Leg *v.* Turnbull, 2 P. Wms. 409.

Where one of two trustees of real estate declines to act, the court will appoint a receiver on behalf of infant *cestuis que trustent*, but with liberty to either of the trustees to offer himself, Tati *v.* Jenkins, 1 Y. & C. Ch. 492.

(2) *Lunatics' Estates.*—Under this first class are also included (2) Lunatics' Estates; for, though the control of the court over the property of a lunatic is ordinarily exercised by means of a committee,[1] yet instead of a committee,[2] and especially where no person will act as a committee,[3] the court may appoint a receiver;[4] and so a receiver may be appointed to act in connection with the committee,[5] or after the office of the committee is determined by the death of the lunatic;[6] or the committee may be appointed receiver.[7]

(3) *Estates of Decedents.*—Under the same first class are included (3) Estates of Decedents; and the doctrine concerning them is that during the litigation concerning the admission of a will to probate, and during the interval before an executor or administrator is appointed, a court of equity has power to appoint a receiver of the personal property and of the rents and profits of the real estate, where there is any danger of their loss, misuse, or misapplication;[8] but the necessity of such a receiver has been

As to when receiver of infant's estate will not be directed to keep down the interest of mortgages, see Anonymous, 6 Madd. 9. For refusal to discharge receiver of two infant tenants in common, because one of them came of age, see Smith *v.* Lyster 4 Beav. 228.

1. See Bisph. Eq. (4th ed.), p. 598, § 555; Adams Eq. (Ralston's 8th Am. ed.), p. 291; *In re* Colvin, 3 Md. Ch. 282.

2. The court of chancery will interpose for the care of a supposed lunatic's estate by provisional order before the lunacy is finally determined. *In re* Hele, 3 Atk. 635 (and see as to ordering rents to be remitted, Lady Murr's Case, Ambl. 82); and so a receiver will be appointed before the inquisition of lunacy is returned. *Ex parte* Kenton, 5 Binn. (Pa.) 613.

3. See *Ex parte* Warren, 10 Ves. 622; *Ex parte* Radcliffe, 1 J. & W. 640.

4. 3 Pom. Eq. Jur., p. 359, § 1322.

When Receivers of Lunatics' Estate Appointed or Refused.—So a receiver will be appointed *pendente lite* in an action to set aside deeds given by a person of unsound mind and incapable of managing her affairs against a defendant who was wholly insolvent and had been in possession of the property and collected the rents and profits thereof. Mitchell *v.* Barnes, 22 Hun (N. Y.) 199.

But where two rival claimants had filed bills praying for a receiver of the real estate of a deceased lunatic, and there presented petitions in lunacy for the appointment of a receiver, the court refused the application in lunacy, and also declined to exercise its original jurisdiction in chancery for that purpose, upon an interlocutory application in the suits. *In re* Ferrior, L. R. 3 Ch. 178. See also Carrow *v.* Ferrior, L. R. 3 Ch. App. 728 *et seq.*

5. *Ex parte* Billinghurst, Ambl. 104. Nor does it seem to be necessary that there should be a suit pending. See *supra* this title, *Prerequisites to Appointment.*

6. *In re* Colvin, 3 Md. Ch 288.

7. *In re* Langham, 1 Jur. 281

Who May be Appointed in General.—See *ex parte* Pincke, 2 Meriv. 452; *In re* Lord Banger, 2 Moll. 518.

Appointment of Person to Recover, Receive and Apply Property.—Under *English* Lunacy Regulation Act, see Harvey *v.* Trenchard, 34 Beav. 243; *In re* Faircloth, L. R. 13 Ch. Div. 308. Provisional protection of property, etc., in *Ireland*, *In re* Lawler, 3 Ir. Rep. Eq. 102.

Powers and Rights of Receivers.—See *In re* Starkie, 1 Russ. 476; *In re* Chinnerys, 6 Ir. Eq. Rep., 470; Hoops *v.* Lord Kingston, 11 Ir. Eq. Rep. 470.

8. See Flagler *v.* Blunt, 32 N. J. Eq. 522; *In re* Colvin, 3 Md. Ch. 294; Watkins *v.* Brent, 7 Sim. 518; *affirmed* 1 M. & C. 102; Wood *v.* Hitchings, 2 Beav. 296; King *v.* King, 6 Ves. 173; Ball *v.* Oliver, 2 Ves. & B. 96, 97; Parkin *v.* Seddons, L. R. 16 Eq. 36; 6 Moak's Eng. Rep. 625, 627.

greatly lessened by modern statutes authorizing the probate court to appoint an administrator *ad litem*, and enlarging his powers;[1] and the recent *English* decisions hold that this well settled jurisdiction will not be exercised if the probate court has already appointed an administrator *ad litem*, though otherwise a receiver will be appointed.[2]

b. PARTIES EQUALLY ENTITLED.—The second class of cases in which receivers are appointed embraces instances in which the appointment is based upon the fact that all of the parties are equally entitled to the possession of the property which is the subject-matter of the controversy, but that it is not just and proper from the nature of the dispute and the mutual relations of the parties, that either or any one of them should be allowed to retain possession and control during the litigation.[3]

(1) *Suits Between Partners.*—The most important instances of this second class are, (1) suits between partners; and here it is the rule that in suits for a dissolution or winding up of a partnership, and even[4] in some very special cases without a dissolution, the court may appoint a receiver of the firm assets, when there is any misconduct on the part of the defendants,[5] and even, perhaps, where the partners themselves are wholly unable to agree as to the management of the property and the settlement of the partnership affairs;[6] but the jurisdiction is always exercised[7] with great carefulness and caution;[8] and it is only in extreme cases of misconduct and danger therefrom that an *ad interim* receiver will be appointed without the occurrence or asking of a dis-

Concerning the reluctance of equity to take the assets from an executor or administrator and place them in the hands of a receiver, see Randle *v.* Carter, 62 Ala. 95, 102; and concerning the effect upon the office of receiver of a grant of administration *pendente lite*, see *In re* Colvin, 3 Md. Ch. 294.

1. See as to such administrator, Croswell's Ex's and Adm'rs, p. 132, § 235: and as to *British* enactment authorizing such appointment, Parkin *v.* Seddons, L. R. 16 Eq. 36; 6 Moak's Eng. Rep. 627; Hitchen *v.* Birks, L. R. 10 Eq. 471; Veret *v.* Duprez, L. R. 6 Eq. 331.

2. 3 Pom. Eq. Jur., p. 359, § 1322.

See for such decisions, Atkinson *v.* Henshaw, 2 Ves. & B. 92; Ball *v.* Oliver, 2 Ves. & B. 97; Veret *v.* Duprez, L. R. 6 Eq. 331.

Cases apparently holding different views from those stated in this clause or other clauses of the text, are Richards *v.* Chane, 12 Ves. 464; Jones *v.* Goodrich, 10 Sim. 328; Knight *v.* Duplessis, 1 Ves. Sr. 225.

As to want of need of bringing to a hearing a bill for a receiver *pendente lite*, where the right to probate was in contest, see Anderson *v.* Guichard, 9 Sim. 275.

As to need of special case for appointment pending litigation for recall of probate or grant of administration, see Rendall *v.* Rendall, 1 Hare 154, and *compare* Rutherford *v.* Douglas, 1 S. & S. 12, notes; Newton *v.* Ricketts, 10 Beav. 530.

3. 3 Pom. Eq. Jur., p. 360, § 1333, where it is remarked that while the foundation of the remedy is, of course the danger, yet it is not always essential that there should be any element of actual fraud or breach of trust.

4. See Clegg *v.* Fishwick, 1 M. & G. 296.

5. See Sheppard *v.* Oxenford, 1 K. & J 499; Evans *v.* Coventry, 5 De G. M. & G. 916; Blakeney *v.* Dufaur, 15 Beav. 41.

6. See Hale *v.* Hale, 4 Beav. 377.

7. 3 Pom. Eq. Jur., p. 360, § 1333.

8. See Waters *v.* Taylor, 15 Ves. 26; Goodman *v.* Whitcomb, 1 J. & W. 592.

solution;[1] while a disagreement among the partners themselves is essential.[2] And although the authorities affirm as a general rule, that a receiver will be appointed, of course where a bill is filed seeking a dissolution of a co-partnership, and it satisfactorily appears that the complainant will be entitled to a decree,[3] yet the doctrine is here deemed applicable that the appointment of a receiver, in all cases, rests in the discretion of the court.[4]

1. See Hall *v.* Hall, 3 M. & G. 86; Butchart *v.* Dresser, 4 De G. M. & G 544, as to receiver, after dissolution. Goodman *v.* Whitcomb, 1 J. & W. 592; Const *v.* Harris, T. & R. 517.

2. 3 Pom. Eq. Jur., p. 360, § 1333. Acts of a nature to destroy mutual confidence have been held sufficient for a dissolution, receiver, and injunction. Smyth *v.* Jeyes, 4 Beav. 503.

But mere non-coöperation has been held insufficient ground for a receiver. Roberts *v.* Eberhardt, Kay 163.

3. See Seighortner *v.* Weissenborn, 20 N. J. Eq. 172; Garretson *v.* Weaver, 3 Edw. Ch. (N. Y.) 385, as to this being a prerequisite.

4. Bard *v.* Bingham, 54 Ala. 466. A receiver was, however, held properly appointed where it appeared that a dissolution was contemplated and imminent, and that there was a serious and irreconcilable disagreement between the parties. Whitman *v.* Robinson, 21 Md. 43.

See also as to exclusion, etc., after dissolution, made or intended, Speights *v.* Peters, 9 Gill (Md.) 479; and as to receivership asked on motion to set aside dissolution, O'Bryan *v.* Gibbons, 2 Md. Ch. 10.

The need of mismanagement and improper conduct by a surviving partner, to justify a receiver against him, is dwelt on in Walker *v.* House, 4 Md. Ch. 39, 43; and the right to a receiver when the firm is admitted to be insolvent, and each partner charges the other with a design to waste the property, is sustained in Williamson *v.* Wilson, 1 Bland Ch. (Md.) 426.

A partner who has loaned to the firm more than his agreed capital, is entitled to come into equity for relief by the repayment of his loan, and, if the firm is insolvent or in failing circumstances, the appointment of a receiver and an injunction. Seighortner *v.* Weissenborn, 20 N. J. Eq. 183.

After Dissolution of Firm. — In the courts of *New York* and elsewhere the rule which has been stated to be established is, that on a bill for closing the affairs of a partnership when it is admitted that the firm has been dissolved, the appointment of a receiver follows as a matter of course. This view of the rule said to be adopted is supported by Law *v.* Ford, 2 Paige (N. Y.) 310; Marten *v.* Van Schaick, 4 Paige (N. Y.) 480.

In *New Jersey* this principle has been subjected to the important qualification, that even after a dissolution a receiver will be appointed only when it appears necessary to protect the interests of the parties. Renton *v.* Chaplain, 9 N. J. Eq. 68; Birdsall *v.* Colie, 10 N. J. Eq. 64; Cox *v.* Peters, 13 N. J. Eq. 41.

But even in that State the circumstance of the insolvency of one of the partners coupled with the fact of the dissolution of the firm, would induce the court to assume the administration of the partnership affairs, and appoint a receiver of the firm property, and grant an injunction as an almost indispensable auxiliary to a receiver. Randall *v.* Morrell, 17 N. J. Eq. 346.

All that the *New York* cases cited as establishing the rule above stated, however, really seem to decide is that where either party has a right to dissolve the partnership, and the agreement between the parties makes no provision for closing up the concern, it is of course to appoint a manager or receiver, on a bill filed for that purpose, if the partners cannot arrange the matter between themselves. Law *v.* Ford, 2 Paige (N. Y.) 310, and, that where such partner has an equal right to the possession and control of the partnership effects and business, it is a matter of course to appoint a receiver, upon a bill filed to close the partnership concerns on the application of either party. Marten *v.* Van Schaick, 4 Paige (N. Y.) 480.

But a transfer, after notice of dissolution, by two members of a firm, of all the firm property, to a corporation organized by them for the purpose of continuing the business under a new arrangement, cannot affect the rights

(2) *Partition Suits.*—Among the chief instances of the second class are also suits for partition between co-owners; and here it is to be noted that in suits between co-owners of mines and collieries, the *English* courts grant a receiver upon the same grounds and under the same circumstances as in those between partners,[1] as the working of such mining property is regarded as necessarily a business analogous to a partnership;[2] but in all ordinary cases

of a remaining partner who does not consent thereto; and he is thereafter entitled to the exclusive control of all the firm property for the purpose of winding up the partnership business. MacDonald *v.* Trojan Button Fastener Co., 56 Hun (N. Y.) 648; *affirming* 8 N. Y. Supp. 91, nor will a receiver of the firm's property be appointed in such a case, unless the remaining partner neglects to perform, or improperly performs his duty of closing up the business as expeditiously as may be, with due regard to the interests of all concerned. McDonald *v.* Trojan Button Fastener Co., 56 Hun (N. Y.) 648.

Disagreement Among Partners.—During the continuance of a partnership, a receiver will not be appointed merely because of a disagreement, nor even because of a quarrel between the partners, unless one of them behaves unrighteously against another, as by seeking to exclude him from that participation in the concern to which he is entitled. Sloan *v.* Moore, 17 Pa. St. 222. But *compare* as to *New York* doctrine, Law *v.* Ford, 2 Paige (N. Y.) 310; Marten *v.* Van Schaick, 4 Paige (N. Y.) 480.

But when a dissolution is intended, or has already taken place, a court of equity will always appoint a receiver, provided there be some breach of the duty of a partner, or of the contract of partnership; as when the parties cannot agree as to the disposition of the joint effects, and especially if one has attempted to sell the entire property of the firm. Sloan *v.* Moore, 37 Pa. St. 222.

And still more especially when the object of the firm was a business to which the continued ownership of such property is indispensable. Sloan *v.* Moore, 37 Pa. St. 222.

Exclusion of Copartner from Participation in Business.—The exclusion of one partner by the other from participation in the business of the partnership is a prominent ground for the appointment of a receiver, as well as for the granting of an auxiliary injunction. Wolbert *v.* Harris, 7 N. J. Eq. 621.

But there can be no ground for a receiver where the partner applying to the court has the property in his own possession and the other does not object to such possession. Smith *v.* Lowe, 1 Edw. Ch (N. Y.) 34.

Against Surviving Partner.—If the surviving partner neglects or refuses to proceed within a reasonable time to close up the business of the firm and settle its concerns, a court of chancery will take the property out of his custody, and commit it to the care of a receiver, and direct the latter to make sale of such property. Holden *v.* McMakin, 1 Pars. Sel. Cas. (Pa.) 278. And a receiver may be appointed if the surviving partner negligently or faithlessly fails to take an account of stock, and to keep a record of sales of the partnership effects, and there is danger that the estate of the deceased copartner will suffer by reason of the surviving partner's inability to make good his default, or, rather, that he cannot be compelled to make it good. Word *v.* Word, 90 Ala. 81.

Property Must be Shown to Belong to Partnership.—A receiver will not be appointed over specific property alleged to belong to a partnership, without proof satisfactory to the court that such specific property is in fact property of the partnership. Gregory *v.* Gregory, 1 Sweeny (N. Y.) 624.

Business Partly Illegal.—If part of a partnership business be legal and part illegal, the court may direct an accounting of that which is legal; and in such a case, a receiver may be appointed in an action to settle the affairs of the partnership. Anderson *v* Powell, 44 Iowa 22.

1. See Adams' Eq. (8th Am. ed.) 247; Jefferys *v.* Smith, 1 J. & W. 302. *Compare* Roberts *v.* Eberhardt, Kay 159.

2. See Jefferys *v.* Smith, 1 J. & W. 302; Crawshay *v.* Maule, 1 Swanst. 523; Fereday *v.* Wightwick, 1 R. & M.

of partition between legal co-owners of land a receiver is not generally appointed[1] unless some of the parties are in sole possession to the exclusion of the others.[2]

(3) *Suits Between Land Claimants.*—Further instances of the second class are found in suits between conflicting claimants of land; especially between parties claiming under legal titles, a receiver will not ordinarily be appointed;[3] but the remedy may be granted under special circumstances,[4] in cases of great fraud,[5] or great danger,[6] or where possession is maintained by violence,[7] and the like;[8] though even in such cases the court acts with great caution, and only where the plaintiff's rights are reasonably certain,[9] and the danger is apparent.[10]

c. DELINQUENT TRUSTEES OR QUASI TRUSTEES.—The third class of cases in which a receiver is appointed embraces those cases in which the person holding title to the property is in a position of trust or of *quasi* trust, and is violating fiduciary duties by misusing, misapplying, or wasting the property, and is thereby endangering the rights of other persons beneficially interested.[11]

49; Bentley *v.* Bates, 4 Y. & C. 189; Duryea *v.* Burt, 28 Cal. 577; Grubb's Appeal, 66 Pa. St. 128; Snyder *v.* Burnham, 77 Mo. 54. *Consult* further concerning mining partnerships, Bissell *v.* Foss, 114 U. S. 260; Dodds *v.* Preston, 59 L. T., N. S. 718.

1. 3 Pom. Eq. Jur., p. 361, § 1333.

2. Tyson *v.* Fairclough, 2 S. & S. 143; Milbank *v.* Revett, 2 Mer. 406. For instances of appointment of receivers for co-tenants, see Evelyn *v.* Evelyn, 2 Dick. 800; Street *v.* Anderton, 4 Bro. C. C. 415. And for doctrines governing such appointment, see *supra*, this title, *Particular Kinds of Cases Where Receivers Appointed—Appointment.*

As to receiver of steamship's machinery, see Brenan *v.* Preston, 2 De G. M. & G. 830, *et seq.* As to receiver without exclusive occupation by co-tenant, under *English* Judicature Act, see Porter *v.* Lopes, L. R., 7 Ch. Div. 359.

For leading or suggestive *American* cases on subject, see Darcin *v.* Wells, 61 How. Pr. (N. Y.) 260; Cassetty *v.* Capps, 3 Tenn. Ch. 526; Williams *v.* Jenkins, 11 Ga. 599.

3. See Mapes *v.* Scott, 4 Ill. App. 270; Guernsey *v.* Powers, 9 Hun (N. Y.) 79; Davis *v.* Reaves, 2 Lea (Tenn.) 651; Jones *v.* Goodrich, 10 Sim. 328. *Compare* Mays *v.* Wherry, 3 Tenn. Ch. 35; Battle *v.* Davis, 66 N. Car. 256.

4. See Mapes *v.* Scott, 4 Ill. App. 271; Talbot *v.* Hope Scott, 4 K. & J. 112.

5. See Johnson *v.* Tucker, 2 Tenn. Ch. 400; Toldervy *v.* Colt, 1 Y. & C. 621.

6. See Twitty *v.* Logan, 80 N. Car. 71; Rollins *v.* Henry, 77 N. Car. 470; Huguenin *v.* Basely, 13 Ves. 107; Clark *v.* Dew, 1 R. & M. 109. *Compare* as to great inadequacy of consideration, Stilwell *v.* Wilkins, Jacob 283.

7. Hlawacek *v.* Bohman, 51 Wis. 95, where interference in harvesting of crops.

8. See, as to sufficient equity, Chappell *v.* Boyd, 56 Ga. 582; as to co-tenants of mills, Williams *v.* Jenkins, 11 Ga. 598, and as to trust property including land, Jones *v.* Dougherty, 10 Ga. 287.

9. See Davis *v.* Reaves, 2 Lea (Tenn.) 651.

10. 3 Pom. Eq. Jur., p. 361, § 1333.

11. In many though not in all the instances following within this class, the plaintiff has some equitable estate or interest which he is seeking to enforce; but whatever be the nature of his right, the ground of the remedy is always the misconduct of the party holding the title, and the consequent danger of loss. 3 Pom. Eq. Jur., p. 361, § 1334.

(1) *Trustees' Breach of Trust.*—Among the more important instances of this class in which a receiver may be appointed[1] are the following: Suits against trustees who have been guilty of a breach of trust.[2]

(2) *Executors or Administrators.*—Suits under like circumstances against executors or administrators, but only where such fiduciaries have been guilty of misconduct, waste, misuse of assets and the like, and there is real danger of loss.[3]

(3) *Enforcement of Mortgages.*—Suits to enforce a mortgage when the security is inadequate, and the mortgagor is insolvent, or is committing acts of waste and the like, depreciating the value of the property.[4]

1. See 3 Pom. Eq. Jur., p. 361, § 1334.

2. Danger to the trust fund or property is a prerequisite to the interference of the court with the trustee's possession. See Bowling *v.* Scales, 2 Tenn. Ch. 66; Richards *v.* Barrett, 5 Ill. App. 514; Vose *v.* Reed, 1 Woods (U. S.) 650; Middleton *v.* Dodswell, 13 Ves. 268; Browell *v.* Reed, 1 Hare 434; Bainbrigge *v.* Blair, 3 Beav. 424; Evans *v.* Coventry, 5 De G. M. & G. 916; Chase's Case, 1 Bland Ch. (Md.) 206; 17 Am. Dec. 279; Poythress *v.* Poythress, 16 Ga. 409.

3. See Randle *v.* Carter, 62 Ala. 102; Powell *v.* Quinn, 49 Ga. 523; Du Val *v.* Marshall, 30 Ark. 230; Haines *v.* Carpenter, 1 Woods (U. S.) 265; Anonymous, 12 Ves. 5. *Consult* further, note to Cortleyeu *v.* Hathaway, 64 Am. Dec. 489.

To the effect that the appointment of a receiver does not remove or supersede the trustee as such, but merely as receiver, see Leddel *v.* Starr, 19 N. J. Eq. 163.

As to bankruptcy cases in *England*, see Nothard *v.* Proctor, 1 Ch. Div. 6; Dowd *v.* Hawtin, L. R., 19 Ch. Div. 64.

4. **English Doctrine.**—In *England* under the earlier law, an equitable mortgagee is alone entitled to a receiver, because a legal mortgagee can at any time gain possession, and thus secure rents and profits. See Reid *v.* Middleton, T. & R. 456; Berney *v.* Sewell, 1 J. & W. 648.

But a legal mortgagee of business premises, such as an hotel, who is prevented by the mortgagor from taking possession under the mortgage, may obtain an interlocutory order for the appointment of a receiver and manager as well as an injunction. Truman *v.* Redgrave, 18 Ch. Div. 549; and in an action by debenture holders of a mining company against the company for foreclosure, the court has jurisdiction to make an *interim* order for the appointment of a manager, as the only way to secure the property from ruin. Peek *v.* Trinsmaran Iron Co., L. R., 2 Ch. Div. 116.

So under the Judicature Act, where the estates of which the plaintiffs were legal and equitable mortgagees were mixed up together, and there was no adverse possession, there is clearly a case in which, under the wording of the enactment, it is "just and convenient" that a receiver should be appointed. Pease *v.* Fletcher, L. R., 1 Ch. Div. 275.

A receiver may also be appointed in a suit to determine the priority of incumbrances. Smith *v.* Earl of Effingham, 2 Beav. 233; or where it is necessary to make such determination concerning a mortgage of tolls. Lord Crewe *v* Edleston, 1 De G. & J. 109. See also Davis *v.* Duke of Marlborough, 2 Swanst. 137.

In *New Jersey* the *English* view is so far followed that only a second mortgagee is, in the absence of special circumstances, deemed entitled to the remedy of a receiver, because he has an equitable mortgage. Cortleyeu *v.* Hathaway, 11 N. J. Eq. 41; 64 Am. Dec. 479. But see Mahon *v.* Crothers, 28 N. J. Eq. 568. *Compare* also Brasted *v.* Sutton, 30 N. J. Eq. 463.

Doctrine in the United States.—In this country no distinction is generally made between legal and equitable mortgages, but the ground for appointing a receiver is the smallness of the security, and the danger lest it should be rendered more inadequate by the conduct of the mortgagor. 3 Pom. Eq., § 1334, p. 362, note 1. See Price *v.* Dowdy, 34 Ark. 290. *Com-*

(4) *Enforcement of Equitable Liens.*—Suits under like circumstances to enforce equitable liens, including those of judgment creditors in the nature of an equitable execution.[1]

(5) *Specific Performance by Vendors of Land.*—Suits under like circumstances and for a like reason, by a vendor to enforce the specific performance of a contract for the sale of land against a vendee who is in possession.[2]

(6) *Suits by Creditors.*—In suits by creditors, although not strictly creditors' actions by judgment creditors, brought to enforce their demands from the debtor's property,[3] under some very special circumstances involving great danger of loss, such as the debtor's non-residence, insolvency, etc.[4]

pare Weis *v.* Neal (Ark. 1890), 14 S. W. Rep. 1097; Worrill *v.* Coker, 56 Ga. 670; Haas *v.* Chicago Building Soc., 89 Ill. 498; stating the general doctrine and reviewing various cases, Reynolds *v.* Quick (Ind. 1891), 27 N.E. Rep. 621, as to a chattel mortgage; Des Moines Gas Co. *v.* West, 44 Iowa 26, as to case where rents and profits pledged; Callanan *v.* Shaw, 19 Iowa 185, as to need of clear case; Phillips *v.* Eiland, 52 Miss. 722; Mahon *v.* Crothers, 28 N. J. Eq. 568; Stockman *v.* Wallis, 30 N. J. Eq. 450; Chetwood *v.* Coffin, 30 N. J. Eq. 451; Williams *v.* Noland, 2 Tenn. Ch. 153 (and see p. 154, as to giving security instead); Johnson *v.* Tucker, 2 Tenn. Ch. 401, to like effect. Pullan *v.* Cincinnati, etc., R. Co., 4 Biss. (U. S.) 50; L. Ins. Co. *v.* Grant, 3 McArthur (D. C.) 223, requiring agreed lien upon rents and profits.

As to deeds of trust on mortgages by corporations, see Allen *v.* Dallas, etc., R. Co., 3 Woods (U. S.) 327; Warner Rising Fawn Iron Co., 3 Woods (U. S.) 526; Wilmer *v.* Atlanta, etc., R. Co., 2 Woods (U. S.) 415.

See also, concerning receivers for mortgaged property in general, note to Cortleyeu *v.* Hathaway, 64 Am. Dec. 492; FORECLOSURE OF MORTGAGES, vol. 8, p. 234; Beverley *v.* Brooke, 4 Gratt. (Va.) 209. As to effect of special terms of mortgage, see Swan *v.* Mitchell (Iowa), 47 N. W. Rep. 1044; Hardin *v.* Hardin (S. Car. 1891), 12 S. E. Rep. 937.

1. Lien by deposit of title deeds is discussed in Adams Eq. (Ralston's 8th Am. ed.), pp. 124, 125. Other instances are given in 3 Pom. Eq. Jur., p. 362, note 2.

Liens of judgment creditors will be considered *infra*, this title, *Receivers in Particular Cases—After Judgment.*

2. This subject will be considered *infra*, this title *Receivers in Particular Cases—Between Vendors and Purchasers.* Authorities concerning the general grounds and time of appointment are given in 3 Pom. Eq. Jur., p. 362, note 3. A survey of the law is given in the note to Cortleyeu *v.* Hathaway, 64 Am. Dec. 491.

3. The appointment of receivers between debtor and creditor is discussed in the note to Cortleyeu *v.* Hathaway, 64 Am. Dec. 491.

4. But the case must undoubtedly be very special to warrant the appointment of a receiver in a suit by a simple creditor. 3 Pom. Eq. Jur., p. 363, note 1, and creditors who have no lien and no title, and have not reduced their claims to judgment, are ordinarily in no condition to call for an injunction and the appointment of a receiver; and this rule applies in the case of voluntary assignments for the benefit of creditors as well as to sales or pretended sales by the debtor to other persons; nor is it material whether the debts are due or not. Johnson *v.* Farnum, 56 Ga. 145.

The remedy for creditors by bill, injunction, and the appointment of a receiver is, however, more ample and complete, and certainly more safe, than the remedy at law by attachment, where the debtors are beyond the jurisdiction, their creditors numerous, and their assets in the State in the shape of money and credits, but many of them unknown, and therefore not to be reached by garnishment, and where they have an agent in the State cognizant of all their resources within the jurisdiction, and where conflicting claims among different creditors, touching equitable priority, are to be settled. Ballin *v.* Ferst, 55 Ga. 547.

(7) *Suits for Rescission of Land Contracts.*—Suits for the rescission of a contract for the sale of land under special circumstances.[1]

(8) *Suits for Payment of Annuities.*—Suits to enforce payment of the arrears of annuities.[2]

(9) *Suits for Protection of Remainder-men.*—Suits for the protection of remainder-men against the life tenant or other holder of the particular estate.[3]

(10) *Suits Against Corporations.*—Suits under many circumstances against corporations.[4]

(11) *Bankruptcy Proceedings.*—Suits and proceedings in bankruptcy.[5]

d. AFTER JUDGMENT.—The fourth class contains those cases in which a receiver is appointed after judgment for the purpose of carrying the decree into effect.[6]

5. Particular Kinds of Cases Where Receivers Appointed—*a.* CORPORATIONS.—A receiver may be appointed where the property of a corporation is being mismanaged, and is in danger of being lost to the stockholders and directors through the collusion and fraud of its officers and directors, who are themselves creditors of the corporation and mortgage the corporate property to themselves;[7] and a receiver may be appointed to take charge of the property of a corporation in various other cases, which will be later considered.[8]

1. As in the case of a coal mine which must be kept in a going state. Gibbs *v.* David, L. R. 20 Eq. 376.

2. This subject will be considered *infra*, this title, *Appointment—Over What Property Receivers Appointed.*

3. See as to appointment, at instance of trustees, against tenant for life not keeping houses in repair, *In re* Fowler, L. R. 16 Ch. Div. 725.

4. Illustrative cases are collected in 3 Pom. Eq. Jur., p. 363, note 5. The appointment of receivers over corporations and associations is also briefly considered in the note to Cortleyen *v.* Hathaway, 64 Am. Dec. 485. But the subject will be fully discussed *infra*, this title, *Receivers in Particular Cases.*

5. This subject will be considered *infra*, this title, *Receivers in Particular Cases—For Insolvents.* A group of authorities is given in 3 Pom. Eq. Jur., p. 363, note 6.

6. The mode and object of the appointment, and some of the most important cases in which it is made, may be gathered from 3 Pom. Eq., § 1335 pp. 363-64. But the subject will be fully discussed *infra*, this title, *Receivers in Particular Cases—After Judgment.*

7. Haywood *v.* Lincoln Lumber Co., 64 Wis. 645.

8. See *infra* this title, *Receivers in Particular Cases—For Corporations.* A survey of the law of receivers for corporations and associations is given in the note to Cortleyen *v.* Hathaway, 64 Am. Dec. 485. *Consult* also Folger *v.* Columbian Ins. Co., 99 Mass. 274; 96 Am. Dec. 751; Potter *v.* Merchants' Bank, 28 N. Y. 653; 86 Am. Dec. 273; Neall *v.* Hill, 16 Cal. 150; 76 Am. Dec. 512.

A receiver of a dissolved corporation is only to be appointed, in *California*, when necessary for the purpose of preserving and distributing the property; and only on application of a party interested, such as a creditor or stockholder, and not of the State seeking a forfeiture of the charter. Havemeyer *v.* Superior Court, 84 Cal. 335.

A receiver will not be appointed merely because it is asserted that the management of the property of a corporation is conducted in the interest of partisan political objects if it is not shown that the revenues of the corpo-

b. RAILROADS.—A receiver may properly be appointed in foreclosure proceedings on a second mortgage, where more than one million dollars of interest is in default upon mortgage on a railroad 1,600 miles long, mortgaged for $28,000 a mile, where the business of the road is decreasing and seems likely to decrease and the real owners are not in harmony as to its management.[1]

c. MORTGAGED PROPERTY.—To justify the appointment of a receiver in foreclosure on the ground of waste, the waste must be serious, and the danger of destruction or impairment of the security imminent.[2]

d. PARTNERSHIP PROPERTY.—The law may be considered as settled, that in case of dissensions or disagreements between partners, a receiver will be appointed by a court of equity to settle up the affairs of the partnership, whenever it is made to appear by a bill filed by any of the partners, that there is a breach of duty on the part of the other partners, or a violation of the agreement of partnership.[3]

e. TRUSTS—(1) *When Receiver not Appointed.*—A court will not appoint a receiver, merely because the measure can do no harm, more especially against a trustee appointed by a testator; for if such reasons could operate, a receiver might be appointed for every trust;[4] and a receiver will not be appointed merely because the trustee mixes the trust funds with his own, where it is not alleged that the fund is in danger, nor denied that the trustee keeps accounts;[5] nor will a receiver be appointed upon light grounds to displace the possession of an executor who has qualified and given bonds for the faithful discharge of his trust.[6]

(2) *When Receiver Appointed.*—But where a trust fund is in danger of being wasted or misapplied, the court of chancery will interfere at the instance of those interested in the fund, and by

ration are being squandered in paying useless employes kept in its service for political reasons. Stewart *v.* Chesapeake, etc., Canal Co., 4 Hughes (U. S.) 49; 5 Fed. Rep. 151; 27 Myer's Fed. Dec. 28.

1. Mercantile Trust Co. *v.* Missouri, etc., R. Co., 36 Fed. Rep. 225; 1 Lawy. Rep. Ann. 400. See further, on subject in general, *infra*, this title, *Receivers in Particular Cases—For Railroads.*

2. Union Mut. L. Ins. Co. *v.* Union Mills Plaster Co., 37 Fed. Rep. 291; 3 Lawy. Rep. Ann. 92. See also, upon the subject in general, note to Cortleyen *v.* Hathaway, 64 Am. Dec. 492; Rose *v.* Bevan, 10 Md. 470; 69 Am. Dec. 171; and *infra*, this title, *Receivers in Particular Cases—For Mortgaged Property.*

3. Allen *v.* Hawley, 6 Fla. 164; 63 Am. Dec. 209. See also, on subject in general, note to Cortleyeu *v.* Hathaway, 64 Am. Dec. 486; and *infra*, this title, *Receivers in Particular Cases—For Partnership Property.*

4. Orphan Asylum Soc *v.* McCartee, Hopk. (N. Y.) 435.

5. Orphan Asylum Soc. *v.* McCartee, Hopk. (N. Y.) 435.

6. Haines *v.* Carpenter, 1 Woods (U. S.) 265. So the court will not displace the possession of a competent trustee and appoint a receiver or consignee of a West India estate, unless the trustee has wilfully or ignorantly shown negligence by permitting the property to be placed in a state of insecurity. Barkley *v.* Lord Reay, 2 Hare 308; nor will a receiver be appointed before answer, and without the joining in the application of all the parties interested, merely because the party who administers the testator's property is an uncertificated bankrupt, and was not appointed by the testator, and has

the appointment of a receiver, or in some other mode, secure the fund from loss;[1] and this rule applies to executors and administrators, as well as to other trustees;[2] while there are various other circumstances of misconduct or disqualification of trustees under which a receiver of property held in trust will be appointed.[3]

(3) *Slight and Insufficient Grounds.*—But a trustee will not be displaced, and a receiver appointed, on slight grounds,[4] falling short of mismanagement,[5] especially before answer;[6] and it is not enough to allege that the habits of the trustee are bad, and that

changed his residence and lives on another part of the property. Smith *v.* Smith, 2 Y. & C. 361.

1. Calhoun *v.* King, 5 Ala. 525; Jones *v.* Dougherty, 10 Ga 287; Edie *v.* Applegate, 14 Iowa 275, charging waste and insolvency; Attorney-General *v.* Bowyer, 3 Ves. 727, against heirs neglecting to carry out a charitable devise. 2 Perry on Trusts (4th ed.), § 818.

The loss of part of a trust fund is *prima facie* a breach of trust, and sufficient ground for the appointment of a receiver on an interlocutory application. Evans v. Coventry, 5 De G. M. & G. 917.

The trustee cannot be appointed receiver. Anonymous, 3 Ves. 516.

2. Calhoun *v.* King, 5 Ala. 525.

It is a good ground for the appointment of a receiver, that an executor and trustee has, by omitting to get in the testator's personal estate deprived infant legatees of the maintenance or means of advancement provided for them by the will. Richards *v.* Perkins, 3 Y. & C. Ch. 307.

But a strong case is necessary to take the property from an executor and put it in the hands of a receiver. Middleton *v.* Dodswell, 13 Ves. 269; and a receiver will not be appointed merely because the executor is in poor circumstances, where no misconduct appears. Anonymous, 12 Ves. 5; Howard *v.* Papera, 1 Madd. 143.

Appointment Standing in Another Suit.—Where there are conflicting claimants of a trust fund, who are prosecuting separate suits in the same court, to subject the fund to their claims, the appointment of a receiver in one of the suits, on the motion of the plaintiff in that suit, will enure to the benefit of the plaintiff in the other suit, upon the establishment of his superior right to the fund. Beverley *v.* Brooke, 4 Gratt. (Va.) 218.

3. Thus a receiver may be appointed where trustees have accepted another conflicting trust. Talbot *v* Hope Scott, 4 K. & J. 140; or where the application is sustained or strengthened by the consent of one or more of several trustees. Tidd *v.* Lister, 5 Madd. 433; Middleton *v.* Dodswell, 13 Ves. 269; Brodie *v.* Barry, 3 Meriv. 696; and see Browell *v.* Reed, 1 Hare 435. *Compare* also, as to need of sureties, Manners *v.* Furze, 11 Beav. 31; Tylee *v.* Tylee, 17 Beav. 583; or in case of the misconduct of one trustee, and the incapacity, through age, of the other. Bainbrigge *v.* Blair, 3 Beav. 421; or where the trustee is out of the jurisdiction. Noad *v.* Backhouse, 2 Y. & C. 530; Smith *v.* Smith, 10 Hare, App'x LXXI (and see, as to trustee's husband, Taylor *v.* Allen, 2 Atk. 213), or in case of such disagreement among the trustees as interferes with the administration of the trust. Swale *v.* Swale, 22 Beav. 585 (and see Day *v.* Croft, 2 Beav. 488; Lewin on Trusts (5th ed) 731), or where the trustees are persons of bad character, drunken habits, and great poverty. Everett *v.* Prythergch, 12 Sim. 367; or where they are insolvent or bankrupt. Scott *v.* Beher, 4 Price 348; Gladdon *v.* Stoneman, *cited* in note to Howard *v.* Papera, 1 Madd. 143; Mansfield *v.* Shaw, 3 Madd. 101. *In re* Johnson, L. R. 1 Ch. App. 326; Langley *v.* Hawk, 5 Madd. 46 (and *compare* Middleton *v.* Dodswell, 13 Ves. 269). See, to like effect, 2 Perry on Trusts (4th ed.), § 818. Even the fact that the trustee was very poor, coupled with her having given insufficient security, has been held sufficient ground to appoint a receiver in her stead to administer the estate of an infant. Havers *v.* Havers, 3 Barn. 23.

4. Middleton *v.* Dodswell, 13 Ves. 268.

5. Barkley *v.* Lord Reay, 2 Hare 308.

6. Ogden *v.* Kip, 6 Johns. Ch. (N. Y.) 162.

his conduct is capricious and litigious, but it must appear that the trust fund is likely to be squandered so that it will not be accessible to answer the decree in the premises.[1]

(4) *Mismanagement or Misconduct Requisite.*—Indeed, while courts of equity have original jurisdiction of trusts, and will enforce their execution at the instance of beneficiaries, yet the displacement of a trustee will not be made except for some mismanagement or misconduct on his part in executing the trust; and when a general assignment is made by an insolvent bank, for the benefit of its creditors, a court of equity will not at once assume jurisdiction, at the instance of some of the creditors, and remove the assignee and appoint a receiver as trustee in his stead, unless it is shown that the assignee is incompetent or unfit for his office, or that he has been guilty of some neglect or breach of duty.[2]

f. TENANTS IN COMMON—(1) *In General.*—The principle established by the cases is, that a court of equity will not, at the instance of one tenant in common, wrest from another cotenant his share of the property, to the enjoyment of which he is legally entitled, unless it be necessary to secure and protect the rights of the complaining cotenant.[3]

(2) *When Appointment Made.*—A court of equity, has, however, jurisdiction to appoint a receiver, upon the ground of the inadequacy of the remedy at law, at the instance of one tenant in common against his cotenants, when such cotenants are insolvent, are in possession of undivided valuable property, receiving the whole of the rents and profits, and exclude their companion from the receipt of any portion thereof.[4] So it has been considered that a receiver may be appointed where the other cotenants not only deny the complainant's title, but have endeavored to

1. Poythress *v.* Poythress, 16 Ga. 409.

So it is stated never to have been the practice to appoint a receiver solely because one of several trustees had disclaimed, or was inactive, or had gone abroad. Browell *v.* Reed, 1 Hare 434. *Compare* Tait *v.* Jenkins, 1 Y. & C. Ch. 492.

Nor is it of itself sufficient ground for a receiver (see 2 Perry on Trusts 4th ed., § 819) that the trustees are poor, if they are not insolvent. Anonymous, 12 Ves. 5; Howard *v.* Papera, 1 Madd. 142; Hathornthwaite *v.* Russel, 2 Atk. 127; nor that acting trustees have let a purchaser into possession and not accounted for the purchase-money. Browell *v.* Reed, 1 Hare 435.

2. Jones *v.* McPhillips, 77 Ala. 319, reviewing various authorities on the subject.

3. Low *v.* Holmes, 17 N. J. Eq. 151.

4. Williams *v.* Jenkins, 11 Ga. 599.

But equity will not interfere *pendente lite* by the appointment of a receiver with the possession of a person having the legal title, even if it be only to an undivided share in the property, if it does not appear that he disputes the title or interferes with the right of possession of his cotenants, especially if there is no sufficient averment of insolvency. Cassetty *v.* Capps, 3 Tenn. Ch. 526, where the motion for a receiver was made in a suit for a sale of land for division among cotenants. So there is not a proper case for the appointment of a receiver where there is nothing before the court to show that the cotenants against whom it was asked were in the exclusive possession of the rents and profits, shutting out the other cotenants from all participation therein, or that the cotenants in question were insolvent or mismanaging the common property. Vaughan *v.* Vincent, 88 N. Car. 119.

entangle the whole title, and are not disposed to account for the rents and profits.[1]

(3) *Over Mines and Timber Lands.*—It can also be readily understood why power should be vested in a court of equity to appoint a receiver in instances like those where a mine containing precious metals is in the possession of one tenant in common, and is being worked by him to the exclusion of other cotenants, where he is insolvent and unable to respond in damages. Here we have a case in which the value of the property is being rapidly exhausted by an irresponsible cotenant, and the cotenants out of possession are threatened with an entire destruction of their estate. It would, therefore, seem to be eminently just and proper for the court, in which a suit was pending for the partition of such property, to wrest it from the possession of the tenant holding and working it, and to put it into the hands of a receiver.[2] Again, to take another supposable example: if the estate consisted of land, the only value of which was in the timber upon it, and the tenant in possession was cutting down and disposing of such timber, and appropriating the proceeds to his own use, though he is also insolvent and unable to respond in damages, it would clearly appear to be within the jurisdiction of a court of equity, in which a suit for the partition of such land was pending, to appoint a receiver to take possession of the property, and hold it for the joint benefit of all parties in interest.[3]

(4) *On Grounds of Exclusion.*—It is doubtful, however, in view of other remedies considered available, whether a receiver will be appointed for mere exclusion of a cotenant from the possession of an estate not of an equitable character;[4] but a receiver will be appointed where the excluding cotenant received the whole of the rents;[5] or where the exclusion is from the entire use and enjoyment of the property.[6]

(5) *In Partition Suits.*—It is also competent for a court of equity, in some cases, to grant a receiver in partition suits.[7] Thus in order to preserve the property from serious loss by the interference of a cotenant with the securing and collection of rents, the court will appoint a receiver during the pendency of an

1. Ducan *v.* Campau, 15 Mich. 416.

2. This illustration is given, in negative and interrogative language, by Morrison, C. J., in Goodale *v.* Fifteenth Dist. Court, 56 Cal. 32.

3. Goodale *v.* Fifteenth Dist. Court, 56 Cal. 33.

4. Tyson *v.* Fairclough, 2 S. & S. 144; *distinguishing* Street *v.* Anderton, 4 Bro. C. C. 414; Evelyn *v.* Evelyn, 2 Dick. 800, and Milbank *v.* Revett, 2 Meriv. 406. See also Spratt *v.* Ahearne, 1 Jones (Ir. Eq.) 51; Scurrah *v.* Scurrah, 14 Jur. 874. But *compare* Searle *v.* Smales, 3 Week. Rep. 438.

5. Sandford *v.* Ballard, 33 Beav. 401; 33 L. J. Ch., N. S. 450. See also Hargrave *v.* Hargrave, 9 Beav. 551. *Compare* Holmes *v.* Bell, 2 Beav. 299.

6. Low *v.* Holmes, 17 N. J. Eq. 151. Under the *English* Judicature Act, however, a receiver may be appointed although there is no exclusive occupation by the co-owner. Porter *v.* Lopes, L. R., 7 Ch. Div. 359.

7. Goodale *v.* Fifteenth Dist. Court, 56 Cal. 32.

action in partition;[1] but not upon affidavit made on information and belief, that the defendant in the partition suit is of little or no responsibility where there is no showing that the appointment is necessary to protect the income from waste, but such defendant in possession of a portion of the estate has been in the habit of collecting the rents for the alleged purpose of such protection;[2] nor where the tenant in possession is occupying under such circumstances that he is not liable to account, does such mere occupancy afford a ground for the appointment of a receiver, pending an action for partition.[3]

(6) *Peculiar Footing of Mines.*—Mines are also generally placed on a peculiar footing in this respect. Thus it has been held in this country that the purchaser at a judicial sale of a mining claim may, where the judgment debtor remains in possession, working the claims, and is insolvent, have a receiver appointed to take charge of the proceeds during the period allowed by the statute for redemption.[4]

Where, however, two persons are owners or tenants in common of a mine, and have agreed to work it together, the court will not in *England* appoint a manager and receiver of the mine, on a bill not asking for a dissolution of the partnership, and in a case where one of the tenants in common has not taken any steps to obstruct the other.[5]

Indeed, it has been said in that country, that the only ground for the appointment of a receiver against a tenant in common of a mining concern is, that he is wasting the property, or excluding from the fair opportunity of interfering in the concern, those who are entitled with him to the benefit of the license to work the mines under leases;[6] and in the *United States*, stress has also been laid upon the extraordinary nature of the working of mines, as justifying a special remedy and as constituting a waste or destruction of the property.[7]

1. Pignolet *v.* Bush, 28 How. Pr. (N. Y.) 9.

2. Darcin *v.* Wells, 61 How. Pr. (N. Y.) 261. See also as to right to receiver in partition suit, Hargrave *v.* Hargrave, 9 Beav. 551; Searle *v.* Smales, 3 Week. Rep. 438; Porter *v.* Lopes, L. R., 7 Ch. Div. 359; Rutherford *v.* Jones, 14 Ga. 526; 60 Am. Dec. 658; Duncan *v.* Campau, 15 Mich. 416; Goodale *v.* Fifteenth Dist. Court, 56 Cal. 29, fully reviewing the authorities on the subject; Pierce *v.* Pierce, 55 Mich. 640.

3. Varnum *v.* Leek, 65 Iowa 752.

4. Hill *v.* Taylor, 22 Cal. 193.

5. Roberts *v.* Everhardt, Kay 156, *reviewing* as to co-ownership in mining concerns, Jefferys *v.* Smith, 1 J. & W. 298; Story *v.* Lord Windsor, 2 Atk. 630; Bentley *v.* Bates, 4 Y. & C. 182, and Wynget *v.* Heathcote, therein cited; Goodman *v.* Whitcomb, 1 J. & W. 592; Crawshay *v.* Maule, 1 Swanst. 495; Waters *v.* Taylor, 15 Ves. 26, and Denys *v.* Shuckburgh, 4 Y. & C. 42.

6. Lord Chancellor Eldon in Norway *v.* Rowe, 19 Ves. 159.

7. Hill *v.* Taylor, 22 Cal. 194. See also as to receiver for mining property in general, Parker *v.* Parker, 82 N. Car. 167; MINES AND MINING CLAIMS, vol. 15, p. 605.

In General.—A receiver appointed for the benefit of two infant tenants in common will not be discharged on one coming of age. Smith *v.* Lyster, 4 Beav. 228.

A receiver may be appointed over

g. BETWEEN HEIR-AT-LAW AND DEVISEE.—A receiver will not be appointed on behalf of an heir-at-law against a devisee unless there are strong circumstances to induce such appointment as the heir has his remedy at law by bringing ejectment.[1] Nor will a receiver be granted against the heir, at the instance of the devisee, pending the issue, except in a strong case, as where the court feels clear from the evidence that there is no ground to impeach the will, or where the heir throws a doubt upon his own title by moving to postpone the trial;[2] or, more generally speaking, where the claimant satisfies the court that there is a reasonable probability of his succeeding on the issue, and that the property will be endangered by being left in the possession of the heir-at-law.[3]

h. IN EJECTMENT SUITS.—The cases in which receivers may be appointed in actions of ejectment[4] will be later considered.[5]

i. AT INSTANCE OF VENDEE OF LAND.—In *California* the superior court has jurisdiction to appoint a receiver in an action brought by a vendee of land, who has repudiated his purchase because of the vendor's fraud, to regain possession of the money and securities given for the land.[6]

the whole of a property, at the instance of a mortgagee of an undivided share. Sumsion *v.* Crutwell, 31 Week. Rep. 399. See also Holmes *v.* Bell, 2 Beav. 299. *Compare* Stockman *v.* Wallis, 30 N. J. Eq. 450; Chetwood *v.* Coffer, 30 N. J. Eq. 451.

Allowance of a receiver of part of an estate was made in Calvert *v.* Adams, 2 Dick. 478. But *compare* Willoughby *v.* Willoughby, *cited* in note to preceding case. See also Hargrave *v.* Hargrave, 9 Beav. 551.

Where a bill in equity by one tenant in common of tools and machinery, against another shows no right to final relief upon any of the grounds set forth, the injunction and receiver prayed for as means to secure the ultimate purpose of the bill, fall with it. Blood *v.* Blood, 110 Mass. 548. As to receiver for a vessel where part owners cannot agree upon the sale or for the working of it, see Andrews *v.* Betts, 8 Hun (N. Y.) 323; and as to receivers for a trotting horse held under an attachment, where the co-owner is alleged to be insolvent and to be seeking to collusively obtain the animal, see Shehan *v.* Mahar, 17 Hun (N. Y.) 130. A receiver has been granted to protect the property upon the idea that nobody's rights were thereby prejudiced; where application therefor was made in a suit on behalf of a number of grantees of rent charges on the same property, which was becoming dilapidated and less valuable, and for which tenants could not be obtained for want of guaranty against the powers of distress given to each of such grantees, who could not separately recover or maintain possession of the property. White *v.* Smale, 22 Beav. 75.

1. Knight *v.* Duplessis, 1 Ves. Sr. 225.

See as to special circumstances under which a receiver will, it seems, be appointed, Middleton *v.* Sherburne, 4 Y. & C. 377. And as to postponement of action on motion for a receiver, where it is alleged that the will was forged, see Bonser *v.* Bradshaw, 4 Jur., N. S. 1011.

2. Lord Fingal *v.* Blake, 1 Moll. 113. See further, as to when a receiver may be appointed in such a case, Earl of Fingal *v.* Blake, 2 Moll. 60; Dobbin *v.* Adams, 8 Ir. Eq. Rep. 157. And as to when a receiver will be refused, Lloyd *v.* Lord Trimleston, 2 Moll. 83.

3. Clark *v.* Dew, 1 R. & M. 109.

As to appointment of receiver pending new trial after verdict upon issue *devisavit vel non*, see Bainbrigge *v.* Bainbrigge, 20 L. J. Ch. N. S. 141.

4. See note to Cortleyeu *v.* Hathaway, 64 Am. Dec. 494.

5. See *infra*, this title, *Receivers in Particular Cases—Of Real Property.*

6. Loaiza *v.* Superior Court, 85 Cal. 35; 9 Lawy. Rep. Ann. 382. See

j. AGAINST TENANT FOR LIFE.—A receiver will not be appointed to raise the arrears of interest which accrued during the lifetime of a former tenant for life, out of the estate of a like subsequent tenant.[1]

But a receiver has been granted against a tenant for life subject to a term to raise portions, who refused to produce title deeds necessary to raise such portions.[2]

k. AT CREDITOR'S INSTANCE.—Upon a bill by creditors claiming satisfaction against the real as well as the personal estate, a receiver will be appointed in the first instance, where it appears by the answer of the party in possession of the real estate, that it must become responsible to the demand, on account of the probability that there will be no personal estate to be first applied to debts.[3]

l. IN DIVORCE CASES.—A husband, who is guilty of adultery, voluntarily subjects himself to the jurisdiction of the court, so far as to enable the chancellor to order his property to be applied, through a receiver, to the support of his family during the divorce litigation and afterwards.[4] So the court may appoint a receiver where the husband, to evade the payment of alimony, attempts to fraudulently dispose of his property and leave the State.[5]

6. Jurisdiction to Appoint—*a.* EQUITABLE JURISDICTION TO APPOINT—(1) *In General.*—The right to appoint a receiver is inherent in a court of chancery, or in any court which possesses equitable jurisdiction;[6] but this jurisdiction does not exist in courts of law, as such, unless specially conferred;[7] nor of necessity does a State code which specifies certain cases in which a receiver may be

further on this subject in general, note to Cortleyeu *v.* Hathaway, 64 Am. Dec. 491; and *infra*, this title, *Receivers in Particular Cases—Between Vendors and Purchasers.*

1. Garnett *v.* Pratt, H. & J. 304.

2. Brigstocke *v.* Mancel, 3 Madd. 48.

3. Jones *v.* Pugh, 8 Ves. 71.

4. Kirby *v.* Kirby, 1 Paige (N. Y.) 262.

For refusal to determine rights of wife where receiver appointed of rents and profits of real estate, partly belonging to third person, see Vincent *v.* Parker, 7 Paige (N. Y.) 66. A receiver in a divorce suit to apportion the property between the husband and wife was appointed in Bergen *v.* Bergen, 22 Ill. 188; and to hold and rent property set apart to the wife, as permanent alimony, in Stillman *v.* Stillman, 7 Baxt. (Tenn.) 172.

5. Carey *v.* Carey, 2 Daly (N. Y.) 425. See also as to appointment of receiver where husband designedly omitted to pay interest on mortgaged property, so that it would be foreclosed and he might obtain the surplus proceeds and so facilitate his escape from coercive proceedings for the support of his family, Holmes *v.* Holmes, 25 N. J. Eq. 10. And as to appointment of receivers to secure the income of property to satisfy alimony, where the husband separated from his wife without providing for her support, and conveyed his property to his son to prevent her from obtaining subsistence, Questel *v.* Questel, Wright (Ohio) 492. Concerning appointment of receiver in proceedings supplementary to execution upon judgment for alimony, and his power to sue, see Barker *v.* Dayton, 28 Wis. 381.

6. Folsom *v.* Evans, 5 Minn. 419; Skinner *v.* Maxwell, 66 N. Car. 47. See also Battle *v.* Davis, 66 N. Car. 255.

7. Folsom *v.* Evans, 5 Minn. 419.

appointed,[1] materially alter the equitable jurisdiction of the courts upon the subject.[2]

(2) *In Partition Suits.*—It is competent for a court of equity, in some cases, to grant a receiver in partition suits; and whether in a particular case the power of the court has been properly exercised, cannot be determined upon *certiorari.*[3]

(3) *Pending Ejectment Suit.*—But a court of equity is not authorized to appoint a receiver to hold land pending an action of ejectment for the recovery of the same, where defendant in ejectment was a *bona fide* purchaser thereof.[4]

(4) *In Partnership Cases.*—A court of equity has inherent power, not dependent upon any statute, to appoint a receiver in the settlement of partnership affairs; and where no statute deprives the court of that power, it exists where an accounting, sale, and division of the partnership property is sought.[5]

(5) *Over Corporations.*—But the general and ordinary jurisdiction of courts of equity does not embrace the power to appoint a receiver of the property of a corporation in aid of a suit prosecuted by a private person; for this is only to say that there is no jurisdiction vested in these courts in such a case to dissolve a corporation; and such power, if it exists at all, must be derived from a statute conferring it on the court.[6]

(6) *In Foreclosure Cases.*—The power of a court of equity to appoint a receiver *pendente lite* in foreclosure proceedings is, however, inherent in such a court as a part of its incidental jurisdiction, and is not dependent on statutory authorization.[7]

b. STATUTORY JURISDICTION TO APPOINT—(1) *Under English Judicature Act.*—Sometimes the jurisdiction to appoint receivers is greatly enlarged by statute; and this is especially the case under the *English* Judicature Act,[8] which provides that a receiver may be appointed, upon terms or otherwise, by an interlocutory order of court, "in all cases in which it shall appear to the court that it is just or convenient that such order should be made."[9]

1. Like *North Carolina* Code Civ. Proc., § 215.

2. Skinner *v.* Maxwell, 66 N. Car. 48.

3. Goodale *v.* Fifteenth Dist. Court, 56 Cal. 32. See further, *supra*, this title, *Particular Kinds of Cases Where Receiver Appointed.*

4. Whitworth *v.* Wofford, 73 Ga. 260. See further concerning receivers in ejectment suits, note to Cortleyeu *v.* Hathaway, 64 Am. Dec. 494.

5. Cox *v.* Volkert, 86 Mo. 511. See further concerning receivers for partnership property, *infra*, this title, *Receivers in Particular Cases—Receivers for Partnership Property.*

6. French Bank Case, 53 Cal. 550. See further concerning receivers for corporations, *infra*, this title, *Receivers in Particular Cases—Receivers for Corporations.*

7. U. S. Trust Co. *v.* New York, etc., R. Co., 101 N. Y. 483; 25 Am. & Eng. R. Cas. 602. See Hollenbeck *v.* Donnell, 94 N. Y. 346. Concerning receivers for mortgaged property, consult further *infra*, this title, *Receivers in Particular Cases—Receivers for Mortgaged Property.*

8. Act of 1873, § 25, sub-sec. 8.

9. See Anglo-Italian Bank *v.* Davies, L. R. 9 Ch. Div. 286. As to the enforcement, under the Rules of 1875, of a judgment for payment of money into court by the appointment of a receiver, see Stanger Leathes *v.* Stanger Leathes, Weekly Notes for 1882, p. 71.

Authority to Appoint When it Appears "Just or Convenient."—Under this provision a receiver may be appointed:

Over the equitable interest of a defaulting trustee in property in *England*, in order to enforce a judgment for payment of money into court by him, where he is out of the jurisdiction. *In re* Coney, L. R., 29 Ch. Div. 995.

In an order that the costs of a cross-action should be paid by a married woman who had separate property but who could not be found for purposes of service, Bryant *v.* Bull, L. R., 10 Ch. Div. 155.

On an interlocutory application in behalf of a judgment creditor who cannot obtain possession of land under an ordinary writ of *elegit*, Anglo-Italian Bank *v.* Davies, L. R., 9 Ch. Div. 282.

Until the hearing, in an action for partition, where one of the co-owners is in occupation, though not in exclusive occupation, of the property. Porter *v.* Lopes, L. R., 7 Ch. Div. 359.

By extension, after appointment, on an interlocutory application, over the whole property comprised in the plaintiff's security, as to part of which he was legal, and as to part equitable mortgagee. Pease *v.* Fletcher, L. R., 1 Ch. Div. 275.

In an action for the specific performance of an agreement to accept a lease of a farm, in which judgment had been given for the defendant, and the plaintiff had appealed; under which circumstances the court of appeal, in the absence of any previous application to the divisional court or a judge, appointed the plaintiff receiver and manager of the farm without security, on his undertaking to abide by any order which the court might make in the matter. Hyde *v.* Warden, L. R., 1 Ex. Div. 310.

Where an interpleader issue has been ordered to try the right to goods seized in execution, in which case the court or a judge may order that instead of a sale by the sheriff, a receiver and manager of the property be appointed. Howell *v.* Dawson, L. R., 13 Q. B. Div. 68.

Upon terms, where the plaintiff, in an ejectment action which was set down for trial, but had been stayed until another action affecting the same property, and brought by the defendant in ejectment against the plaintiff and others, should be ready for trial, moved for a receiver and for attornment to him; and the defendant in ejectment set up a defense that in equity the plaintiff was only a sub-mortgagee; but the evidence in support of the motion showed that the property was wasting, and that even if the plaintiff was only sub-mortgagee, it was insufficient for the original mortgage upon it; and this evidence was not met to the satisfaction of the court. Real, etc., Advance Co. *v.* McCarthy, 27 Weekly Reporter 707.

Over the income of a wife's reversionary interest under a will, upon the *ex parte* application of a plaintiff who had obtained judgment against the husband and wife. Fuggle *v.* Bland, L. R., 11 Q. B. Div. 711.

Where a creditor who had recovered judgment in an action, sued out a writ of *elegit*, to which writ returned that there were no goods or lands of the debtor which he could deliver; but it appeared that the debtor was entitled to an equity of redemption of certain land; and the creditor, without commencing any fresh action for the purpose, made an application to a judge at chambers for the appointment of a receiver; under which circumstances it was held that such application was rightly made in the original action, and that it was unnecessary to commence a new action for the purpose. Smith *v.* Cowell, L. R., 6 Q. B. Div. 76.

By way of equitable execution upon furniture, of which an invalid bill of sale has been given, by one of several defaulting trustees ordered to pay money into court in weekly installments, although sequestration was the proper remedy, because of the jurisdiction to appoint a receiver if it appeared just or convenient so to do. *In re* Whiteley, 56 L. T., N. S. 847, relying upon *In re* Pope, 17 Q. B. Div. 743, or 55 L. T., N. S. 369, upon *Ex parte* Evans. *In re* Watkins, L. R., 13 Ch. Div. 260, or 41 L. T., N. S. 567, and upon Anglo-Italian Bank *v.* Davies, L. R., 9 Ch. Div. 285, or 39 L. T., N. S. 245.

But the court will appoint a receiver in behalf of a judgment creditor only where there is some legal impediment in the way of getting legal execution, or where special circumstances exist to make it "just or convenient" within the meaning of the act. Manchester, etc., Banking Co. *v.* Parkinson, 22 Q. B. Div. 173; 37 Week. Rep. 265; *doubting* Whittaker *v.* Whittaker, 7 Prob. Div. 15, or 30 Week. Rep. 431.

Nor does the phraseology used, that

(2) *Under Irish Judicature Act.*—The doctrine in regard to jurisdiction to appoint, under the *Irish* Judicature Act,[1] in instances involving a wife's separate property, is indicated in a case where an action was brought against a married woman alleged to be possessed of separate estate; and no statement of defense being delivered, the Master, by his report, found that she was entitled to separate estate vested in trustees, and subject to certain charges; whereupon, the report being confirmed, the plaintiff was appointed receiver, without security, of the residue of the income of the separate estate, after payment of the prior charges, such plaintiff undertaking to act without commission.[2]

(3) *Under Canadian Judicature Act.*—An identical provision with that in force in *England* is made under the similar enactment in the Province of *Ontario, Canada;*[3] but whether the application is interlocutory or made at the hearing; whether it is incidental to other relief or is the sole subject of the action; and whether it is made at the instance of a judgment creditor or of any one else, the court acts only upon a proper case being made out for the exercise of its jurisdiction, according to well established principles;[4] and it is in that sense only that a receiver can be said to be *ex debito justitiæ.*[5]

(4) *Under Indiana Statute.*—Of like broad scope is the *Indiana* statute, which provides that receivers may be appointed in cases "where, in the discretion of the court, it may be necessary to secure ample justice to the parties;[6] and under this provision it has been held that the court had undoubted power to appoint a receiver of the property of a corporation, in a suit by a stockholder against it, where the directors acting for a majority of the stockholders have been derelict in the matter of repairs, thus endangering the rights of the other interested parties, and rendering the property unproductive.[7]

(5) *Under Various State Statutes.*—Under State statutes in this county, various questions have arisen in the present connection, as will be seen from the note below.[8]

a receiver "may" be appointed when it is just or convenient, take away the discretion of the court to refuse a receiver asked on behalf of a legal mortgagee, who has taken possession and remained in possession for a long time, and then at the last moment declares that he will give up possession and put the mortgagors to the expense of a receivership. *In re* Prytherch, 42 Ch. D. 600.

1. Act of 1877, § 28, sub-sec. 8.

2. M'Garry *v.* White, 16 L. R. (Ir.) 324.

3. *Ontario* Judicature Act, § 17, sub-sec. 8.

4. Smith *v.* Port Dover, etc., R. Co., 12 Ont. App. 290; 25 Am. & Eng. R. Cas. 640.

5. Smith *v.* Port Dover, etc., R. Co., 12 Ont. App. 290; 25 Am. & Eng. R. Cas. 640.

6. *Indiana* Rev. St. 1882, § 1222, ch. 7.

7. Wayne Pike Co. *v.* Hammond (Ind. 1891), 27 N. E. Rep. 491.

8. In *New York* the supreme court has no general power to appoint receivers of the property of any corporation, whether domestic or foreign, except such as is derived from the statute, and the statute as formerly constituted, distinctly provides that a receiver of a corporation could be appointed only

(6) *Controlling Force of Statute.*—Where the provisions of the statute are applicable, and they furnish an adequate remedy, the power of the court to appoint or continue a receiver is limited thereby; and it must proceed in the manner therein prescribed, or its orders will be void.[1]

c. JURISDICTION DEPENDENT ON PENDENCY OF SUIT.—Courts have ordinarily no jurisdiction to appoint a receiver, except in a suit pending, in which a receiver is desired;[2] and this rule is not changed by the *Colorado* enactments concerning the

by the supreme court, and in one of the cases enumerated therein, and the case of a creditor-at-large is not mentioned therein; so that it would seem that the filing of a bill by a plaintiff company, simply as creditor-at-large, on behalf of itself and all others similarly situated, conferred no jurisdiction upon that court to appoint the receiver. Lehigh Coal, etc., Co. *v.* Central R. Co., 43 Hun (N. Y.) 547; *distinguishing* Woerishoffer *v.* North River Constr. Co., 99 N. Y. 398, or 34 Hun (N. Y.) 634; or 6 Civ. Proc. Rep. 113, upon the ground that there the bill was filed by a stockholder. But see as to power of superior court of New York city to appoint a receiver for a corporation in sequestration under change in condition of statute, Jelly *v.* Paraiso Reduction Co., 1 N. Y. Supp. 111. See also Than *v.* Bankers', etc., Tel. Co., 2 N. Y. Supp. 12.

Indeed in that State the legislature has carefully prescribed the cases in which a receiver may be appointed, and other provisional remedies granted; and by specifying the cases in which a receivership may be had, pending the action, and as a proceeding in the action, has as carefully excluded every other case, and prohibited the appointment except as authorized. Fellows *v.* Heermans, 13 Abb. Pr. N. S. (N. Y.) 7. But the independent general jurisdiction of the supreme court to appoint receivers over insolvent corporations, is asserted in Potter *v.* Merchants' Bank, 28 N. Y. 653; 86 Am. Dec. 273. Concerning the transfer of the power of appointing receivers to the supreme court, under the statute of 1848, see Stewart *v.* Beebe, 28 Barb. (N. Y.) 36. As to want of jurisdiction of the superior court of the city of New York to appoint receivers to wind up foreign corporations in 1853, see Day *v.* U. S. Car Spring Co., 2 Duer (N. Y.) 608.

In *Massachusetts*, there is no precedent for the appointment of a receiver, under the general equity jurisdiction to collect debts due to a defendant from persons in foreign jurisdictions, in a suit brought by a judgment creditor against his debtor; and if this can be done at all under the statute of that State, it cannot be done where the bill does not name the persons from whom the debts are due, or specifically describe the debts and no attempt is made to supply this defect through interrogatories. Amy *v.* Maning, 149 Mass. 489.

In *California*, a statutory provision for the appointment of a receiver in cases where a corporation is insolvent has been held inoperative in the absence of other provisions authorizing the dissolution of a corporation at the instance of private parties. French Bank Case, 53 Cal. 553. The Superior Court is held to have no jurisdiction to appoint a receiver of the property of a corporation in a *quo warranto* proceeding upon judgment of forfeiture of its corporate charter, in Havemeyer *v.* Superior Court, 84 Cal. 355; 18 Am. St. Rep. 205.

In *Minnesota* the statute declaring that a mortgage of real property shall not be deemed a conveyance, so as to enable the mortgagee to recover possession without foreclosure, is held not to abrogate the power of the court to appoint a receiver of such property in an action to foreclose the mortgage, when that becomes necessary for the protection of such equitable rights of the mortgagee as do not rest upon the common-law principle of a legal estate transferred by the mortgage. Lowell *v.* Doe, 44 Minn. 146.

1. Colwell *v.* Garfield Nat. Bank, 119 N. Y. 413.

2. Jones *v.* Bank of Leadville, 10 Colo. 472; 20 Am. & Eng. Corp. Cas. 561. See *supra*, this title, *Prerequisites to Appointment.*

cases in which a receiver may be appointed, or other provisions of the statutes of that State relating to corporations.[1]

d. QUESTIONING JURISDICTION OF COURT—(1) *By Objection to Bill.*—A motion for an injunction and a receiver will not be entertained while the jurisdiction of the court or the equity of the bill is in doubt by the pendency of a plea or demurrer;[2] for under these circumstances it would be highly improper for the court to interfere by the exercise of such high powers over men's property.[3]

(2) *Objection Barred by Delay.*—The need of an early assertion of an objection to the jurisdiction of a court of equity, precludes an insolvent corporation from raising such an objection to the appointment of a receiver over its property, after long delay and acquiescence therein.[4]

e. JURISDICTION IN PARTICULAR CASES—(1) *At Instance of Vendee of Land.*—Under the *California* statute regulating the appointment of receivers,[5] a superior court in that State, which has general jurisdiction to enforce the rescission of a contract to purchase land, sought on the ground that such contract was procured by fraudulent misrepresentations as to the value of the land, has jurisdiction to appoint a receiver of the moneys and securities in that State which the purchaser claims should be restored.[6]

(2) *At Instance of Judgment Creditor.*—A judgment creditor is entitled, on the return of an execution unsatisfied, to an order for the examination of the debtor and to an order forbidding the transfer of his property; and when such orders have been issued and served, the judgment creditor has a lien on the debtor's equitable assets disclosed, and can, under the construction given to the *Minnesota* law, obtain the appointment of a receiver, as the proceedings supplementary to execution are regarded in the light of a creditor's bill; nor is it a bar to the appointment that subsequently to such proceedings the judgment debtor has made a voluntary assignment of his property to an assignee of his own choosing.[7]

(3) *Against Executor.*—The alleged rule that a receiver is only appointed to take and hold possession of property where the title is in controversy has been interposed as an objection to the jurisdiction to appoint a receiver to take the assets out of the

1. Jones *v.* Bank of Leadville, 10 Colo. 472.

2. Ewing *v.* Blight, 3 Wall. Jr. (C. C.) 139.

3. Ewing *v.* Blight, 3 Wall. Jr. (C. C.) 139. See also, against appointment while demurrer to bill pending, Cook *v.* Detroit, etc., R. Co., 45 Mich. 454; 12 Am. & Eng. R. Cas. 459.

4. Brown *v.* Lake Superior Iron Co., 134 U. S. 535.

5. *California* Code Civ. Proc., § 564.

6. Loaiza *v.* Superior Court, 85 Cal. 35. See further as to receivers between vendors and purchasers, *infra*, this title, *Receivers in Particular Cases—Receivers Between Vendors and Purchasers.*

7. Tomlinson, etc., Mfg. Co. *v.* Shatto, 34 Fed. Rep. 381. See further, as to receivers after judgment, *infra*, this

hands of an executor, who has legal title to them, and to deliver them to a receiver for the benefit of creditors, who had no specific legal right to them; but this objection is met by the consideration that the creditors have an interest in the assets for the payment of their debts, and that the executor representing the deceased is a *quasi* trustee for them; and this gives them a right, in a proper case, to have a receiver appointed to take charge of the assets in order to prevent waste.[1]

(4) *Garnishment of Pledged Stock.*—In order to invoke the aid of a court of equity to subject a debtor's property to the claims of his creditors, the demands must have been established by some judicial proceeding; but suing out and serving a writ of garnishment in the case of pledged stock is not such a judicial determination of the claim as will give the court jurisdiction to entertain a bill asking that a receiver be appointed of the property attached.[2]

(5) *Under Landlord and Tenant Act.*—In an action under the landlord and tenant act of *North Carolina*, carried by appeal to the superior court, it is within the power of the court to appoint a receiver to collect the rents, etc., upon an uncontroverted affidavit by the plaintiff that the defendants entered into possession as tenants of plaintiff, held over after expiration of their term, are insolvent, and that plaintiff has no security for rents.[3]

f. WHAT COURTS MAY EXERCISE JURISDICTION—(1) *Appellate Courts.*—In *Tennessee* the supreme court has power to issue restraining orders and to appoint receivers, when it becomes necessary to exercise such powers, in the due administration of its appellate jurisdiction; but to exercise this authority, the property sought to be placed in the hands of the receiver must first be brought under the jurisdiction of the court, by virtue of the appeal or of some order or decree rendered in the court.[4]

(2) *County Courts.*—A county court in *Wisconsin*, having civil jurisdiction, possesses the power to appoint a receiver, in a proper case, upon supplementary proceedings against a debtor, against whom a judgment has been rendered in such court.[5]

title, *Receivers in Particular Cases—Receivers After Judgment.*

1. Harman v. Wagner (S. Car., 1890) 12 S. E. Rep. 100.

2. Morton v. Grafflin, 68 Md. 553.

3. Nesbitt v. Turrentine, 83 N. Car. 536.

4. Kerr v. White, 7 Baxt. (Tenn.) 396. For an instance of such appointment, see West v. Weaver, 3 Heisk. (Tenn.) 593; and for an instance of refusal to appoint, see Allen v. Harris, 4 Lea (Tenn.) 191.

The Supreme Court of the *United States* without deciding whether a case might not arise in which it would appoint a receiver pending an appeal to that court, declined to do so upon the showing made in the particular case, in Pacific R. Co. v. Ketchum, 95 U. S. 2.

As to exclusive jurisdiction of *New York* Supreme Court, prior to repeal of statute (Jelly v. Paraiso Reduction Co., 1 N. Y. Supp. 111), see Lehigh Coal etc. Co. v. Central R. Co., 43 Hun (N. Y.) 547.

5. Second Ward Bank v. Upmann, 12 Wis. 504.

(3) *Superior Courts.*—It seems that the superior court of the city of New York has, within its territorial limits, general jurisdiction in equity coequal with the supreme court; and that it may appoint a receiver of a corporation in sequestration proceedings, although the judgment was not recovered in the superior court, but in the court of common pleas.[1]

g. IN WHOM JURISDICTION EXISTS—(1) *Chancellor.*—Sometimes a statute authorizes "the chancellor" to appoint a receiver, as is the case under a *New Jersey* act,[2] if a railroad neglects to run daily trains; and an enactment of this character has been regarded as conferring such power upon the court of chancery, and not upon the chancellor in his personal capacity; so that the authority may be delegated to a vice-chancellor.[3]

(2) *Court Commissioner.*—But a court commissioner has, in *California*, no jurisdiction to appoint a receiver; and a bond given by a receiver so appointed is void.[4]

(3) *Circuit Judges.*—Circuit judges likewise have no power, under the *Mississippi* Code of 1880, to appoint receivers in cases pending in the chancery court, either when the chancellor is disqualified, or in any other state of the case.[5]

(4) *Resident or Other Judge of District.*—In *North Carolina*, under the acts of 1877 and 1879, motions for the appointment of a receiver may be made, at the option of the mover, before the resident judge of the district, or one assigned to the district, or one holding the courts thereof by exchange.[6]

h. PLACE WHERE JURISDICTION EXERCISED—(1) *Over Corporations.*—Suits for the appointment of receivers of corporations are from the very nature of the case infrequent; and the plaintiffs are ordinarily able to prosecute their actions as well in the proper court of the county of the defendant's principal office as elsewhere; so that, there being no reason for restricting the privilege of the defendant in such cases, there is good reason for a return to the general policy of the venue statutes, and a requirement, if the defendant shall so demand, that suits for the appointment of a receiver of a corporation shall be brought only in the county of its principal office which by analogy of law is the county of its residence.[7] But such a privilege relating to the question of venue, might be waived; and an intention to confer it does not show an intention on the part of the legislature to deprive any proper court of the State outside of the county of

1. Jelly *v.* Paraiso Reduction Co., 1 N. Y. Supp. 111.

2. *New Jersey* Supp. Revision, p. 834, pl. 42.

3. Delaware Bay etc. R. Co. *v.* Markley, 45 N. J. Eq. 139; 37 Am. & Eng. R. Cas. 425.

But in *Alabama*, in strict view of the restrictive words of the statute, the chancellor cannot refer the entire appointment of a receiver to the register. *Ex parte* Smith, 23 Ala. 74.

4. Quiggle *v.* Trumbo, 56 Cal. 627.

5. Alexander *v.* Manning, 58 Miss. 635.

6. Corbin *v.* Berry, 83 N. Car. 30.

7. Bonner *v.* Hearne, 75 Tex. 251; 39 Am. & Eng. R. Cas. 584.

the principal office of the corporation, of jurisdiction to appoint a receiver of the corporation, where such waiver has taken place.[1]

(2) *Over Railroads.*—Where the application for the appointment of a receiver for a railway company should be made in the judicial district in which the principal business office of the company was located, or in an adjoining county, an order for such appointment, made in a different county, is without jurisdiction and void; and it does not stand in the way of an application in the proper county.[2]

i. APPOINTMENT IN VACATION.—The question whether a receiver may be appointed in vacation seems to depend upon the terms of the statute, as well as upon the authority to perform other acts in vacation. In *Illinois*, a judge of a circuit court cannot, in vacation, appoint a receiver of a railroad corporation.[3]

But in *Indiana*, under an express provision on the subject, a judge in vacation has as full authority to appoint a receiver in specified cases, as when the court is in regular and open session.[4]

j. APPOINTMENT AT CHAMBERS.—A receiver may be appointed in an insolvency proceeding, as well as in ordinary cases, in *California*, by the judge at chambers, upon an *ex parte* application.[5]

k. APPOINTMENT SOUGHT IN ANOTHER CO-ORDINATE COURT —(1) *In General.*—When a court which has jurisdiction of a case has appointed a receiver for the property which is the subject of the suit, and such receiver has taken possession of the property, no other court of co-ordinate jurisdiction can ordinarily appoint a receiver for the same property,[6] or interfere with the property in the hands of such receiver,[7] or entertain complaints against the receiver, or undertake to remove him.[8] This rule is founded on the doctrine of priority of jurisdiction stated in the succeeding section.

1. Bonner *v.* Hearne, 75 Tex. 251.

2. U. S. Trust Co. *v.* New York, etc., Co., 67 How. Pr. (N. Y.) 390.

3. Hammonck *v.* Farmers' L. & T. Co., 105 U. S. 77; 7 Am. & Eng. R. Cas. 469. In *Mississippi*, under the code of 1880, a circuit judge cannot appoint a receiver in vacation when the chancellor is disqualified. Alexander *v.* Manning, 58 Miss. 634.

4. Pressley *v.* Lamb, 105 Ind. 183. See also First Nat. Bank *v.* U. S. Encaustic Tile Co., 105 Ind. 235. But formerly there was no law in that State authorizing a judge to appoint a receiver during vacation or a clerk to approve a receiver's bond in vacation. Newman *v.* Hammond, 46 Ind. 120.

In *Missouri*, the circuit court, independently of an authorizing statute, has authority to appoint a receiver in vacation and to subsequently confirm that provisional appointment by an order made on the assembling of the court. Greeley *v.* Provident Sav. Bank, 103 Mo. 212.

5. Real Estate Association *v.* San Francisco, 60 Cal. 227.

6. Young *v.* Montgomery, etc., R. Co., 2 Woods (U. S.) 618, explaining the principle involved.

7. O'Mahony *v.* Belmont, 39 N. Y. Super. Ct. 385; Hutchinson *v.* Green, 6 Fed. Rep. 837, *et seq.*; Bruce *v.* Manchester, etc., R. Co., 19 Fed. Rep. 345; Nelson *v.* Conner, 6 Rob. (La.) 341; Gelpcke *v.* Milwaukee, etc., R. Co., 11 Wis. 456.

8. Young *v.* Montgomery, etc., R. Co., 2 Woods (U. S.) 619.

(2) *Where Previous Appointment Without Jurisdiction.*—But where the order in form providing for the appointment of a receiver is without jurisdiction and void, because made in the wrong county, it presents no obstacle to an application in the right county.[1]

(3) *Doctrine of Comity.*—And furthermore, under the principles of comity recognition may be given to a receiver appointed in a foreign jurisdiction.[2]

l. PRIORITY OF JURISDICTION—(1) *General Rule.*—In the case of conflicting applications for the appointment of a receiver, the settled rule is that the court which first takes cognizance of the controversy and thus obtains jurisdiction, will retain it to the end of the litigation,[3] and incidentally is entitled to take the possession or assume the control of the subject-matter of the controversy, to the exclusion of all interference from other courts of co-ordinate jurisdiction.[4]

(2) *Exceptions to Rule.* But the rule, among courts of concurrent jurisdiction, that the one which first obtains jurisdiction of a case has the exclusive right to decide every question arising therein, is subject to some limitations;[5] and among these exceptions have been placed those cases where a court may take action without interfering with the possession of a receiver appointed by another court;[6] while it has been considered that the proper application of the rule does not require that the court which first takes jurisdiction of the case, should also first take possession of the property in controversy.[7]

m. EXTRA-TERRITORIAL JURISDICTION—(1) *Statement of Rule.*—The rule in this country is said to be, that receivers appointed by one jurisdiction are not entitled, as of right, to recognition

1. U. S. Trust Co. *v.* New York, etc., R. Co., 67 How. Pr. (N. Y.) 395.

2. See, *infra*, this title, *Application of Principles of Comity.*

3. Union Trust Co. *v.* Rockford, etc., R. Co., 6 Biss. (U. S.) 198; Gaylord *v.* Fort Wayne, etc., R. Co., 6 Biss. (U. S.) 290.

See application of this doctrine where both appointments were on the same day, in People *v.* Central City Bank, 53 Barb. (N. Y.) 417, holding that the party who first applied and obtained and perfected the appointment of his receiver took precedence of the other party, whose receiver merely first took possession of the assets.

The same principle is applied to give precedence to an injunction over a later injunction and receiver obtained on an *ex parte* application, in McCarthy *v.* Peake, 9 Abb. Pr. (N. Y.) 165; 18 How. Pr (N. Y.) 139.

See also Bill *v.* New Albany, etc., R. Co., 2 Biss. (U. S.) 401; Crane *v.* McCoy, 1 Bond (U. S.) 431. The doctrine is sustained generally in West *v.* Morris, 2 Disney (Ohio) 416; Bruce *v.* Manchester, etc., R. Co., 19 Fed. Rep. 344. As to prior jurisdiction precluding action in another suit in the same court, see Young *v.* Rollins, 85 N. Car. 488.

4. Union Trust Co. *v.* Rockford, etc., R. Co., 6 Biss. (U. S.) 198; Gaylord *v.* Fort Wayne, etc., R. Co., 6 Biss. (U. S.) 290.

5. Buck *v.* Colbath, 3 Wall. (U. S.) 344.

6. See The Holladay Case, 27 Fed. Rep. 843.

7. Union Trust Co. *v.* Rockford, etc., R Co., 6 Biss. (U. S.) 198; Gaylord *v.* Fort Wayne, etc., R. Co., 6 Biss. (U. S.) 290.

But *compare* Wilmer *v.* Atlantic, etc., R. Co., 2 Woods (U. S.) 425.

in other jurisdictions; and that courts of equity cannot acquire extra-territorial jurisdiction over property by appointing receivers.[1]

(2) *Qualification of Statement.*—But expressions of this character have been considered to go too far; and the correct and current doctrine appears to be, that under the principle of comity, the courts of one jurisdiction will recognize the authority and permit the exercise of the functions of a receiver appointed in another jurisdiction, except in those cases where a court of the former jurisdiction finds that its own policy would be displaced or the rights of its own citizens invaded or impaired;[2] and this seems to be especially true where such receiver is, by the terms of his appointment, to gather the assets wherever found.[3]

(3) *Ancillary Receiver in Another Jurisdiction.*—Indeed, even where no such authority is given to the receiver appointed by a State court, the court of another State may, when necessary, appoint an ancillary receiver in the latter State, to collect and take charge of the assets therein.[4]

(4) *Property Controlled Need Not be Within the Jurisdiction.*—Nor is the right to confer such authority to be questioned upon any theory that the receiver's power is limited to property found within the State where he is appointed; for it is not necessary that the property should be within the jurisdiction of the court.[5]

(5) *Defendant's Residence in Another State.*—So a court of one State may appoint a receiver of personal property within its

1. Atkins *v.* Wabash, etc., R. Co., 29 Fed. Rep. 173; 26 Am. & Eng. R. Cas. 452.

See Booth *v.* Clark, 17 How. (U. S.) 335 (*discussed* in Hurd *v.* Elizabeth, 41 N. J. L. 2, and Bank *v.* McLeod, 38 Ohio St. 185); Moseby *v.* Burrow, 52 Tex. 403; Boulware *v.* Davis, 90 Ala. 207; 9 Lawy. Rep. Ann. 602; Holmes *v.* Sherwood, 16 Fed. Rep. 727; Harvey *v.* Varney, 104 Mass. 444. But *compare* Chandler *v.* Siddle, 3 Dill. (U. S.) 479.

2. Hurd *v.* Elizabeth, 41 N. J. L. 4. See also Boulware *v.* Davis, 90 Ala. 207; note in 6 Am. St. Rep. 185; Sercomb *v.* Catlin, 128 Ill. 562; 15 Am. St. Rep. 150.

3. See Hurd *v.* Elizabeth, 41 N. J. L. 4; Bank *v.* McLeod, 38 Ohio St 184.

4. Williams *v.* Hintermeister, 26 Fed. Rep. 891, relating to a foreign corporation.

5. Bank *v.* McLeod, 38 Ohio St. 184. See also Houlditch *v.* Donegal, 8 Bligh N. S. 343.

Thus the courts of *England* have appointed receivers to manage landed property in *British India*, Keys *v.* Keys, 1 Beav. 425; ——— *v.* Lindsey, 15 Ves. 91; Cockburn *v.* Raphael, 2 S. & S. 454.

The *West Indies.*—Davis *v.* Barrett, 13 L. J. Ch., N. S. 304.

Canada.—*Compare* Faulkner *v.* Daniel, 3 Hare 204*n*.

Italy.—Hinton *v.* Galli, 24 L. J. Ch. 121.

Ireland.—Houlditch *v.* Donegal, 8 Bligh, N. S. 349; Langford *v.* Langford, 5 L. J. Ch., N. S. 61; Houlditch *v.* Wallace, 5 C. & F. 666.

Brazil.—Sheppard *v.* Oxenford, 1 K. & J. 500; and other places. 2 Dan. Ch. Prac. (5th Am. ed.) 1731; Seton on Decrees (4th Eng. ed.) 450; Bunbury *v.* Bunbury, 1 Beav. 331.

So on principles of comity, the aid of a *New Jersey* court was extended to the receiver of a foreign corporation seeking to obtain possession of property, as against the officers of the corporation, who were charged to be endeavoring to withhold it by fraud or subterfuge. Bidlack *v.* Mason, 26 N. J. Eq. 232.

jurisdiction and involved in a pending action, although the defendant resides in another State.[1]

(6) *Railroad Passing Through Two States.*—And where a railroad lies partly in one State and partly in another, a receiver may, in a proper case, be appointed in the former State over the mortgaged property of such road.[2]

n. APPLICATION OF PRINCIPLES OF COMITY—(1) *General Rule.*—Upon principles of comity, after recognized and always acted on, except when they come in conflict with the rights of suitors in the local courts, receivers appointed in one State or jurisdiction, may be allowed in another State or jurisdiction to protect interests and enforce claims concerning the property of which they are the legal guardians;[3] and their authority and acts will receive recognition in a sister State.[4]

(2) *Qualification of Rule.*—But comity does not require the courts of one State to permit the exercise of such privilege by receivers appointed by the courts of another State, to the detriment of citizens of the former State, who are pursuing appropriate legal remedies in the court thereof.[5]

o. CONFLICT OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS—(1) *Doctrine Confined to Receiver in Possession.*—Where the jurisdiction of a State and Federal Court is concurrent, it is held that the jurisdiction of the latter will not be ousted if it appears that the property covered by the litigation is not in

1. Hellebush *v.* Blake, 119 Ind. 350. But the court will not in *England*, appoint a receiver in a cause where the persons representing the estate are out of the jurisdiction and have not appeared in the suit. Shaw *v.* Shore, 5 L. J. Ch. (N. S.) 79.

2. State *v.* Northern Cent. R. Co., 18 Md. 215.

3. Hunt *v.* Columbian Ins. Co., 55 Me. 297; 92 Am. Dec. 596. See also Boulware *v.* Davis, 90 Ala. 207; Lawy. Rep. Ann. 603; note in 6 Am. St. Rep. 185; Bank *v.* McLeod, 38 Ohio St. 183, fully discussing subject. Hind *v.* Elizabeth, 41 N. J. L. 2; also explaining principle and drawing distinctions; Runk *v.* St. John, 29 Barb. (N. Y.) 587; *Ex parte* Norwood, 3 Biss. (U. S.) 511; Pond *v.* Cooke, 45 Conn. 130; 29 Am. Rep. 672; Davis *v.* Gray, 16 Wall. (U. S.) 219; Graydon *v.* Church, 7 Mich. 50; Pugh *v.* Hurtt, 52 How. Pr. (N. Y.) 24; Barclay *v.* Quicksilver Min. Co., 6 Lans. (N. Y.) 31.

4. See, as to sale and assignment of debt due an insolvent corporation, by receiver thereof appointed in another State, Hoyt *v.* Thompson, 5 N. Y. 338; 19 N. Y. 224; *followed* as to comity in other matters, in Willitts *v.* Waite, 25 N. Y. 583; and *distinguished* in Taylor *v.* Atlantic, etc., R. Co., 57 How. Pr. (N. Y.) 15.

The doctrine of comity was considered not to be involved in the question whether a receiver appointed by a Federal court could sue in his own name in a State court, in Battle *v.* Davis, 66 N. Car. 257.

5. Hunt *v.* Columbian Ins. Co., 55 Me. 298; 92 Am. Dec. 596. See also Boulware *v.* Davis, 90 Ala. 207; 9 Lawy. Rep. Ann. 603; note in 6 Am. St. Rep. 189; Humphreys *v.* Hopkins, 81 Cal. 554; 15 Am. St. Rep. 78, and note, 79; Catlin *v.* Wilcox Silver Plate Co., 123 Ind. 479; 18 Am. St. Rep. 340.

As to need of applying to courts of sister State to be made a party to proceedings there, see South Carolina R. Co. *v.* People's Sav. Inst., 64 Ga. 31.

As to inability to raise claim that corporation was dissolved where receivers therefor had been appointed in another State, see Taylor *v.* Columbian Ins. Co., 14 Allen (Mass.) 357.

the possession of the State court, or of the defendants as its receivers.[1]

The doctrine of this case and of others like it is, that it is the interference with the possession of another court, that would ensue if jurisdiction were taken, that prevents it from attaching, and not the mere existence of a receivership, if the receiver has not taken the property in controversy into his possession.[2]

(2) *Doctrine Where Receiver in Possession.*—Even apart from adherence to this doctrine, it seems to be agreed that where a receiver is in possession of property under an appointment from a State court, the Federal court will not take jurisdiction in the matter, by interference with the possession,[3] or otherwise, and a like view has been taken where the receiver appointed by a State court was endeavoring to obtain possession of assets;[4] and in the converse case, as to the action of the State court, where the receiver is appointed by the Federal court.[5]

When, on the other hand, a receiver appointed by a Federal court is vested with the title to real estate, as well as the possession thereof as such receiver, his possession is the possession of the Federal court, and any attempt to disturb such possession by proceedings subsequently instituted in a State court without first obtaining the leave of the Federal court, is a contempt of the Federal court.[6]

(3) *Doctrine Disregarding Receiver's Possession.*—Yet it is sometimes considered that possession by the receiver is not essential to

1. Andrews *v.* Smith, 19 Blatchf. (U. S.) 103; 5 Fed. Rep. 835.

2. Andrews *v.* Smith, 19 Blatchf. (U. S.) 102; 5 Fed. Rep. 835, reviewing various cases on the subject of interference with possession of another court.

Pursuant to this doctrine, a suit may be entertained by a federal court where the relief sought may be granted without interfering with the possession of the receiver appointed by a State court. The Holladay Case, 27 Fed. Rep. 843.

Incipient steps of a suit in the State court were held not to defeat the jurisdiction of the federal court, in Buck *v.* Piedmont, etc. L. Ins. Co., 4 Hughes (U. S.) 418; 4 Fed. Rep. 853.

3. See Alden *v.* Boston, etc., R. Co., 1 Nat. Bank. Reg. 231; Conkling *v.* Butler, 4 Biss. (U. S.) 24; *In re* Clark, 4 Ben. (U. S.) 97.

4. Interference in bankruptcy by the federal court was declined where the receiver was trying to reduce to possession assets of a debtor, and to apply them to the payment of a judgment obtained by the receiver in behalf of the creditors, in Sedgwick *v.* Menck, 6 Blatchf. (U. S.) 157; 1 Nat. Bank. Reg. 676.

The disqualification of a receiver appointed by a State court to be a trustee or assignee in bankruptcy under appointment by a federal court, is developed in *In re* Stuyvesant Bank, 6 Nat. Bank. Reg. 273.

5. Ohio, etc., R. Co. *v.* Fitch, 20 Ind. 504.

6. De Visser *v.* Blackstone, 6 Blatchf. (U. S.) 236. But see, as to different doctrine under the act of 1887, Dillingham *v.* Russell, 73 Tex. 50; and for contrary view as to receiver of a railroad, see Kinney *v.* Crocker, 18 Wis. 77; *criticising* Wiswall *v.* Sampson, 14 How. (U. S.) 52, and Freeman *v.* Howe, 24 How. (U. S.) 450; though the criticising case itself does not seem entirely compatible with Milwaukee, etc., R. Co. *v.* Milwaukee, etc., R. Co., 20 Wis. 172. As to want of authority of State court to appoint a receiver where property in hands of trustee controlled by federal court, see Bill *v.* New Albany, etc., R. Co., 2 Biss. (U. S.) 398.

preclude interference by a court of co-ordinate jurisdiction,[1] but that there is no safer rule to adopt than that the court which first obtains jurisdiction of the controversy, and thereby of the *res*, is entitled to retain it until the litigation is settled;[2] and that even after the technical, but not necessarily final dismissal of a suit in the Federal court, that court retains jurisdiction to such an extent that its jurisdiction is not superseded by a suit for a receiver in a State court.[3]

(4) *In Bankruptcy Cases.*—The view of the Federal tribunals is that the authority of Congress to pass the late National Bankruptcy Act, or a similar enactment, is paramount, and so is the jurisdiction of the Federal court thereunder;[4] and this doctrine is applied in cases of conflict arising between the assignee in bankruptcy and the receiver appointed by a State court,[5] and to other controversies concerning such receiver,[6] at least so far as concerns cases where possession has not been taken by a receiver under a specific lien on the property,[7] or otherwise, prior to the bankruptcy proceedings.[8]

1. Union Trust Co. *v.* Rockford, etc., R. Co., 6 Biss. (U S.) 198.

2. Gaylord *v.* Fort Wayne, etc., R. Co., 6 Biss. (U. S.) 291.

See also May *v.* Pintup, 59 Ga. 135; and *compare* Merchants', etc., Nat. Bank *v.* Masonic Hall, 63 Ga. 551. The former of these cases refers to the different view in Wilmer *v.* Atlanta, etc., R. Co., 2 Woods (U. S.) 425, where the subject is fully discussed.

3. Union Trust Co. *v.* Rockford, etc., R. Co., 6 Biss. (U. S) 201. See also as to imperfect bill, full discussion in Gaylord *v.* Fort Wayne, etc., R. Co., 6 Biss. (U. S.) 290.

4. Platt *v.* Archer, 9 Blatchf. (U. S.) 569; *In re* National L. Ins. Co., 6 Biss. (U. S.) 36; *In re* Merchants' Ins. Co., 3 Biss (U. S.) 164. See also Buchanan *v.* Smith, 16 Wall. (U. S.) 308.

5. Platt *v* Archer, 9 Blatchf. (U. S.) 566; *In re* Whipple, 6 Biss. (U. S.) 517. *Compare*, as to when assignee not justified in suit against receiver, Goodrich *v.* Remington, 6 Blatchf. (U. S.) 516.

6. *In re* National L. Ins. Co.. 6 Biss. (U. S.' 36; *In re* Merchants' Ins. Co., 3 Biss.(U. S.) 163.

As to right of receiver of bankrupt corporation in one State to prove his debt in Federal court of another State, see *Ex parte* Norwood, 3 Biss. (U. S.) 511.

7. See Davis *v.* Railroad. Co., 1 Woods (U. S.) 664.

8. So the appointment by a State court of a receiver of the property of a debtor, for the purpose of paying his debts, is regarded as defeating and delaying the operation of the Bankrupt Act; and a debtor who procures such appointment commits an act of bankruptcy within the meaning of the Act. *In re* Bininger, 7 Blatchf. (U. S.) 274. See also *In re* Merchants' Ins. Co., 3 Biss (U. S.) 165.

But, under the exception as to property subjected to a specific lien, a receiver in possession of mortgaged premises under order of a State court of chancery, in proceedings for foreclosure, prior to commencement of proceedings in bankruptcy, cannot be dispossessed by order of the Federal court in the bankruptcy proceedings: Davis *v.* Railroad Co, 1 Woods (U. S.) 664. As to title vesting in receiver by bankrupt's conveyance; see *In re* Freeman, 4 Ben. (U. S.) 246.

Nor will the Federal court affirm and sanction the act of its marshal in summarily dispossessing a receiver appointed by the State court. *In re* Hulst 7 Ben. (U. S.) 18. See also as to summary proceedings to take goods seized for rent, Marshall *v.* Knox, 16 Wall. (U. S.) 555.

So it is sometimes held that, even where there is no specific lien to which the property has been subjected, the Federal court will not interfere with the possession taken by a receiver of a State court prior to the proceedings in bankruptcy: *In re* Clark, 4 Ben. (U.

(5) *In Foreclosure Cases.*—In foreclosure cases, the doctrine maintained in the Federal courts is that where the property is in the possession of a receiver appointed by the State court, the Federal court will do nothing to disturb his possession, or to interfere with the receivership,[1] though this view will not preclude the Federal court from having jurisdiction to make a decree of foreclosure merely determining rights and not interfering in any way with such possession.[2] So in the State courts it has been held that such a court has no jurisdiction of an action to foreclose a mortgage where the premises were in the possession of a receiver appointed under foreclosure proceedings in the Federal court; for the resulting sale would disturb the possession of such receiver.[3]

7. Who May be Appointed—*a.* GENERAL PRINCIPLES—(1) *Indifferent Person Alone Eligible.*—Receivers should be impartial between the parties in interest;[4] they should not be themselves personally interested in the litigation, nor the partisans of any of the contending litigants;[5] and none but such an indifferent person is ordinarily eligible to appointment as a receiver.[6]

S.) 97; Alden *v.* Boston, etc., R. Co., 5 Nat. Bank. Reg. 230.

And in the State courts it has also been held that the mere filing of a petition in bankruptcy will not oust the jurisdiction to compel the transfer and delivery of the property of the bankrupt to a receiver appointed by such a court for the benefit of a particular judgment creditor: Watkins *v.* Pinkney, 3 Edw. Ch. (N. Y.) 534. *Compare* also Storm *v.* Waddel, 2 Sandf. Ch. (N. Y.) 502; Eisen. Mann *v.* Thiel, 1 Cin. Sup. Ct. 191.

1. Mercantile Trust Co. *v.* Lamoille Valley R. Co., 16 Blatchf. (U. S.) 326. See also Davis *v.* Railroad Co., 1 Woods (U. S.) 664.

2. Mercantile Trust Co. *v.* Lamoille Valley R. Co., 16 Blatchf. (U. S.) 327.

3. Milwaukee, etc., R. Co. *v.* Milwaukee, etc., R. Co., 20 Wis. 171. *Compare* Thompson *v.* Van Vechten, 5 Duer (N. Y.) 620.

4. Atkins *v.* Wabash, etc., R. Co., 29 Fed. Rep. 161.

5. Meier *v.* Kansas Pac. R. Co., 5 Dill. (U. S.) 476.

6. Fripp *v.* Chard R. Co., 21 Eng. L. & Eq. 53.

See also, *In re* Empire City Bank, 10 How. Pr. (N. Y.) 498; Smith *v.* New York Consolidated Stage Co., 28 How. Pr. (N. Y.) 208; Williamson *v.* Wilson, 1 Bland Ch. (Md.) 427; Baker *v.* Backus, 32 Ill. 79, 115; Runyon *v.* Farmers', etc., Bank, 4 N. J. Eq. 481; Taylor *v.* Life Assoc., 3 Fed. Rep. 469; on other points, 13 Fed. Rep. 493.

But *compare contra*, Shainwald *v.* Lewis, 8 Fed. Rep. 879.

Private Interest Disqualifies.—Although there may be nothing against the character or ability of a person, yet if he have a private interest in conflict with the management of a company, he will not only not be selected to receive and manage the property of such company, but he will be removed from a position of management which he already occupies. Fripp *v.* Chard R. & Co., 21 Eng. L. & Eq. 62.

See also Meier *v.* Kansas Pac. R. Co., 5 Dill. (U. S.) 479; McArdle *v.* Barney, 50 How. Pr. (N. Y.) 103.

It may happen, however, that the parties to a litigation, by their attorneys, ask the appointment, as receiver, of a person who is an interested party; and where this is the case, and the attorneys represent to the court that such appointment would save to the estate the salary of the person then in office, and the court makes such appointment, and the appointee serves as such receiver until removed without making claim for compensation, it is not error for the court to refuse to make an allowance of salary for his services upon an application made after his removal. Steel *v.* Holladay, 19 Oregon 520. See also as to effect of appointment of inter-

(2) *Discretion of Court.*—As has already been seen, the appointment of a receiver rests in the discretion of the court; and this discretion ordinarily extends to the selection of the person to be appointed;[1] nor will the appellate court disturb the selection of a receiver by a judge of the lower court, unless there be some fatal objection to the propriety of the choice, either on personal grounds or on general grounds of interest and the like.[2]

In the exercise of such discretion, private preferences must yield to public considerations; and no person, or his counsel, has a right to complain that he or his particular friend is not appointed a receiver; but consideration will be given to the

ested party as receiver of mortgaged property, Bolles *v.* Duff, 54 Barb. (N. Y.) 216. And in case of a fraudulent bankrupt, Shainwald *v.* Lewis, 8 Fed. Rep. 879.

Corporate Stockholders and Directors Generally Ineligible.—Stockholders and directors of insolvent corporations should not be appointed receivers thereof, unless the case is exceptional and urgent, and then only on the consent of the interested parties. Atkins *v.* Wabash, etc., R. Co., 29 Fed. Rep. 174. See also Wismell *v.* Starr, 48 Me. 406. As to an order substantially making the president and directors of a railroad company its receivers, see *ex parte* Brown, 15 S. Car. 304; 9 Am. & Eng. R. Cas. 739; *In re* Fifty-four First Mortgage Bonds, 15 S. Car. 313; 9 Am. & Eng. R. Cas. 746.

Objection to Person Undertaking to Give Defendant Control.—The appointment of a person who undertakes to hand the control over to the defendant, is objectionable. Lupton *v.* Stephenson, 11 Ir. Eq. 486.

Basis of Requirement of Indifferent Person.—The requirement that none but a person indifferent between the parties shall be appointed receiver rests upon the doctrine before developed that the receiver is appointed as an officer of the court, for the benefit not alone of the party who makes the application, but also for any others who may choose to avail themselves thereof, and indeed, represents all the parties in interest. See, as to this doctrine, Chase's Case, 1 Bland Ch. (Md.) 213; 17 Am. Dec. 280; Booth *v.* Clark, 17 How. (U. S.) 331; Meier *v.* Kansas Pac. R. Co., 5 Dill. (U. S.) 479; Hooper *v.* Winston, 24 Ill. 363; Kaiser *v.* Kellar, 21 Iowa 96; Ellicott *v.* Warford, 4 Md. 85; Davis *v.* Duke of Marlborough, 2 Swanst. 118.

But the reason for the rule does not exist where the object of the receivership is to obtain property of a bankrupt admitted to have been fraudulently secreted by him, and the duty of the receiver requires him to be the active adversary of the fraudulent debtor and his accomplices. Shainwald *v.* Lewis, 8 Fed. Rep. 879.

1. See Taylor *v.* Life Assoc., 3 Fed. Rep. 467; Benneson *v.* Bill, 62 Ill. 411.

2. Cookes *v.* Cookes, 2 De G. J. & S. 528.

See also Perry *v.* Oriental Hotels Co., L. R., 5 Ch. App. 422.

Exceptions to Master's Report.—Under the English chancery practice, whereby the selection of a receiver is referred to a master, exception will not lie to the master's report of the appointment of a receiver, without showing that the person appointed is improper. Thomas *v.* Dawkin, 3 Bro. C. C. 508; Creuze *v.* Bishop of London, 2 Bro. C. C. 255; Garland *v.* Garland, 2 Ves. 137; and to maintain such an exception a strong case of disqualification is necessary. Tharpe *v.* Tharpe, 12 Ves. 319; Bowersbank *v.* Colasseau, 3 Ves. 165. See also Wilkins *v.* Williams, 3 Ves. 589; Anonymous, 3 Ves. 516. *Compare* Wynne *v.* Lord Newborough, 15 Ves. 285. As to *Irish* practice of reference of appointment to master, see Murphy *v.* Harman, 2 Ir. Ch. 39. As to scope of objection to master's appointment, see Hughes *v.* Williams, 6 Ves. 459. So in *New York*, to induce the court to set aside the appointment made by the master, it must be shown that the person selected by him is legally disqualified, or that his situation is such as to induce a belief that the interests of the parties will not be properly attended to by him. *In re* Eagle Iron Works, 8 Paige (N. Y.) 387.

interests of all parties, absent or present, minors or adults, who may rightly rely upon the care and vigilance and unbiased judgment of the court.[1]

(3) *Recommendation of Appointee.*—It follows as a necessary consequence of appointing a receiver before answer, that the selection of the person to be appointed must, in the first instance, sometimes be made by the chancellor on the *ex parte* recommendation of the party applying for the appointment.[2]

But later, or on review, most regard has generally been paid to the recommendations of those most interested, and who are most likely to sustain injury without an appointment of a receiver.[3]

1. *In re* Empire City Bank, 10 How. Pr. (N. Y.) 503. See also Taylor *v.* Life Assoc., 3 Fed. Rep. 468.

Party Found to Have Participated in Illegal Transactions.—The court will not appoint a person, or his attorney, if both have been concerned in a transaction which the court has held to be either a breach of trust or a violation of law. Smith *v.* New York Consolidated Stage Co., 28 How. Pr. (N. Y.) 208; 18 Abb. Pr. (N. Y.) 423. As to vacating appointment of collusive receivers, see Wilson *v.* Barney, 5 Hun (N. Y.) 259.

Personal Friend or Stranger.—Nor, as it seems, will the court commit the manifest indelicacy of appointing a personal friend; nor, on the other hand, will it appoint a person with whom it has no sufficient personal acquaintance to justify the selection against the objection of the parties, or where their assent is lacking. Smith *v.* New York Consolidated Stage Co., 28 How. Pr. (N. Y.) 209; 18 Abb. Pr. (N. Y.) 424.

Competency to Manage Property Without Advice.—It is improper, however, to make an appointment of a person as receiver over a kind of property the management of which he does not understand, with an undertaking to act under the direction of a person who does understand it. Lupton *v.* Stephenson, 11 Ir. Eq. 485.

Difficulty in Giving Personal Attention.—And though the professional and parliamentary positions occupied by a proposed receiver, who resides at a considerable distance from the estate to be managed, do not constitute an absolute disqualification, yet these circumstances are to be considered, as rendering it probable that the requisite attention cannot be given to the property. Wynne *v.* Lord Newborough, 15 Ves. 284.

Additional Expense as a Consideration.—The liquidator of a company ought to be appointed receiver, where no personal objection is or can be made against him and the appointment of another person would cause great additional expense. Perry *v.* Oriental Hotels Co., L. R., 5 Ch. App. 422.

2. See Williamson *v.* Wilson, 1 Bland Ch. (Md.) 427. In *England* the selection of a suitable person is most commonly referred to a master, by whom both parties may be heard; but in this country that duty must ordinarily be performed by the chancellor himself. Williamson *v.* Wilson, 1 Bland Ch. (Md.) 427.

What is here said of the chancellor would be applicable, of course, to any judge of the proper court, where the old equity system does not prevail.

It does not follow because the bill praved for the appointment of a particular person as receiver that he was appointed on that sole recommendation, but the chancellor must be presumed to have acted on his own judgment. Johns *v.* Johns, 23 Ga. 36.

3. Williamson *v.* Wilson, 1 Bland Ch. (Md.) 427. As to selection of receiver appointed by debenture-holders, see *In re* Pound, L. R., 42 Ch. Div. 411; 28 Am. & Eng. Corp. Cas. 504.

The plaintiff's men were allowed to nominate a receiver, subject to a hearing in chambers on the part of the defendants, and the selection by the court of a skilled person who would do the best for both parties in Gibbs *v.* David, L. R., 20 Eq. 378.

Under English Chancery Practice.—Under the *English* chancery practice, on reference to appoint a manager of an estate, it is regarded as the master's duty to appoint the person whom he thinks most fit, without regard to who may propose or recommend such per-

(4) *Agreement of Parties.*—Just as the court will respect the agreement of parties with regard to the management of property, to the extent of declining to appoint a receiver at all,[1] so it will carry into effect the agreement of the parties that one of them shall be appointed managing receiver.[2]

(5) *Relationship as Ground of Objection.*—The fact that the person proposed is a near relative of either party, is not of itself an absolute disqualification; but it must be allowed to have its weight when connected with other circumstances.[3]

(6) *Non-Residence as Ground of Objection.*—A non-resident should not ordinarily be appointed receiver of a railway company.[4]

(7) *More Than One Receiver.*—More than one receiver should not ordinarily be appointed.[5]

(8) *Occupation or Office as Disqualification.*—The occupation or office of the person proposed may sometimes operate as a disqualification.[6]

son. Lespinasse *v.* Bell, 2 J. & W. 436.

Under Irish Chancery Practice.—Under the *Irish* chancery practice, each party has a right to propose a person to the master to be appointed receiver; but the nominee of whoever has the carriage of the order will be appointed, in general, unless a more eligible person shall be proposed by some other party. Wilson *v.* Poe, 1 Hog. 322.

Furthermore the master, in his selection of a receiver over a lunatic, should look to the general wish of his family; but the master's choice will not be changed unless he be shown incompetent, and it is not enough that another person is more eligible. *In re* Lord Bangor, 2 Moll. 518.

1. See Waters *v.* Taylor, 15 Ves. 26.

2. Hanover F. Ins. Co. *v.* Germania F. Ins. Co., 33 Hun (N. Y.) 542.

In *Ireland*, however, a consent to appoint a particular designated person is not one which ought to be made a rule of court. Leach *v.* Tisdal, 4 Ir. Ch. 210, and consent of parties cannot make a solicitor for the plaintiff capable of being receiver, and thus exercising two opposite functions. Watson *v.* Arundel, Ir., 10 Eq. Rep. 324.

So in this country it has been considered that the consent not merely of all parties to the suit, but of all parties concerned in the results of the receivership must be obtained in order to render eligible the law partner of a solicitor for the complainant in foreclosure. Merchants', etc., Nat. Bank *v.* Kent, 43 Mich. 297.

3. Williamson *v.* Wilson, 1 Bland Ch. (Md.) 427.

But *compare contra*, Shainwald *v.* Lewis, 8 Fed Rep. 879.

4. Meier *v.* Kansas Pac. R. Co., 5 Dill. (U. S.) 477. See also as to non-resident creditor, Chamberlain. *v.* Greenleaf, 4 Abb. N. Cas. (N. Y.) 96. But a non-resident may be appointed receiver of a corporation doing business in thirty-two States, where such a course is advantageous and unobjectionable. Taylor *v.* Life Assoc., 3 Fed. Rep. 467; or of a railroad extending through two States. Wilmer *v.* Atlanta, etc., R. Co., 2 Woods (U. S.) 417.

The element of residence is mentioned in connection with the choice of a receiver of an estate in Wynne *v.* Lord Newborough, 15 Ves. 283.

As to residence of sureties, see Cockburn *v.* Raphael, 2 S. & S. 453; Taylor *v.* Life Assoc., 3 Fed. Rep. 470.

5. Meier *v.* Kansas Pac. R. Co., 5 Dill. (U. S.) 477. See also as to receiver of judgment debtor's property, Sparks *v.* Davis, 25 S. Car. 384.

6. **Peer**.—Thus in *England* a peer cannot be appointed receiver because a receiver may sometimes be committed. Attorney-Gen'l *v.* Gee, 2 Ves. & B. 208.

Member of Parliament.—So the fact that the person proposed is a member of Parliament, though not absolutely a disqualification, is a circumstance of

b. PARTIES GENERALLY INELIGIBLE.—It is the settled rule that one of the parties to the cause shall not be appointed receiver[1] without the consent of the other party,[2] unless in a very special case,[3] such as sometimes justifies the appointment of a partner as receiver.[4]

(1) *Relatives of Parties*—(a) **Generally Objectionable.**—The near relationship of the person proposed to either party has already been seen to be ordinarily a weighty circumstance tending to

weight to be taken in connection with other facts indicating difficulty in giving the requisite attention to the trust. Wynn *v.* Lord Newborough, 15 Ves. 284.

Clergyman.—In *Ireland*, in 1825, a clergyman was discharged from a receivership on the ground that he could not act under the late statute of 5 Geo. IV, ch. 91, § 2, in Mayne *v.* Mayne, 2 Moll. 362.

1. Jessel, M. R., in *In re* Lloyd, L. R., 12 Ch. Div. 451. See also Benneson *v.* Bill, 62 Ill. 411; Taylor *v.* Life Assoc., 3 Fed. Rep. 469; Young *v.* Rollins, 85 N. Car. 489; 12 Am. & Eng. R. Cas. 457.

In *Ireland*, however, it has been regarded as immaterial that the receiver was a party in the cause. Marchioness of Downshire *v.* Tyrrell, Hayes 354.

2. See Hanover F. Ins. Co. *v.* Germania F. Ins. Co., 33 Hun (N. Y.) 542; Benneson *v.* Bill, 62 Ill. 411.

3. Jessel, M. R., in *In re* Lloyd, L. R., 12 Ch. Div. 451.

Mortgagee.—A defendant who was a mortgagee has, in the absence of any direct authority therefor, been appointed the consignee, manager, and receiver of the mortgaged estates. Davis *v.* Barrett, 13 L. J. Ch., N. S. 304.

Compare also Meader *v.* Sealey, 6 Hare 621, where liberty was given to the parties to propose themselves. Bolles *v.* Duff, 54 Barb. (N. Y.) 216, as to effect of accepting appointment. But see *contra* Cox *v.* Champneys, Jacob 577; and *compare* as to charging receiver's fees, etc., Carew *v.* Johnston, 2 Sch. & Lef. 301; Godfrey *v.* Watson, 3 Atk. 518; French *v.* Baron, 2 Atk. 120; Bonithon *v.* Hockmore, 1 Vern. 316; Langstaffe *v.* Fenwick, 10 Ves. 406; Davis *v.* Dendy, 3 Madd. 172; and as to stipulation to be receiver, see Chambers *v.* Goldwin, 9 Ves. 271; Scott *v.* Brest, 2 T. R. 241.

Unpaid Vendor.—The unpaid vendors of property sold to a colliery company have been appointed receivers of such property, without security or salary, where the company was in voluntary liquidation, and unable from insolvency to carry on its works. Boyle *v.* Bettws Llantwit Colliery Co., L. R., 2 Ch. Div. 728, holding that such unpaid vendors are really the owners of the colliery, and have a right to be appointed receivers and managers of their property, which is threatened with destruction; and *distinguishing* Perry *v.* Oriental Hotels Co, L. R., 5 Ch. 420, and Campbell *v.* Compagnie Général de Bellegarde, L. R., 2 Ch. Div. 181.

Reversioner.—A reversioner plaintiff has, in *England*, been appointed receiver *instanter* on waiving all salary, and giving the usual security. Rawson *v.* Rawson, 11 L. T. N. S. 595.

Heir-at-Law.—Under the *Irish* chancery practice, however, the heir-at-law will not be appointed receiver with poundage, except by consent. Earl of Fingal *v.* Blake, 2 Moll. 80.

Applicant for Specific Performance.—The plaintiff in an action for specific performance has under special circumstances been appointed temporary receiver on his undertaking to deal with the property under the direction of the court, and to abide by any order which the court might make as to damages or otherwise. Taylor *v.* Eckersley, L. R., 2 Ch. Div. 303. See also to like effect, Hyde *v.* Warden, L. R., 1 Ex. Div. 310.

Co-owner of Mine.—Under the *English* chancery practice, every co-owner of a mine is at liberty to propose himself as manager before the master, in case of litigation between such co-owners. Jefferys *v.* Smith, 1 J. & W. 303.

4. See Sargant *v.* Read, L. R., 1 Ch. Div. 603, and *infra*, this title, *Partners Often Eligible.*

render such person ineligible, though it does not work an absolute disqualification.[1]

(b) **When Otherwise.**—But the relationship of a receiver to the complainant is not a sufficient ground for his removal, where the receivership was designed to obtain property of a bankrupt which he admits that he has fraudulently concealed, and was created in order to satisfy a decree of court for the payment of a large sum of money; for a connection of the complainant, who may be supposed to share in some degree the desire felt by the complainant to collect the sum decreed to be due, would, if otherwise unobjectionable, be eminently fit for the receivership in such a case.[2]

(2) *Master.*—The master of the court should not in any case be appointed receiver,[3] as his official duties conflict with the performance of a receiver's functions,[4] and his double position may cause difficulty in administering justice.[5]

(3) *Clerk of Court*—(a) **Cannot be Made Receiver Without His Consent.**—The clerk is not by virtue of his office a receiver of the court;[6] and a court of chancery can no more impose the office of receiver upon its clerk and master, without his consent, than it can upon any private individual.[7]

(b) **Practice to Make Clerk of Court Receiver.**—But it is a somewhat common practice in some jurisdictions to appoint the clerk receiver.[8]

(c) **Waiver of Prescribed Consent of Parties.**—And even where the code of a State forbids the appointment of the clerk of a court as receiver, except by the written consent of all parties, this statutory condition may be waived by a party so as to preclude his objecting to it,[9] nor can the action of the court be assailed in a collateral proceeding attacking the appointment as void, on account of such mere irregularity.[10]

(4) *Solicitor or Legal Adviser*—(a) **In England.**—In *England* it is no objection to the receiver that he is a practicing barrister,[11] but the solicitor in the cause cannot be receiver.[12]

1 See Williamson *v.* Wilson, 1 Bland Ch. (Md.) 427, as cited *supra*, this title, *General Principles*.

2. Shainwald *v.* Lewis, 8 Fed. Rep. 879.

3. Kilgore *v.* Hair, 19 S. Car. 488; Waters *v* Carroll, 9 Yerg. (Tenn.) 107. See also *Ex parte* Fletcher, 6 Ves. 427, mentioned in *Ex parte* Pincker, 2 Meriv. 452.

4. Kilgore *v.* Hair, 19 S. Car. 488.

5. Benneson *v.* Bill, 62 Ill. 411.

6. Hammer *v.* Kaufman, 39 Ill. 89.

7. Waters *v.* Carroll, 9 Yerg. (Tenn.) 108. See also, as to liability of sureties of clerk for his default as receiver, Rogers *v.* Odom, 86 N. Car. 434; Kerr *v.* Brandon, 84 N. Car. 131.

8. See Waters *v.* Carroll, 9 Yerg. (Tenn.) 108; Rogers *v.* Odom, 86 N. Car. 433.

9. Southwick *v.* Moore, 54 N. Y. Super. Ct. 127; Moore *v.* Taylor, 40 Hun (N. Y.) 58.

10. Moore *v.* Taylor, 40 Hun (N. Y.) 58.

11. Garland *v.* Garland, 2 Ves. 138.

12. Garland *v.* Garland, 2 Ves. 138; *In re* Lloyd, L. R., 12 Ch. Div. 451.

Solicitor of Lunatic.—The solicitor under the commission of lunacy should not be appointed receiver of the lunatic's estate. *Ex parte* Pincke, 2 Meriv. 452.

Clerk or Agent of Solicitor.—As to rule forbidding any clerk or agent of a

(b) **In Ireland.**—In *Ireland*, a solicitor not concerned in the cause is not ineligible; but he cannot be the solicitor in any proceedings which it may be necessary for him to take as receiver.[1]

(c) **In United States.**—In this country the legal adviser of the parties is also disqualified for appointment as receiver.[2]

(5) *Next Friend.*—Under the *English* chancery practice, the next friend of infants cannot be appointed receiver, because it is his duty to supervise the conduct of the receiver.[3]

(6) *Trustees*—(a) **General Rule Against Appointment.**—It is the general rule that a trustee should not be appointed receiver with emolument, if any other person can be procured for the purpose, who will act with equal benefit to the estate.[4]

(b) **When Trustee May be Appointed.**—But a trustee may be appointed receiver where he is not a trustee solely for particular persons, antagonistic to the plaintiffs, but is trustee for the plaintiffs as much as for others.[5]

(7) *Corporate Officers and Stockholders*—(a) **General Rule.**—It has not been the policy or practice of the courts in appointing receivers for insolvent companies, to select any one who had been officially and responsibly connected with the mismanagement which brought the company's affairs to ruin;[6] and this view

solicitor to be appointed receiver, see *In re* Stokes, 1 J. & L. 676. *Compare* as to *Ireland*, Meara *v.* Egan, 9 Ir. Eq. 260.

1. Wilson *v.* Poe, 1 Hog. 322. As to rule against clerk or agent of solicitor being appointed receiver, see Meara *v.* Egan, 9 Ir. Eq. 260.

As to disqualification of solicitor for plaintiff, even by consent, see Watson *v.* Arundell, Ir., 10 Eq. Rep. 324.

2. See Baker *v.* Backus, 32 Ill. 115 (mentioned in Benneson *v.* Bill, 62 Ill. 412), where it was held a fatal objection to the person appointed receiver, that he was the legal adviser of the applicant for the appointment, and of the company sought to be affected, and was also the largest creditor of such company. So it has been considered that the law partner of the solicitor for a complainant in foreclosure cannot be made receiver in the suit, even by consent of all the parties to the suit, who might not be all the parties concerned in the results of the receivership. Merchants', etc., Nat. Bank *v.* Kent, 43 Mich. 296.

3. Stone *v.* Wishart, 2 Madd. 64.

Son of Next Friend.—The son of the next friend was regarded as ineligible in Taylor *v.* Oldham, Jac. 529, mentioned in Benneson *v.* Bill, 62 Ill. 411.

4. Sykes *v.* Hastings, 11 Ves. 364. See also Sutton *v.* Jones, 15 Ves. 587; Anonymous, 3 Ves. 516; Benneson *v.* Bill, 62 Ill. 490; ——— *v.* Jolland, 8 Ves. 72; Hibbert *v.* Jenkins, in Chancery, February, 1805 (*cited* in Sykes *v.* Hastings, 11 Ves. 363).

Where, however, a trustee offers to act as receiver without salary, he will be allowed to propose himself, but the master is not bound to accept him. Banks *v.* Banks, 14 Jur. 659.

Nor is a trustee appointed upon his own undertaking entitled, under ordinary circumstances, to a salary as receiver. Pilkington *v.* Baker, 24 Week. Rep. 234.

5. Taylor *v.* Life Assoc., 3 Fed. Rep. 469.

So a trustee and executor may be continued as receiver under special circumstances, at a salary. Newport *v.* Bury, 23 Beav. 31.

But where a trustee named by creditors had been appointed receiver of the estate of a bankrupt by a State court these positions were held incompatible by the Federal court. *In re* Stuyvesant Bank, 5 Ben. (U. S.) 568.

6. Buck *v.* Piedmont, etc., L. Ins. Co., 4 Fed. Rep. 855; 4 Hughes (U. S.) 420. See also People *v.* Third Ave. Sav. Bank, 50 How. Pr. (N. Y.) 23; McCullough *v.* Merchant's L. & T. Co., 29 N. J. Eq. 218; Middlesex Co. *v.* State Bank, 28 N. J. Eq. 166.

excludes from eligibility the trustee and former vice-president of such a company.[1]

So upon proceedings against a bank for insolvency under the *New York* statute, an officer of the corporation is not a proper person to be appointed the receiver.[2]

(b) **Exceptions.**—But upon a voluntary dissolution of a corporation, any of its officers or stockholders may, under the statute of the same State, be appointed receivers, if not otherwise disqualified.[3] And exceptions to the rule may also arise, in urgent cases, by consent of parties.[4]

c. CREDITORS NOT INELIGIBLE.—There is no rule of law that a creditor cannot be appointed the receiver of his debtor's property.[5]

Secured creditors, however, cannot dictate who shall be appointed a receiver; for the receiver is not the representative of such creditors, but the hand of the court, and the interest of creditors of every grade will be considered in making the appointment.[6]

d. PARTNERS OFTEN ELIGIBLE—(1) *An Exception to General Rule.*—While the general rule undoubtedly is that a receiver should be a person wholly disinterested in the subject-matter of the suit, yet the rule is not without exceptions; and the exceptions seem to be more numerous in the case of partnership than in any other class of cases.[7]

The obvious reason for the reluctance of equity to appoint a receiver of partnership property is, that a valuable business may have grown up by the joint labors of the partners, which would be ruthlessly destroyed by the appointment of an outside receiver, without benefiting either party;[8] but this reluctance has

1. Buck *v.* Piedmont, etc., L. Ins. Co., 4 Fed. Rep. 855; 4 Hughes (U. S.) 420.

2. Attorney-Gen'l *v.* Bank of Columbia, 1 Paige (N. Y.) 516.

3. *In re* Eagle Iron Works, 8 Paige (N. Y.) 388.

4. Atkins *v.* Wabash, etc., R. Co., 29 Fed. Rep. 174. See further, *supra*, this title, *General Principles.*

Trust Company.—A trust company may be properly appointed receiver of two corporations. *In re* Knickerbocker Bank. 19 Barb. (N. Y.) 603.

Effect of Improvident Appointment.—Although a party interested in a suit, like a stockholder in a corporation, plaintiff should not be appointed receiver, yet when a party has been appointed receiver without knowledge of the fact that he was such stockholder, and has acted as receiver for some months, he will not be removed immediately, but the matter will be referred again to the master, with liberty to propose the same receiver; and the receiver will, in the meantime, have the custody and charge of the property. Bank of Monroe *v.* Schermerhorn, Clarke's Ch. (N Y.) 369.

5. Chamberlain *v.* Greenleaf, 4 Abb. N. Cas. (N. Y.) 94.

6. Richards *v.* Chesapeake, etc., R. Co, 1 Hughes (U. S.) 32 (mentioned in Taylor *v.* Life Assoc., 3 Fed. Rep. 469).

In *Ireland* the court will not remove the receiver appointed by it in order to assist a creditor who has, under his security, the right of appointing a receiver. Sanders *v.* Lord Lisle, 4 Ir. Rep. (Eq.) 46.

7. Todd *v.* Rich, 2 Tenn. Ch. 108.

8. Slemmer's Appeal. 58 Pa. St. 178. See also Gowan *v.* Jeffries, 2 Ashm. (Pa.) 303, as to grounds for such appointment.

not prevented the appointment of such receivers; nor from reasons of necessity, have partners themselves been excluded from appointment.

(2) *Appointment Not Uncommon.*—The courts have, indeed, been inclined, when there has been no actual misconduct, to appoint as receiver the managing partner,[1] or the partner most interested.[2]

8. Over What Property Receiver Appointed—*a.* IN GENERAL—(1) *Equitable Property.*—Every kind of property of such a nature that, if legal, it might be taken in execution, may, if equitable, be put into the possession of a receiver.[3]

(2) *Municipal Property.*—And he has even been given control, with specified exceptions, of all the assets and property of a city.[4]

(3) *Personal Property.*—Personal chattels may be placed in charge of a receiver.[5] Receivers have also been appointed over manors,[6] and other lands.[7]

1. Wilson *v.* Greenwood, 1 Swants. 483.

2. Hoffman *v.* Duncan, 18 Jur. 69.

See Todd *v.* Rich, 2 Tenn. Ch. 109; Taylor *v.* Life Assoc., 3 Fed. Rep. 470.

There are sufficient grounds for making an exception to the general rule, where it was necessary for persons carrying on the particular class of business, that of colonial and metal brokers to pledge their personal credit with their bankers, and it was quite impossible to get an indifferent person to take such an onerous duty upon himself, while the only person likely to undertake it would be a person largely interested in the success of the business, like one of the partners. Sargant *v.* Read, L. R., 1 Ch. Div. 603.

For circumstances under which the solvent partner was appointed receiver, without salary, so as to be enabled to deal solely with the partnership property, see *Ex parte* Stoveld, 1 G. & J. 307.

Administrator of Deceased Partner.—In a case where the administrator of a deceased partner may file a bill against the surviving partner, and have a receiver appointed, the administrator himself, if a proper person may be made receiver; but in that event the court should require him to give a new bond as such. Miller *v.* Jones, 39 Ill. 61.

3. Davis *v.* Gray, 16 Wall. (U. S.) 217; 15 Myer's Fed. Dec., p. 537.

See also Davis *v.* Duke of Marlborough, 2 Swanst. 132; Blanchard *v.* Cawthorne, 4 Sim. 572.

4. Meriwether *v.* Garrett, 102 U. S. 508; 10 Myer's Fed. Dec., p. 891. Concerning the appointment of a receiver for the city of Nashville in 1869, see article by Lucius S. Merriam in 25 Am. L. Rev. 393.

5. Taylor *v.* Eckersley, L. R., 2 Ch. D. 303.

Growing Crops.—See, in favor of receiver over, Corcoran *v.* Doll, 35 Cal. 480. But *compare* Williams *v.* Green, 37 Ga. 47.

Heirlooms.—As to receiver of heirlooms, see Shaftesbury *v.* Marlborough, *cited* in 1 Seton on Decrees (4th Eng. ed.), p. 421.

Rings and Jewelry.—See Frazier *v.* Barnum, 19 N. J. Eq. 318; REAL PROPERTY.

6. Windham *v.* Ginterlei, Week. Notes (1871), p. 119.

7. See as to lands of railway company, Marling *v.* Stonehouse, etc., R. Co., 17 Week. Rep. 485.

"**Assets.**"—This term in a statute covers all the property of a company, including its real estate. Attorney-General *v.* Atlantic Mut. Life Ins. Co., 100 N. Y. 282.

Homestead.—Barfield *v.* Barfield, 72 Ga. 670, is adverse to the appointment of a receiver over a homestead.

In Supplementary Proceedings.—Under the *New York* Code, the appointment of a receiver in proceedings supplementary to execution vests in such receiver all the property of the debtor, real as well as personal. Porter *v.* Williams, 9 N. Y. 148, *citing*, as to law before the Code, Mann *v.* Pentz, 2 Sandf. Ch. (N. Y.) 257; Wilson *v.* Allen, 6 Barb. (N. Y.) 545; Scouton *v.*

(4) *Incorporeal Property.*—So receivers have been appointed[1] over such incorporeal property as the profits of a clerical office,[2] or returns of an ecclesiastical character[3] like those of a rectory,[4] tolls of various kinds,[5] debts to be collected,[6] and pensions[7] as well as annuities, or the property on which they are charged,[8]

Bender, 3 How. Pr. (N. Y.) 185; and Chautauque Co. Bank *v.* White, 6 Barb. (N. Y.) 602.

1. See Foster's Fed. Prac., § 244.

2. Palmer *v.* Vaughan, 3 Swanst. 173.

But not of the salary of the assistant parliamentary counsel to the treasury. Cooper *v.* Reilly, 2 Sim. 564; 1 R. & M. 562.

3. Metcalfe *v.* Archbishop of York, 6 Sim. 232; Cullen *v.* Dean, etc., of Killaloe, 2 Ir. Ch. Rep. 134, discussing powers of receiver; Strange *v.* Ormsby, 2 Hog. 55, 60; Grenfel *v.* Dean and Canons of Windsor, 2 Beav. 548. But *compare contra*, as to benefice of clergymen, Hawkins *v.* Gathercole, 6 De G. M. & G. 16, *reversing* same case, 1 Sim. N. S. 70; Bates *v.* Brothers, 2 Smale & G. 515.

4. White *v.* Bishop of Peterborough, 3 Swanst. 109, 118; Silver *v.* Bishop of Norwich, 3 Swanst. 112, 117, notes.

Educational Income.—But a motion by an incumbrancer on a college fellowship for a receiver and an injunction was refused with costs in Berkeley *v.* King's College, 10 Beav. 604. *Compare* Feistel *v.* King's College, 10 Beav. 502.

5. Knapp *v.* Williams, 4 Ves. 431, notes; Dumville *v.* Ashbrooke, 3 Russ. 100, notes; De Winton *v.* Mayor, etc., of Brecon, 26 Beav. 539; State *v.* Northern Cent. R. Co., 18 Md. 214; Covington Drawbridge Co. *v.* Shepherd, 21 How. (U. S.) 123.

Kinds of Tolls.—Receivers have been appointed to take charge of tolls of turnpike roads: Lord Crewe *v.* Idleston, 1 De G. & J. 111; Dumville *v.* Ashbrooke, 3 Russ. 100, notes; Knapp *v.* Williams, 4 Ves. 431, notes; a canal and railway company: Fripp *v.* Chard R. Co., 11 Hare 252; a canal company: Hopkins *v.* Company of Proprietors, 37 Law J. Ch. 731; Potts *v.* Warwick, etc., Canal Nav. Co., Kay 146, as to conflicting claims of receivers and creditor. (See, as to when receiver of canal tolls not appoir. ed, Gray *v.* Chaplain, 2 Russ. 141); a railway company: State *v.* Northern Cent. R. Co., 18 Md. 214; Kingston *v.* Cowbridge R. Co., 41 L. J. Ch. 153; Contract Corp. *v.* Tottenham, etc., R. Co., Week Notes, 1868, p. 43; Furness *v.* Catherham R. Co., 25 Beav. 619; a dock company: Ames *v.* Birkenhead Dock Co., 3 Week. Rep. 382. *Compare* Postlethwaite *v.* Manyport Harbor Trustees, Week. Notes, 1869, p. 37; a bridge company: Covington Drawbridge Co. *v.* Shepherd. 21 How. (U. S.) 123; and a market: De Vinton *v.* Mayor, etc., of Brecon, 26 Beav. 539.

6. Candler *v.* Candler, Jac. 229; Mills *v.* Pittman, 1 Paige (N. Y.) 491.

7. Heald *v.* Hay, 3 Gibb. 472; Noad *v.* Backhouse, 2 Y. & C. Ch. 530. See also as to sequestration, M'Carthy *v.* Goold, 1 B. & B. 389, *discussing* Stone *v.* Lidderdale, 2 Anstr. 533. But *compare contra*, Davis *v.* Duke of Marlborough, 1 Swanst. 74, 79, 84, on other points, 2 Swanst. 108; Lucas *v.* Harris, 18 Q. B. D. 133, reversing court below, *approving* Birch *v.* Birch, 8 Prob. Div. 163, and *distinguishing* Dent *v.* Dent, L. R., 1 P. & M. 366. See generally, as to military commission and its nature, Collyer *v.* Fallon, 1 T. & R. 467.

8. O'Neill *v.* Ward, 1 Hog. 112; Hogan *v.* Bodkin, 1 Hog. 374; Richards *v.* Goold, 1 Moll. 24; Lyne *v.* Lockwood, 2 Moll. 498; Tanfield *v.* Tanfield, 2 Russ. 151; Fay *v.* Fay, 2 Jones 350; Kelly *v.* Butler, 1 Ir. Eq. Rep. 438; Evans *v.* Cassidy, 11 Ir. Eq. Rep. 247; Beamish *v.* Austen, 9 Ir. Rep. Eq. 363, reviewing the authorities.

Dalmer *v.* Dashwood, 2 Cox 382.

The general doctrine seems to be that a receiver is appointed because the remedy at law is not complete or effectual enough, and the jurisdiction ought at least to be exercised when the legal remedy is shown to be doubtful or difficult. See opinion Vice-Chancellor Chatterton in Beamish *v.* Austen, 9 Ir. Rep. Eq. 364; Lord Chancellor Plunket's remarks in Manly *v.* Hawkins, 1 D. & W. 372, and in Swift *v.* Swift, 3 Ir. Eq. Rep. 275.

But a receiver will not be appointed where there is ample remedy by distress to collect the arrears of annuity, or otherwise. Sollory *v.* Leaver, L. R.,

and rents charged upon property;[1] and also of the profits of a theater,[2] and the produce of colonial estates and plantations.[3]

(5) *Various Other Kinds of Property.*—Receivers have also been appointed[4] over mines,[5] newspapers,[6] railroads,[7] and mortgaged property,[8] as well as over various other kinds of property.[9]

(6) *Over Taxes.*—A receiver cannot be appointed to collect taxes levied against a strictly municipal or *quasi* municipal corporation,[10] where there is an adequate remedy at law, as by man-

9 Eq. 24; Kelsey *v.* Kelsey, L. R., 17 Eq. 499.

As to the concurrent jurisdiction of equity in annuity cases in general, see Fay *v.* Fay, 2 Jones 351; Cupit *v.* Jackson, 13 Price 731; 1 M'Clel. 495; Swift *v.* Swift, 3 Ir. Eq. Rep. 275.

1. See as to a fee-farm rent, Stevelly *v.* Murphy, 2 Ir. Eq. Rep. 450.

But *compare* Brady *v.* Fitzgerald, 12 Ir. Eq. Rep. 276, *discussed* in Beamish *v.* Austen, Ir. Rep., 9 Eq. 365.

2. Const *v.* Harris, T. & R. 527. But *compare*, as to theatrical manager's earnings, Gilleg *v.* Barrett (Supreme Ct.), 5 N. Y. Supp. 380.

3. See, as to rights, duties, and liabilities of such receiver, consignee, or manager of property in the West Indies, or of persons acting as such, Morris *v.* Elme, 1 Ves. 139; Scott *v.* Nesbitt, 14 Ves. 444; Chambers *v.* Goldwin, 9 Ves. 271; Forrest *v.* Elwes, 2 Meriv. 65.

4. See Foster's Fed. Prac., § 244.

5. Jeffreys *v.* Smith, 1 J. & W. 302.

6. Chaplin *v.* Young, 6 L. T. N. S. 98; Kelly *v.* Hutton, 17 Week. Rep. 427.

7. Stevens *v.* Davison, 18 Gratt. (Va.) 828; 98 Am. Dec. 694; Davis *v.* Gray, 16 Wall. (U. S.) 219; Russell *v.* East Anglian R. Co., 3 Macn. & G. 104; 15 Myer's Fed. Dec., p. 538. The liability of such a receiver to suit is discussed in Barton *v.* Barbour, 104 U. S. 129; 27 Myer's Fed. Dec., p. 62.

But in *England* it was formerly held that receivers could not be appointed to operate railways, as a court of equity would assume the management of a business or concern only to wind it up, and besides could not control the servants of the company. Gardner *v.* London etc., R. Co., L. R., 2 Ch. 212. *Compare* also *In re* Birmingham, etc., R. Co., L. R., 18 Ch. D. 157; 3 Am. & Eng. R. Cas. 618.

8. See Clanbrassil *v.* Taylor, 5 Brown's Parl. Cas. 319; Cortleyen *v.* Hathaway, 11 N. J. Eq. 41; 64 Am. Dec. 478, and note 492; Cone *v.* Combs, 5 McCrary (U. S.) 52; FORECLOSURE OF MORTGAGES, vol 8, p. 234; Daly *v.* Browne, Ir. Rep., 5 Eq. 621; Kometze *v.* Omaha Hotel Co., 107 U. S. 395; Grant *v.* Phœnix L. Ins. Co., 121 U. S. 116.

9. **Settlement Funds.**—See Brown *v.* Walter, *cited* in 1 Seton on Decrees (4th Eng. ed.) 421.

Freight of Ships.—See Roberts *v.* R., *cited* in 1 Seton on Decrees (4th Eng. ed.) 423.

Brewery.—See Skip *v.* Harwood, 3 Atk. 564.

Corporate Property.—Upon the appointment of a receiver for an insolvent corporation at the instance of a judgment creditor, under the *New York* statutes in force in 1843, it was erroneous not to extend the receivership to all the corporate property and effects; but the corporation cannot complain of an order appointing a receiver of so much property only as is necessary to satisfy the complainant's debt, where it does not appear that there are any other debts. Morgan *v.* New York, etc., R. Co., 10 Paige (N. Y.) 294; 40 Am. Dec. 248. Where a receiver was appointed to take charge of the property, estate, effects, choses in action, books of account, and legal and equitable interests of a company, this appointment does not cover a claim against a stockholder for unpaid subscriptions; and no title to such claim is acquired by a purchaser thereof at the receiver's sale of the uncollected assets of the company. Tucker *v.* Gilman, 45 Hun (N. Y.) 195; *following* Farnsworth *v.* Wood, 91 N. Y. 308, and Mann *v.* Pentz, 3 N. Y. 415.

10. Thompson *v.* Allen Co., 115 U. S. 560. The question was left undecided in Meriwether *v.* Garrett, 102 U. S. 501; 10 Myer's Fed. Dec. 892. *Compare* discussion by Baxter, C. J., in Garrett *v.* Memphis, 5 Fed. Rep. 865.

damus, though it is rendered unavailable by the fact that there is no person willing to accept the office of collector of taxes.[1]

(7) *Over Rates.*—A court of equity will not appoint a receiver of rates, which are to be assessed by commissioners and collected at a future period.[2]

Nor will a receiver be appointed over rates upon the security whereof a municipal corporation has been authorized to borrow money; for there is a clear distinction between the cases where there is a beneficial interest arising out of tolls and market rates, and such a case where there is really nothing for the receiver to take charge of.[3]

(8) *Over Emoluments of Office.*—A receiver of the profits or emoluments of an office may, as before stated, be sometimes appointed. Thus, a county clerk may contract with his deputy that the latter shall have for his compensation a certain share of the fees, taxed and collectable in the clerk's office during his deputyship, without contravening public policy by an attempt to sell an office;[4] and in a suit by such deputy against his principal to recover the former's share of such fees, a receiver may be appointed, and an injunction may be granted pending the cause, restraining the clerk from collecting or transferring such fees yet unpaid, and the sheriff from paying such fees collected by him to the clerk.[5]

But a receiver has been refused of the salary of the assistant parliamentary council to the treasury, upon the ground that such appointment would be nugatory, as the allowance was not assignable, permanent, or enforceable.[6]

(9) *Over Patent Rights.*—A license to construct and use a patented invention is personal to the licensee,[7] and the receiver of

1. Thompson *v.* Allen Co., 115 U. S. 554, dwelling also on the want of power of a court of chancery to appoint an officer to execute the process of a court of law. Harlan J. dissented: see Thompson *v.* Allen Co., 115 U. S. 561. But as to compensation of statutory receiver of city taxes, see Gilchrist *v.* Wilkes Barre (Pa. 1890), 21 Atl. Rep. 806.

2. Drewry *v.* Barnes, 3 Russ. 105.

3. Preston *v.* Mayor of Great Yarmouth, 20 Week. Rep. 358.

4. Cheek *v.* Tilley, 31 Ind. 126.

5. Cheek *v.* Tilley, 31 Ind. 126.

So where the profits of the office of clerk of the peace were assigned for payment of creditors a receiver was appointed, subject to a different arrangement, by agreement, pending the determination of the question of the validity of the assignment. Palmer *v.* Vaughan, 3 Swanst. 173.

6. See Cooper *v.* Reilly, 1 R. & M. 564; 2 Sim. 562.

So where the right to an office is in question, it would be contrary to public policy to interfere with the due course of the litigation by appointing a receiver of the fees and emoluments of the office, and more objectionable to appoint a receiver to discharge the duties of the office, and thus fill it temporarily. Tappan *v.* Gray, 9 Paige (N. Y.) 509; *affirmed*, 7 Hill (N. Y.) 260. To like effect is Stone *v.* Wetmore, 42 Ga. 603. See also as to injunction restraining a party from performing the functions of an office the cases just cited and Wood *v.* Draper, 24 Barb. (N. Y.) 269.

7. See Oliver *v.* Rumford Chemical Works, 109 U. S. 82.

a firm to which such a license has been granted, will not succeed to the firm's right.[1]

(10) *Catalogue Containing Secret Price List.*—A company which invents and prepares a secret code or system of letters, figures, and characters, showing the cost and selling price of its wares and merchandise, for use between itself and its traveling salesmen, has a property therein which the law will protect; and when parties have become possessed, in a wrongful and fraudulent manner, of a knowledge of such secret code or system, and the key thereto, and have copied the same into a catalogue of their own, a court of equity should, when necessary in furtherance of justice, take such marked catalogue into its possession, through a receiver, and retain it pending the action.[2]

(11) *Over Market Stand.*—The court cannot, as a provisional remedy, appoint a receiver of a market stand in a city market, as a permit to occupy stalls in such a market does not constitute property, and confers upon its holder no right or interest cognizable in the courts.[3]

(12) *Over Seat in Commercial Exchange.*—The weight of authority and the better reasoning have been considered to support the proposition that a seat, or membership, in a commercial board of exchange, like a stock or produce exchange, is property, and should be applied as other property of a debtor to the payment of his debts; and in this view an order may properly be made upon proceedings supplementary to execution against the owner of such seats, appointing a receiver therefor and directing the execution debtor to make an assignment thereof to such receiver, and empowering the receiver to sell the seats to satisfy the judgment.[4]

(13) *Over Subscription Moneys.*—A receiver will be appointed of moneys deposited with a defendant, by one who had received them from plaintiff and others under a subscription to carry out a proposed project, and which remained in the defendant's hands after the project had been abandoned and plaintiff had elected to withdraw his subscription.[5]

b. LOCATION OF PROPERTY—(1) *In Hands of Defendant's Agents.*—Courts of equity unquestionably have the power to appoint receivers, and to order them to take possession of the property in controversy, whether it be in the immediate possession of the defendant, or of his agent; and in proper cases they can also order the defendant's agents or employés, although not parties to the record, to deliver the specific property to the receiver.[6]

1. Curran *v.* Craig, 22 Fed. Rep. 101.

2. Simmons Hardware Co. *v.* Waibel (S. Dak. 1891), 47 N. W. Rep. 816.

3. Barry *v.* Kennedy, 11 Abb. Pr. N. S. (N. Y.) 425.

4. Habenicht *v.* Lissak, 78 Cal. 357; 12 Am. St. Rep. 69 and note.

5. Bailey *v.* O'Mahoney, 33 N. Y. Super. Ct. 242.

6. *In re* Cohen, 5 Cal. 496.

(2) *Property Beyond the Jurisdiction.*—Nor is it material if the court has jurisdiction of the parties, that the subject-matter of the controversy is beyond the jurisdiction, though the recognition of the receiver in the foreign or extra State jurisdiction is dependent, as has been heretofore seen, on the principles of comity.[1]

(3) *Property Within the Jurisdiction.*—On the other hand, if the property is within the jurisdiction, it is immaterial that the defendant resides beyond the jurisdiction.[2]

c. DESCRIPTION OF PROPERTY IN ORDER OF APPOINTMENT.—The rule is well settled that the order appointing a receiver should describe with sufficient particularity the property which the receiver is to take,[3] and unless this is done he cannot hold the property.[4]

d. PROPERTY NOT COVERED BY TRUST.—Where a receiver has taken possession of property not rightfully belonging to his trust in an administrative capacity, whether as *United States* marshal, sheriff, administrator or otherwise, he is personally responsible for the trespass committed.[5]

e. AFTER-ACQUIRED PROPERTY.—It is sometimes provided by statute that a receiver appointed in supplementary proceedings obtains no title to property of the judgment debtor, acquired after the receiver's appointment; but this restriction does not apply to property due the judgment debtor by the terms of a will which had been probated prior to the receiver's appointment.[6]

f. EXTENSION OF RECEIVERSHIP.—It is a common practice in the courts to extend a receivership over further property in the same proceeding, as well as to make an extension which shall include other proceedings. Thus where a railroad is in the hands of receivers, pending suits of foreclosure and settlement of the priority of liens, it is proper, on the application of a lienholder claiming priority, to extend the receivership, as to such claim, over the portion of the road on which the priority is claimed.[7]

1. Concerning appointment of receiver or manager in *England* over property elsewhere situated, see Codrington *v.* Johnstone, 1 Beav. 520; Faulkner *v.* Daniel, 3 Hare 204*n*; Barkley *v.* Lord Reay, 2 Hare 307; Sheppard *v.* Oxenford, 1 K. & J. 500; Houlditch *v.* Donegal, 8 Bligh, N. S. 343; Cockburn *v.* Raphael, 2 S. & S. 454; ——— *v.* Lindsey, 15 Ves. 91; Langford *v.* Langford, 5 L. J. Ch., N. S. 61; Shaw *v.* Shore, 5 L. J. Ch., N. S. 80; Hinton *v.* Galli, 24 L. J. Ch. 121; Seton on Decrees (4th Eng. ed.), pp. 450–52.

As to receiver for railway running through two States of this country, see State *v.* Northern Central R. Co., 18 Md. 216.

As to extra-territorial jurisdiction and doctrine of comity, see *supra*, this title, *Jurisdiction to Appoint.*

2. Hellebush *v.* Blake, 119 Ind. 350.

3. See Crow *v.* Wood, 13 Beav. 273.

4. O'Mahoney *v.* Belmont, 62 N. Y. 148. Where a bill is filed asking that a receiver be appointed "of all and singular the said mortgaged property and premises," it would be improper for the court to appoint a receiver of any property not embraced in the mortgage. R. Co *v.* Whitaker, 68 Tex. 636.

5. Curran *v.* Craig, 22 Fed. Rep. 102.

6. Crane *v.* Beecher (Supreme Ct.), 6 N. Y. Supp. 227.

7. Mercantile Trust Co. *v.* Missouri, etc., R. Co., 41 Fed. Rep. 9. As to

9. Procedure Concerning Appointment—*a.* APPOINTMENT ON MOTION.—In ordinary practice the controlling principle is to appoint a receiver with the sole view of preserving the property, and not to inquire into the merits;[1] and the appointment is made on motion,[2] the evidence heard consisting of the sworn pleadings of the parties, and such affidavits or depositions as may, within the rules of practice, be offered on either side.[3]

b. NOTICE OF MOTION.—Of this motion, and indeed of any mode of application for a receiver, the opposite party is, as a general rule, entitled to notice;[4] though, as has been

want of authority to vacate order extending receivership to all the property of a judgment debtor, see Garfield Nat. Bank *v.* Bostwick, 14 N. Y. Supp. 920.

1. See Blakeney *v.* Dufaur, 15 Beav. 40, 42; Huguenin *v.* Baseley, 13 Ves. 107; Conro *v.* Gray, 4 How. Pr. (N. Y.) 167. So on an order to bring money into court, Chapman *v.* Hammersley, 4 Wend. (N. Y.) 175; and in the case of interlocutory applications in general, as well as those for receivership, see Skinners' Co. *v.* Irish Soc., 1 M. & C. 163.

2. See Cooke *v.* Gwyn, 3 Atk. 690. An application for an injunction and a motion for a receiver, should be made the subject of two successive motions: Lawson *v.* Morgan, 1 Price 303, 304.

3. Bitting *v.* Ten Eyck, 85 Ind. 360. See also reference to use of affidavits or testimony on such motion, in Schlechts' Appeal, 60 Pa. St. 175.

The sufficiency of a verification of the bill by complainant, as proof to authorize the court to act, is upheld in Jones *v.* Dougherty, 10 Ga. 282.

Service of Copies of Papers.—In *Wisconsin* such a motion should be founded upon affidavits, or upon papers of which copies are served with the notice of the motion, unless the papers in which the party intends to move have been filed with the clerk, in which case it is sufficient if reference is made to them in the notice of the motion. The object of such a rule, in this as well as in other cases, evidently is to compel the party making the motion to inform the adverse party of the proof upon which the former intends to rely in support of the motion, so as to unable the latter to furnish proofs to resist the motion at the hearing. Hungerford *v.* Cushing, 8 Wis. 322.

Special Grounds Shown by Affidavits.—In *Kansas* the showing of the necessity for a receiver need not be made in the petition, but it is sufficient if that pleading shows a case of the class in which receivers may be appointed, and the special grounds may be shown by affidavits on motion for a receiver. Hottenstein *v* Conrad, 9 Kan. 438. See also to like effect as to Federal court, Commercial, etc., Bank *v.* Corbett, 5 Sawy. (U. S.) 177.

Answer Regarded as Affidavit.—On a motion for a receiver, the answer of a defendant, if a material codefendant has not answered, must be regarded merely as an affidavit, and the plaintiff may read affidavits against it. Kershaw *v.* Mathews, 1 Russ 362.

Amendment of Bill.—A motion for an injunction and a receiver is irregular, under the *English* chancery practice, where the plaintiff amends his bill between the time of giving notice of moving and the time of bringing on the motion. Gouthwaite *v.* Rippon, 1 Beav. 55.

4. Tibbals *v.* Sargeant, 14 N. J. Eq. 450; Fricker *v.* Peters, 21 Fla. 256. In *Pennsylvania* it was held error to appoint a receiver of a corporation, where the company was not a party to the bill nor in court upon notice for a preliminary injunction. Gravenstine's Appeal, 49 Pa. St. 321.

See also Hungerford *v.* Cushing, 8 Wis. 323; Crowder *v.* Moore, 52 Ala. 221; Hardy *v.* McClellan, 53 Miss. 511; Mays *v.* Rose, Freem. Ch. (Miss.) 703; Sandford *v.* Sinclair, 8 Paige (N. Y.) 374; Devoe *v.* Ithaca, etc., R. Co., 5 Paige (N. Y.) 521; Verplanck *v.* Mercantile Ins. Co., 2 Paige (N. Y.) 450; Field *v.* Ripley, 20 How. Pr. (N. Y.) 26; Home *v.* Jones, 57 Iowa 142; Voshell *v.* Hynson, 26 Md. 92; Nusbaum *v.* Stein, 12 Md. 322; Triebert *v.* Burgess, 11 Md. 461; Rogers *v.* Dougherty, 20 Ga. 274; Hutton *v.* Lockridge, 27 W. Va. 433; State *v.* New Orleans (43 La. Ann.), 9 So. Rep. 643; Stratton *v.*

seen,[1] exceptions may arise when irreparable injury might be sustained by delay,[2] or under other special circumstances;[3] and on appeal it will be a fatal objection to an order for a receiver made without notice, that the necessity for dispensing with it does not appear.[4]

(1) *Sufficiency of.*—It is no objection to a notice of motion for a receiver that it is in the alternative, as that the appointment will be asked if a previous appointment is vacated as sought by the opposite party.[5]

Davidson, 1 R. & M. 485; Johnson *v.* Powers, 21 Neb. 295.

Consult further, Simmons *v.* Wood, 45 How. Pr. (N. Y.) 266. Against *ex parte* application for receiver for defunct corporation, see Young *v.* Rollins, 85 N. Car. 488; 12 Am. & Eng. R. Cas. 457. Against appointment of receiver on *ex parte* petition of insolvent corporation asking to be dissolved, without action pending, see Jones *v.* Bank of Leadville, 10 Colo. 473; 20 Am. & Eng. Corp. Cas. 554. As to sufficiency, as notice, of process or publication that brings defendant into court, see Newell *v.* Schmell, 73 Ind. 243. As to notice to landlord but no consent by tenant, see Mariner *v.* Chamberlain, 21 Wis. 254.

1. See under *Prerequisites to Appointment*, in present general subdivision.

2. Johns *v.* Johns, 23 Ga. 36. See also Crowder *v.* Moore, 52 Ala. 221; Maynard *v.* Railey, 2 Nev. 320. Imminent danger to property was held made out in Rosenburg *v.* Moore, 11 Md. 381.

3. Sandford *v.* Sinclair, 8 Paige (N. Y.) 375; Gibson *v.* Martin, 8 Paige (N. Y.) 482; De Bemer *v.* Drew, 57 Barb. (N. Y.) 445, stating extraordinary and exceptional case; Triebert *v.* Burgess, 11 Md. 461, holding imperious necessity lacking; Verplanck *v.* Mercantile Ins. Co., 2 Paige (N. Y.) 450; Maish *v.* Bird, 59 Iowa 310; Alford *v.* Berkele, 29 Hun (N. Y.) 634, as to dispensing with notice to non-resident partner; Dowling *v.* Hudson, 14 Beav. 424; Maguire *v.* Allen, 1 B. & B. 76; Fricker *v.* Peters, 21 Fla. 256, holding extraordinary emergency requisite; Railway Co. *v.* Jewett, 37 Ohio St. 659, as to absence of such circumstances, McCarthy *v.* Peake, 9 Abb. Pr. (N. Y.) 166; 18 How. Pr. (N. Y.) 140, to like effect; Elwood *v.* First Nat. Bank, 41 Kan. 478, mentioning fact that rule not universal.

Delay in Acting Upon Notice, etc.—The existence of unexplained delay in acting upon a notice may cause it to be treated as if it had not originally been given, Tibbals *v.* Sargeant, 14 N. J. Eq. 451; as to curing want of notice by making new order, see West *v.* Chassen, 12 Fla. 331.

Insufficient emergency to justify *ex parte* appointment, People *v.* Albany, etc., R. Co., 7 Abb. Pr., N. S. (N. Y.) 289; 82 Am. Dec. 295.

Ex Parte Application.—In *California*, a receiver may be appointed in an insolvency proceeding, as well as in an ordinary case, by the judge at chambers upon an *ex parte* application. Real Estate Assoc. *v.* San Francisco Super. Ct., 60 Cal. 227. See also as to notice of application, but not of pending of suit in Iowa, Jones *v.* Graves, 20 Iowa 596. As to *ex parte* appointment of *interim* receiver in *England* where defendant died after summons had been taken out for a receiver, see *In re* Parker, L. R., 12 Ch. Div. 294. Notice of motion for the appointment of a receiver, on leave of the court, is not required under an order in chancery which impliedly dispenses with such notice in that case. Dresser *v.* Morton, 2 Phill. 285. Nor is notice necessary when the opposite parties are present in court and represented by counsel. M'Lean *v.* Lafayette Bank, 3 McLean (U. S.) 503, 504; or when no officer of the bank affected can be found. Dayton *v.* Borst, 7 Bosw. (N. Y.) 118.

4. Crowder *v.* Moore, 52 Ala. 221. But even if the notice and prayer are merely for an injunction, the judge may appoint a receiver if the facts make out a proper case for such appointment, and no objection is made on the ground of want of notice of the application. Whitney *v.* Buckman, 26 Cal. 453. And on appeal the presumption of notice has been held to exist where the record is silent. See Miller *v.* Shriner, 86 Ind. 494.

5. Clark *v.* Clark, 11 Abb. N. Cas. (N. Y.) 335.

(2) *Service of.*—Notice of motion for a receiver must be served on the parties to be affected thereby, as otherwise the court could, in ordinary cases, hardly have jurisdiction to take the defendant's property from his possession.[1] But where one defendant in a partition proceeding is served with notice of an application for the appointment of a receiver, he cannot complain because other defendants were not served.[2]

(3) *As Dependent on Defendant's Appearance.*—A motion for a receiver may be made, of course, under the *Irish* practice on process against a defendant who has not appeared; but if he has appeared, notice of the motion will be necessary.[3]

c. OBJECTIONS TO MOTION—(1) *Pendency of Other Proceedings.*—The pendency of a motion for leave to amend the bill is no objection to a motion for a receiver, provided the defect in the bill thus sought to be remedied is not fatal, or such as to render the bill demurrable. Nor does the pendency of a motion to dissolve an injunction constitute an objection to the application for a receiver. But where a motion is pending in another court to set aside the judgment on which a creditor's bill is founded, the court of chancery will direct a motion for a receiver to stand over until the other motion can be decided.[4]

(2) *Delay in Pressing or Making Application.*—An application for the appointment of a receiver, which has been allowed to sleep for six years, will be denied, although some testimony has been taken in the meantime.[5]

(3) *Merely Formal Defects.*—In *England*, on an application which was regarded as simply an interlocutory application for an

1. Whitehead *v.* Wooten, 43 Miss. 526.

See also Hyslop *v.* Happock, 5 Ben. (U. S.) 452.

As to sufficiency of service under *New York* Code or statutes, see Clark *v.* Clark, 11 Abb. N. Cas. (N. Y.) 334; Kattenstroth *v.* Astor Bank, 2 Duer (N. Y.) 632.

Upon Whom Service Made.—An order for a bank to show cause why its business should not be closed, and a receiver appointed, is properly served upon its vice-president, especially where it appears that he is also a director; and although the evidence of such service is not recited in the order appointing the receiver, it will be presumed to have been presented to the court. People *v.* Central City Bank, 53 Barb. (N. Y.) 416; 35 How. Pr. (N. Y.) 432.

As to sufficiency of service upon attorney appearing for foreign corporations, see De Bemer *v.* Drew, 57 Barb. (N. Y.) 446.

2. Rapp *v.* Reehling, 122 Ind. 256.

Under the former *English* chancery practice, a receiver could not be obtained, before appearance, where the notice of motion was served upon the defendant personally, unless by leave of court, which would not be granted without a satisfactory showing that the plaintiff had used due diligence to compel an appearance. Ramsbottom *v.* Freeman, 4 Beav. 145. See also, as to leave to give such notice, Hart *v.* Tulk, 6 Hare 612; Meaden *v.* Sealy, 6 Hare 621

3. Fitzpatrick *v.* Hawkshaw, 1 Hog. 82.

As to appointment of receiver under a bill of revivor, on process entered in the original cause, see Ball *v.* Going, 1 Hog. 396.

4. Barnard *v.* Darling, 1 Barb. Ch. (N. Y.) 76.

5. Hood *v.* First Nat. Bank, 29 Fed. Rep. 56. And a motion for the appointment of a receiver will be denied where it is made on a judgment creditor's bill which was filed on an execution returned unsatisfied nearly nine

injunction, accompanied by the appointment of a receiver, objections to the bill on the ground of misjoinder, multifariousness or want of parties, were held to be no answer to such an application, as they were merely formal, and, as such, curable by amendment.[1]

d. PASSING ON MOTION.—Sometimes a motion may, for purposes of proper delay, be denied, but with liberty to renew it at a later period; as where there is reason to suspect irregularity in a recent judgment and execution, upon which is based a creditor's bill asking for a receiver.[2] But in general, a motion for a receiver does not involve the merits, and therefore cannot be reheard.[3]

Other matters concerning the disposition of the motion are treated in the notes.[4]

e. PETITION FOR RECEIVER.—Ordinarily there will be no appointment of a receiver without a bill;[5] and a petition for a receiver will be refused where there is no cause in court.[6]

Indeed, a receiver is generally appointed on bill filed for that purpose,[7] and rarely before answer, except under the provisions of particular statutes.[8]

years before. Gould *v.* Tryon, Walk. (Mich.) 354.

1. Evans *v.* Coventry, 5 De G., M. & G. 918. So an objection for want of parties to a bill for a receiver and manager of a railway company was overruled, although they consisted of eight mortgages named in the bill, on the ground that there was no utility in making them parties, and that they might be added by amendment. Fripp *v.* Chard R. Co., 21 Eng. L. & Eq. 61.

2. Bank of Wooster *v.* Spencer, Clarke Ch. (N. Y.) 389. So leave to renew a partially denied motion for a receiver upon additional evidence, was given in Devlin *v.* Hope, 16 Abb. Pr. (N. Y.) 319. As to right to renewal on showing altered state of facts, see Attorney-Gen'l *v.* Mayor of Galway, 1 Moll. 104.

3. Sheldon *v.* Weeks, 2 Barb. (N. Y.) 533. See as to doctrine in chancery practice generally, Chapman *v.* Hamersley, 4 Wend. (N. Y.) 175, recognized in Rowley *v.* Van Benthuysen, 16 Wend. (N. Y.) 376.

4. **Not Granted on New Equity in Answer.**—A motion for a receiver will not be granted upon an equity appearing on the answer, which is not relied on in the bill. Cremen *v.* Hawkes, 2 J. & L. 680.

Consideration of Fraudulent Character of Conveyance.—The allegation of the fraudulent character of a conveyance will be considered on the motion for a receiver, only as showing grounds for the protection of the fund until the final hearing. Rheinstein *v.* Bixby, 92 N. Car. 309.

Where Property in Charge of Another Receiver.—A motion for a receiver will not be granted where the property to be administered is in the possession of a receiver appointed by another court of co-ordinate jurisdiction. Young *v.* Montgomery, etc., R. Co., 2 Woods (U. S.) 618. See further under *Jurisdiction to Make Appointment*, in present general subdivision.

5. See Harwell *v.* Potts, 80 Ala. 72.

6. *Ex parte* Mountfort, 15 Ves. 447. To like effect is *Ex parte* Tupper, 1 Rose 79. See further discussion of requirement that suit must be pending, under subdivision on *Prerequisites to Appointment;* and consult particularly Merchants', etc., Nat. Bank *v.* Kent Judge, 43 Mich. 296; Jones *v.* Schall, 45 Mich. 380; Pressley *v.* Harrison, 102 Ind. 18.

7. Under the *English* chancery practice, leave has, however, been granted to file a claim for appointing a receiver; but it was declared that the case was not to be drawn into a precedent. Kempley *v.* Higgins, 14 Jur. 847. A like appointment on a common claim was also made in Bickford *v.* Chalker, 14 Jur. 997.

8. Leddel *v.* Starr, 19 N. J. Eq. 159, 163.

There are, however, a few exceptional cases where a receiver has been appointed upon petition, but these are in the cases of infants, whose position as wards of the court give them the right to apply by petition,[1] or in cases of persons similarly situated.[2]

f. APPOINTMENT AT INSTANCE OF COURT.—A chancellor should not, of his own motion, appoint a receiver without a proper case made therefor in the record; and his order of appointment under such circumstances will be reversed as error.[3] And while, in a proper case, a receiver may be appointed by the court of its own motion, yet a proceeding for such an appointment cannot, according to the regular practice, be inaugurated or conducted by outside parties who have no connection with the case, or interest in the subject-matter of the litigation.[4]

g. APPOINTMENT ON APPLICATION OF DEFENDANT.—A receiver will not, ordinarily and in the absence of statutory authority, be appointed on motion, as against a complainant, upon the application of a defendant;[5] for the whole theory upon which relief is granted in equity, is against such practice.[6]

(1) *Under English Judicature Act.*—But under the *English* Judicature Act a defendant in an action may, before judgment, apply for an injunction and a receiver; and this may be done although the plaintiff has already filed notice of motion for the like purpose.[7]

(2) *Where Relief May be Given to Codefendant.*—And the cases in which the court has refused a receiver upon the application of defendant, against a codefendant, are distinguishable from a case where the party is seeking the aid of the court, and a decree could be made in his favor.[8]

h. APPOINTMENT BY CONSENT OF PARTIES.—A consent that a receiver may be appointed, and that he may not be obliged to account before the master, will not, under the *Irish* practice, be made a rule of court.[9]

1. See *In re* Goode, 1 Ir. Ch. 265. But see *contra*, Rice *v.* Tonnele, 4 Sandf. Ch. (N. Y.) 571.

2. Leddel *v.* Starr, 19 N. J. Eq. 163.

3. Augusta Ice Mfg. Co. *v.* Gray, 60 Ga. 346, where there was considered to be no prayer of anybody to have a receiver appointed for the purpose, and with the powers specified in the order of appointment.

4. Miller, J., in O'Mahoney *v.* Belmont, 62 N. Y. 142.

5. Robinson *v.* Hadley, 11 Beav. 615; Leddel *v.* Starr, 19 N. J. Eq. 164. See also as to analogous case of an injunction, Brown *v.* Newall, 2 M. & C. 575.

6. No positive relief is ever granted to a defendant, except on cross-bill; and no relief, except it be founded on allegations in the bill, or other pleadings in the cause. Chancellor Zabriskie in Leddel *v.* Starr, 19 N. J. Eq. 164.

But it has been thought that though such an application could not be granted when made at the hearing, without notice, yet it might possibly be done upon petition. Barlow *v.* Gains, 8 Beav. 330. Though it has been suggested that the more regular way would be for the defendant to file a cross-bill. Grote *v.* Bury, 1 Week. Rep. 92.

7. Sargant *v.* Read, L. R., 1 Ch. Div. 602.

8. Henshaw *v.* Wells, 9 Humph. (Tenn.) 584.

9. Richey *v.* Gleeson, K. & F. 99.

As to substitution of receiver by

i. CONFLICTING APPLICATIONS OR APPOINTMENTS—(1) *Question of Priority.*—Where two receivers of the same insolvent bank are appointed, under distinct and independent proceedings, and by the terms of their respective appointments each has entire control of all the assets of the bank, they cannot with propriety both act; but the title of the one is necessarily exclusive of the other, and the question of priority must be determined as a legal right, even though it be necessary to inquire into the fractions of the day on which the two receivers were appointed.[1]

(2) *Where Prior Order of Reference Unexecuted.*—But pending an appeal from an order of reference to appoint a receiver, and while it remains unexecuted, the court may suffer a plaintiff in another suit to proceed and obtain and complete an appointment of a receiver of the same property, for the benefit of all who may be similarly entitled.[2]

j. REFERENCE TO MASTER—(1) *Distinction Based on Terms of Reference.*—Under the earlier *English* chancery practice, as formerly in vogue in *New York*, to refer the appointment of a receiver to a master, the effect of his action is dependent on the terms of the reference. Where the matter is referred to a master to report a proper person to be appointed a receiver of the property of a defendant, or of a corporation, or the committee of an idiot or a lunatic, and to approve of sureties to be given by such receiver or committee, the appointment is not complete until it is confirmed by the special order of the court.[3] But where the master is directed to appoint a receiver and to take from him the requisite security, no order for the confirmation is necessary.[4]

(2) *Place Where Reference Made.*—As against a judgment debtor, a reference to a master to appoint a receiver should be made in the county where his property subjected to execution is

consent, see Farran *v.* Morris, 1 Ir. Ch. 682.

1. People *v.* Central City Bank, 53 Barb. (N. Y.) 417; 35 How. Pr. (N. Y.) 432.

See also, against right to interfere with previously appointed receiver, O'Mahoney *v.* Belmont, 62 N. Y. 149, qualifying case of Bailey *v.* O'Mahoney, 33 N. Y. Super. Ct. 242.

2. Lattimer *v.* Lord, 4 E. D. Smith (N. Y.) 190.

3. *In re* Eagle Iron Works, 8 Paige (N. Y.) 385, 386. As to exception to master's report, see Creuze *v.* Bishop of London, Dick. 687, where, however, the distinction drawn is between a reference to appoint and to approve.

4. See, as to appointment of consignee in *England*, Bowersbank *v.* Colasseau, 3 Ves. 165.

In such cases the master, after approving of the receiver and of the sureties to be given by him, takes the requisite bond and files it with his report of the appointment, stating that he has approved of the bond and that it is duly filed. And upon filing such report the appointment of the receiver is complete, and he may immediately enter upon the duties of his office. If either party is dissatisfied with the appointment made by the master, the proper course is to present a petition to the court, upon due notice to all the other parties who have appeared, and who are interested in the appointment, stating the grounds of objection to the receiver and praying that the master may review his report. *In re* Eagle Iron Works, 8 Paige (N. Y.) 386. As to when the master's appointment will not be set aside in *Ireland*, see Turner *v.* Lord Donegal, 8 Ir. Eq. 235.

located, although he has since removed to another county.[1] Other matters concerning this subject will be found considered in the notes below.[2]

k. COSTS OF PROCEEDINGS—(1) *Out of Fund Realized by Receiver.*—The petitioner is entitled, under the *Irish* practice, to be paid the costs of the appointment of a receiver out of a fund realized by him; and this payment should be made in priority to the landlord's claims for rent.[3]

(2) *Where Party Appeared Personally.*—But in *England* on an appeal by the defendant to the lord chancellor, that functionary ordered the plaintiff's motion for a receiver and manager before the master of the rolls to be dismissed, but refused the costs of that motion.[4]

(3) *Where Receiver Improperly Appointed.*—In *Tennessee*, where a receiver has been improperly appointed at the instance of a party, though on a correct statement of facts, such party will be charged with the cost of the receivership, and with such rents as the receiver himself would have been properly chargeable with.[5]

l. TIME OF MAKING APPOINTMENT.—A receiver may be appointed at any stage of the proceedings, whenever the facts authorize and require the appointment.[6]

1. Bank of Monroe *v.* Schermerhorn, Clarke Ch. (N. Y.) 216.

2. **Person to be Appointed by Master.**—The selection by the master of a person to be receiver has already been considered. See topic *Who May be Appointed Receiver*, under general subdivision of Appointment. Lespinasse *v.* Bell, 2 J. & W. 437; Wynne *v.* Lord Newborough, 15 Ves. 285.

Examination Before Master.—This subject is discussed in the cases next cited. Copons *v.* Kauffman, 8 Paige (N. Y.) 587 *et seq.*; Bank of Monroe *v.* Keeler, 9 Paige (N. Y.) 251.

Master's Action as to Delivery of Property.—The right of the master to refuse to direct the delivery of property to the receiver is discussed in Eldred *v.* Hall, 9 Paige (N. Y.) 640.

Reference to Vice Chancellor.—See Delaware Bay, etc., R. Co. *v.* Markley, 45 N. J. Eq. 148; 37 Am. & Eng. R. Cas. 426.

3. Read *v.* Corcoran, 1 Ir. Ch. 235.

4. This refusal was made on the ground that the defendant, who had appeared in person, had in so doing prevented the court below from having all the assistance which was necessary for a right decision of the case, and had thus led to the plaintiffs obtaining the order appealed from and discharged. Hall *v.* Hall, 3 M. & G. 93.

5. Lockhart *v.* Gee, 3 Tenn. Ch. 333. As to vacating appointment of receiver on condition that his expenses and compensation be paid by the moving party, see McCarthy *v.* Peake, 9 Abb. Pr. (N. Y.) 167. As to when party precluded from contesting costs arising from irregularity in appointment of receiver, see State Journal Co. *v.* Commonwealth Co., 43 Kan. 97; 23 Am. & Eng. Corp. Cas. 436.

6. **At Any Stage of Proceedings.**—See Merrill *v.* Elam, 2 Tenn. Ch. 515.

Before Other Substantial Relief Can be Asked.—It is true that, in general, a receivership is ancillary or incidental to the main purpose of the bill, but it does not follow that, where a case is presented which demands the relief that can best be given by a receivership, such relief must be refused because the time has not arrived when other substantial relief can be asked. Brassey *v.* New York, etc., R. Co., 22 Blatchf. (U. S.) 79.

But *compare*, as to mortgaged railroads, American L. & T. Co. *v.* Toledo, etc., R. Co., 29 Fed. Rep. 416.

On Same Day as Commencement of Action.—A receiver cannot ordinarily be appointed before the commencement of the action, but where the record of a case shows that a receiver was appointed on the same day on which the

A court of equity does not lack jurisdiction to appoint a receiver before service of summons on the defendant or defendants, or notice given to him or them; for equity would be shorn of much of its remedial efficacy if a court administering it could not make such an appointment until the summons had been served on the parties to be affected by it, or until it was shown that they were purposely avoiding its service.[1] And where bankruptcy and consequent loss to a trust estate is expected, a receiver may be appointed before the service of the writ in the action.[2] But while the court may, on a proper showing, appoint a receiver to take charge of the assets of an insolvent corporation, for mere purposes of preservation of the same from destruction or waste, before acquiring jurisdiction to adjudicate upon the rights of such corporation, the court has no power to appoint a receiver authorized to sell and convey real estate of the corporation.[3]

It has already been seen that the appointment may be made, in cases of emergency requiring it, before appearances or before answer.[4] And a receiver may be appointed while a plea or de-

action was commenced it will be presumed that each was done in its proper order. Elwood *v.* First Nat. Bank, 41 Kan. 477.

In Vacation Before Bill Filed.—Yet the appointment of a receiver in vacation before bill filed, was held invalid in Harwell *v.* Potts, 80 Ala. 72.

1. Before Service of Summons or Process.—Maynard *v.* Railey, 2 Nev. 319. As to avoidance or impossibility of service, see People *v.* Norton, 1 Paige (N. Y.) 17.

2. *In re* H's estate, L. R., 1 Ch. Div. 276; see also for like view where bankrupt disappeared and bill could not be served, London & Southwestern Bank, 19 Week. Rep. 676, and as to insolvent corporation, see St. Louis, etc., Coal, etc., Co. *v.* Sandoval Coal, etc., Co., 111 Ill. 39.

3. St. Louis, etc., Coal, etc., Co. *v.* Sandoval Coal & Mining Co., 111 Ill. 32.

4. Before Appearance or Answer.—See under appointment in general, this title, *English Authorities.* Metcalfe *v.* Pulvertoft, 1 V. & B. 180; Brodie *v.* Barry, 3 Meriv. 696; Vann *v.* Barnett, 2 Bro. C. C. 158; Duckworth *v.* Trafford, 18 Ves. 283; Middleton *v.* Dodswell, 13 Ves. 269; Tanfield *v.* Irvine, 2 Russ. 151; Maguire *v.* Allen, 1 B. & B. 76; Gouthwaite *v.* Rippon, 1 Beav. 55; Ramsbottom *v.* Freeman, 4 Beav. 145; Dowling *v.* Hudson, 14 Beav. 424; Hart *v.* Tulk, 6 Hare 612; Meaden *v.* Sealey, 6 Hare 621; Gibbins *v.* Mainwaring, 9 Sim. 77; Woodyatt *v.* Gresley, 8 Sim. 189; Taylor *v.* Eckersley, L. R., 2 Ch. Div. 303.

Irish Authorities.—Acheson *v.* Hodges, 3 Ir. Eq. 520; Quin *v.* Gunn, 1 Hog. 75; Nash *v.* Hughes, H. & J. 400, and note.

See also, generally, Fitzgerald *v.* Quinlan, 12 Ir. Eq. 393. *Contra, compare* Lynch *v.* Nolan, 10 Ir. Eq. 57; Arthurs *v.* Arthur, 1 Hog. 96.

Authorities in the United States.—Whitehead *v.* Wooten, 43 Miss. 526; Weis *v.* Goetter, 72 Ala. 260; Micon *v.* Moses, 72 Ala. 440; Bank of Monroe *v.* Schermerhorn, Clarke Ch. (N. Y.) 215; Sandford *v.* Sinclair, 8 Paige (N. Y.) 374; Bloodgood *v.* Clark, 4 Paige (N. Y.) 576; Clark *v.* Ridgely, 1 Md. Ch. 71; Williamson *v.* Wilson, 1 Bland (Md.) 422; Johns *v.* Johns, 23 Ga. 36; Williams *v.* Jenkins, 11 Ga. 597; Jones *v.* Dougherty, 10 Ga. 281; Davis *v.* Browne, 2 Del. Ch. 190; Baker *v.* Backus, 32 Ill. 115; Brinkman *v.* Ritzinger, 82 Ind. 363. *Compare* Probasco *v.* Probasco, 30 N. J. Eq. 109; Brick *v.* Robinson, 55 Md. 418; Latham *v.* Chafee, 7 Fed. Rep. 529; Beecher *v.* Bininger, 7 Blatchf. (U. S.) 173; Simmons *v.* Wood, 45 How. Pr. (N. Y.) 269; West *v.* Swan, 3 Edw. Ch. (N.Y.) 421; Phœnix Mut. L. Ins. Co. *v.* Grant, 3 McArthur (D. C.) 223.

As to stringent necessity requisite for appointment before defendant heard in response to application, see Blondheim *v.* Moore, 11 Md. 374; Haight *v.* Burr, 19 Md. 136; Voshell *v.* Hynson, 26 Md. 93.

murrer to the bill is pending.[1] A special appearance constitutes a step in a pending action, so as to authorize the appointment of a receiver, although the original notice or service is defective, and the appearance is for the purpose of quashing such notice.[2] And a receiver may also, in a proper case, be appointed before the hearing or decree.[3] So the appointment may of course be made by decree at the hearing.[4] And it may even be made after decree, where it is shown to be necessary.[5]

1. **While Plea or Demurrer Pending.**—Thompson *v.* Selby, 12 Sim. 100; Tumbull *v.* Prentiss Lumber Co., 55 Mich. 396; 8 Am. & Eng. R. Cas. 257; discussing subject and reviewing authorities.

2. **After Special Appearance.**—Hellebush *v.* Blake, 119 Ind. 349.

3. **Before Hearing or Decree.**—See Anderson *v.* Guichard, 9 Hare 275, as to receiver *pendente lite*, where suit never brought to a hearing. Edwards *v.* Edwards, 17 Jur. 826, relating to same matter; Jones *v.* Pugh, 8 Ves. 71, as to case where it appears that realty will be chargeable for debts. Const *v.* Harris, T. & R. 517, as to requisites in partnership cases. Fripp *v.* Chard R. Co., 11 Hare 264; Thompson *v.* Selby, 12 Sim. 100; Taylor *v.* Eckersley, 45 L. J. Ch. 527; Bartley *v.* Bartley, 9 Jur. 25; Porter *v.* Lopes, L. R., 7 Ch. Div. 359; Brinkman *v.* Ritzinger, 82 Ind. 363; Syracuse City Bank *v.* Tallman, 31 Barb. (N. Y.) 208.

Consult also, as to appointment of receiver before decision or validity of assignment of profits of office of clerks of peace. Palmer *v.* Vaughan, 3 Swanst. 174; Cooper *v.* Reilly, 1 R. & M. 562, as to a like matter.

But *compare* Houlditch *v.* Lord Donegal, Beat. 149; Tolderry *v.* Colt, 1 Y. & C. 621, as to rents and profits of realty; Owen *v.* Homan, 4 H. L. Cas. 997, as to appointment before title established. Union Mut. L. Ins. Co. *v.* Union Mills Plaster Co., 37 Fed. Rep. 293; 3 Lawy. Rep. Ann. 94, as to appointment not merely ancillary.

On Application for Homestead.—As to allowance of receiver on application for homestead and before final adjudication thereon, see Landrum *v.* Chamberlin, 73 Ga. 728.

In Mortgage Foreclosure Suits.—Before decree, when whole debt due, see Bank of Ogdensburgh *v.* Arnold, 5 Paige (N. Y.) 42.

Between Verdict and Judgment.—Pending motion for new trial, see Whitney *v.* Buckman, 26 Cal. 451.

4. **At Time of Decree.**—Osborne *v.* Harvey, 1 Y. & C., C. C. 116; Fingal *v.* Blake, 1 Moll. 118; Shee *v.* Harris, 1 J. & L. 92, stating the former practice to have been to grant a receiver only on motion. Merrill *v.* Elam, 2 Tenn. Ch. 515.

Under the *Irish* practice a receiver will be appointed on the registrar's notes of the decree, which has not yet been made up. Nash *v.* Flynn, 2 Hog. 250, departing from ruling in Nash *v.* Dillon, 1 Moll. 46.

5. **After Decree.**—Bowman *v.* Bell, 14 Sim. 292; Cooke *v.* Gwyn, 3 Atk. 690; Attorney-General *v.* Mayor, etc., of Galway, 1 Moll. 104; Thomas *v.* Davies, 11 Beav. 30; Wright *v.* Vernon, 3 Drew. 120; Connelly *v.* Dickson, 76 Ind. 444; Moran *v.* Johnston, 26 Gratt. (Va.) 109; see also Merrill *v.* Elam, 2 Tenn. Ch. 515; Shulte *v.* Hoffman, 18 Tex. 682; *In re* Bywater's Estate, 1 Jur. N. S. 227; Brinkman *v.* Ritzinger, 82 Ind. 363; Schreiber *v.* Carey, 48 Wis. 219; Smith *v.* Tiffany, 13 Hun (N. Y.) 672; Astor *v.* Turner, 11 Paige (N. Y.) 437; 43 Am. Dec. 766. But *compare contra* Barker *v.* Roe, 1 L. & T. 662, which seems to be reported on other points, as Barber *v.* Roe, 4 Ir. Eq. 692; and see as to strong showing required in foreclosure cases, Adair *v.* Wright, 16 Iowa 387; Hackett *v.* Snow, 10 Ir. Eq. 220.

Want of Restrictions on Appointment After Decree.—The filing of a supplemental bill is not required in such a case; Bowman *v.* Bell, 14 Sim. 392; and the appointment may be made although further consideration generally or the particular matters in controversy have been reserved; Cooke *v.* Gwyn, 3 Atk. 690; Hiles *v.* Moore, 15 Beav. 175.

When Appointment Made After Decree.—There is a sufficiently urgent case where a person not a party to the cause has been in possession more than nineteen years, and if allowed to continue, may become absolutely entitled, as against all parties. Thomas *v.* Davies, 11 Beav. 30.

Even pending an appeal from an order appointing a receiver, and while it remains unexecuted, a court may suffer another plaintiff to proceed, and obtain and complete an appointment of a receiver of the same property, for the benefit of all who may be similarly entitled; and, indeed, cases may often arise in which property is at hazard, where such a course would be highly beneficial to both.[1] So after appeal from a final judgment, the suit is still pending, so that the lower court may, on application, appoint a receiver.[2] But after the dismissal, by the plaintiff of an action to procure the appointment of a receiver and an injunction, the defendant cannot, in such action, procure the appointment of a receiver; and an order making such appointment will be reversed as erroneous.[3]

So there may be a receiver after decree when he is appointed not for the purpose of turning out parties in possession, but of collecting the rents and preserving them, and insuring their proper application to the outgoings of the estate, and generally, of protecting the estate for the person to whom it should ultimately be determined to belong; Wright *v.* Vernon, 3 Drew. 121; and where the defendant by his conduct in failing to produce title deeds has prevented the complaint from obtaining the benefit of the decree for a sale of lands, Shee *v.* Harris, 1 J. & L. 93; and where there is danger of loss by the possible inability of a prior mortgagee to refund, if he should be ordered to do so and the appointment is necessary to protect the rents of the estate, so that they may be duly apportioned among those ultimately found entitled to them; Hiles *v.* Moore, 15 Beav. 175.

The strongest ground which can be addressed to the court upon such occasions is the utter insolvency of the party in possession; Merrill *v.* Elam, 2 Tenn. Ch. 516; so that after a final decree in a cause confirming a sale of land and awarding a writ of assistance to put the purchaser in possession, from which decree the defendant in possession has prayed for and obtained an appeal, the court may, upon the application of the purchaser, at the same term and such good cause as the defendant's insolvency shown, set aside the order granting the appeal, and appoint a receiver to take possession of the land pending the appeal; Merrill *v.* Elam, 2 Tenn. Ch. 514; and this conclusion is strengthened by the fact that it is also of course after a decree fixing rights to realty to enjoin waste pending an appeal; Wright *v.* Atkyns, 1 V. & B.314; as well as where no appeal appears to be taken; Goodman *v.* Kine, 8 Beav. 379. A receiver may sometimes be allowed after decree of foreclosure and sale of the mortgaged property; but such power will be slowly exercised except in an extreme case and to prevent palpable wrong and injustice. Haas *v.* Chicago Bldg. Soc., 89 Ill. 507, and discussion at pp. 504–7. See also, as to allowance of receiver after decree of foreclosure, Thomas *v.* Davies, 11 Beav. 30; Hyman *v.* Kelly, 1 Nev. 182; Astor *v.* Turner, 11 Paige (N. Y.) 437; 43 Am. Dec. 766; Howell *v.* Ripley, 10 Paige (N. Y.) 48.

1. **Pending Appeal.** — Lottimer *v.* Lord, 4 E. D. Smith (N. Y.) 191.

2. Brinkman *v.* Ritzinger, 82 Ind. 364.

As to appointment of receiver pending appeal in foreclosure suit, see also Penn. Mut. L. Ins. Co. *v.* Semple, 38 N. J. Eq. 315; or to preserve rents and profits for creditors, though case pending in appellate court upon a *supersedeas*, see Beard *v.* Arbuckle, 19 W. Va. 147 (discussed in Hutton *v.* Lockridge, 27 W. Va. 433); or from a final decree confirming a sale of land and awarding a writ of assistance to put the purchaser in possession. See Merrill *v.* Elam, 2 Tenn. Ch. 514. But see, as to contrary view where the object of the receivership is to carry the judgment into effect, Havemeyer *v.* Superior Court, 84 Cal. 327; 18 Am. St. Rep. 225.

3. **Not After Dismissal of Action.**— Dale *v.* Kent, 58 Ind. 585. But *compare* Caldwell *v.* Garfield Nat. Bank, 4 N. Y. Supp. 6.

A receiver may be appointed by a judge in vacation.[1]

m. PLACE OF MAKING APPOINTMENT—(1) *At Chambers.*—Under the *English* practice, where the application for the appointment of a receiver is made for the first time in the cause, it must be heard in court; but where the application is only to supply the place of a receiver already appointed, and whose office has become vacant by death or otherwise, it may be made in chambers.[2]

(2) *In County Where Judgment Debtor's Property Located.*—A receiver may be appointed, and a reference therefore made, in the county where a judgment debtor lived when execution issued, if his property still remains there, though he has since removed to another county.[3]

(3) *Where Hearing Ordered Before Resident Judge of District.*—Where the judge assigned to hold the courts of a district granted a restraining order, with a rule to show cause why a receiver should not be appointed returnable on a day after the close of the circuit, and before the resident judge of the district, this was held not erroneous, and to give jurisdiction to the latter judge.[4]

n. PLEADINGS AND PROOFS—(1) *Grounds and Evidence.*—The facts which show the necessity or propriety of the appointment should be stated in the bill, so that the other party may answer them.[5]

But under the practice in some jurisdictions at least, it is not essential that the facts upon which the application is based be set forth in the pleading, but it is sufficient if they appear by affidavit upon the hearing.[6]

1. Smith *v.* Butcher, 28 Gratt. (Va.) 151. See further, under subdivision on *Jurisdiction to Make Appointment. Compare* Kerr *v.* Hill, 27 W. Va. 616; Pressley *v.* Harrison, 102 Ind. 18; Hammock *v.* Farmers' L. & T. Co., 105 U. S. 82 *et seq.;* 7 Am. & Eng. R. Cas. 469 *et seq.;* Harwell *v.* Potts, 80 Ala. 72.

2. Grote *v.* Bing, 9 Hare (App.) 1; See also as to appointment at chambers, Booth *v.* Coulton, 16 W. R. 684; Blackborough *v.* Ravenhill, 16 Jur. 1085; Kilgore *v.* Hair, 19 S. Car. 487; and under *Jurisdiction to Make Appointment*, in present general subdivison.

3. Bank of Monroe *v.* Schermerhorn, Clarke Ch. (N. Y.) 216.

See further under *Jurisdiction to Make Appointment*, in present general subdivision.

4. Stith *v.* Jones, 101 N. Car. 364.

5. Swift, C. J., in Tomlinson *v.* Ward, 2 Conn. 400. See also Clark *v.* Ridgely, 1 Md. Ch. 72, on *ex parte* application In every case in which the court is asked to deprive the defendant of the possession of his property without a hearing, or an opportunity to oppose the application, the particular facts and circumstances which render such a summary proceeding proper, should be set forth in the bill or petition on which such application is founded. Verplanck *v.* Mercantile Ins. Co., 2 Paige (N. Y.) 450. See also Fricker *v.* Peters, 21 Fla. 257.

Amendment of Bill.—Not allowed, under English chancery practice, pending bringing on of motion. Southwaite *v.* Rippon, 1 Beav. 55. *Compare* Hart *v.* Tulk, 6 Hare 612.

Misconduct of Part of Corporate Directors.—Insufficiency of allegation of Belmont *v.* Erie R. Co., 52 Barb. (N. Y.) 665.

6. Commercial, etc., Bank *v.* Corbett, 5 Sawy. (U. S.) 177; Hottenstein *v.* Conrad, 9 Kan. 438. See also Elwood *v.* First Nat. Bank, 41 Kan. 478.

The application to appoint a receiver must be supported by evidence showing that the appointment is necessary;[1] and such evidence must be stronger than a mere affidavit or verification on information and belief;[2] for there must be an averment of facts to sustain the burden which rests on the applicant to establish a proper case for the desired interference;[3] and the need of an affirmative showing of the necessity for a receiver is such that it will not be sufficient to allege ignorance of material facts or to set forth a legal conclusion without stating the facts on which it is predicated.[4]

(2) *Allegations Held Insufficient.*—An allegation of insolvency as a basis for a receivership is wholly insufficient where it rests alone on the failure of the party to pay a debt at maturity.[5] And a petition for the appointment of a receiver of the mortgaged premises in a foreclosure suit is insufficient where it does not show whether the mortgagor or some subsequent purchaser under him is in possession of the mortgaged premises; nor state that any of the parties to the suit are in possession, either in person or by their tenants; nor indicate that the party personally liable for any deficiency is irresponsible.[6]

As to allegations concerning his appointment, required of receiver who sues to set aside an assignment for the benefit of creditors as void, see Cooper *v.* Bowles, 28 How. Pr. (N. Y.) 11.

As to want of allegations or proof of danger to property or apprehension of injury thereto, or of irresponsible character of defendants, see Willis *v.* Corlies, 2 Edw. Ch. (N. Y.) 286; and to effect of presence of similar allegations, see Rogers *v.* Marshall, 6 Abb. Pr. N. S. (N. Y.) 461.

1. See, as to need of a strong case against an executor, especially before answer, Middleton *v.* Dodswell, 13 Ves. 268.

2. Haines *v.* Carpenter, 1 Woods (U. S.) 266; Davis *v.* Reaves, 2 Lea (Tenn.) 651. See also Darcin *v.* Wells, 61 How. Pr. (N. Y.) 269.

So it is not sufficient that the complainants should say in their bill that they are "informed" of various matters which they claim to be evidences of fraud and imminent danger. Blondheim *v.* Moore, 11 Md. 365, 374-75.

3. Davis *v.* Reaves, 2 Lea (Tenn.) 65.

4. Heavilon *v.* Farmers' Bank, 81 Ind. 254. In the appointment of receivers for a bank, the court will not rest upon affidavits stating, as matters of belief, that great frauds have been committed against the bank, without stating by whom they were committed, or in what such frauds consist. Oakley *v.* Paterson Bank, 2 N. J. Eq. 180. So it is not enough to declare a belief that the property in controversy will be wasted or destroyed. Hanna *v.* Hanna, 89 N. Car. 71. But allegations on information and belief in an attorney-general's information for an injunction and a receiver, were held sufficient in Attorney-General *v.* Bank of Columbia, 1 Paige (N. Y.) 515. And an affidavit that the facts stated in the bill are true, to the best of the complainant's knowledge and belief, was upheld in Triebert *v.* Burgess, 11 Md. 459.

5. Collins *v.* Myers, 68 Ga. 532.

As to what constitutes a very strong *prima facie* case made by a complaint for a partnership receiver, see Barnes *v.* Jones, 91 Ind. 167. As to sufficiency of allegations in information by Attorney-General, asking for an injunction and a receiver against an insolvent bank, see Attorney-General *v.* Bank of Columbia, 1 Paige (N. Y.) 514.

6. Sea Ins. Co. *v.* Stebbins, 8 Paige (N. Y.) 567. For insufficient bill for railroad receiver, see Pond *v.* Franingham, etc., R. Co., 130 Mass. 194; 9 Am. & Eng. R. Cas. 551.

Ordinarily the sufficiency of a complaint, in an action in which a receiver is applied for, cannot be tested by demurrer or otherwise at the time of the application or motion for the appointment of a receiver, Bufkin *v.*

(3) *Amendments.*—The power to grant amendments in furtherance of justice, authorizes the court to permit the filing of an amended petition on the hearing for the appointment of a receiver, upon giving the adverse party opportunity to plead to the same.[1]

(4) *Title of Pleading.*—Petitions for receivers on tenants' and receivers' recognizances should, under the *Irish* practice, be entitled in the name of the Queen; and the attorney-general should be the petitioner.[2]

o. PRAYER.—A prayer for a receiver is, generally speaking, not necessary to obtain the appointment, if the facts stated authorize such appointment.[3] But it has been held that a receiver will not be appointed on motion before decree, unless the appointment was prayed for by the bill,[4] though it has been ruled that such an appointment may be made after decree,[5] because the ground for a receiver consists of circumstances arising subsequent to the decree,[6] and which could, therefore, not be the basis of a prayer.[7]

p. AFFIDAVITS—(1) *Affidavit in Support of Motion.*—Where a receiver is asked before answer, there must be strong special

Boyce, 104 Ind. 55; for no pleadings are contemplated so far as respects the motion or application, Pressley *v.* Harrison, 102 Ind. 20; and accordingly it is not error to refuse to permit a demurrer to be filed to such an application, Pouder *v.* Tate, 96 Ind. 331; nor is any formal answer authorized to a petition, pending a cause, for a receiver, Buchanan *v.* Berkshire L. Ins. Co., 96 Ind. 533.

A petition in a suit to foreclose a chattel mortgage warrants the appointment of a receiver, though it does not show that the mortgage was duly recorded, Reynolds *v.* Quick, 128 Ind. 316, holding the petition sufficient in other respects.

A general charge in a bill, that the defendant, another executor and trustee, is committing waste on the testator's property, without specifying any act of waste, is not sufficient to sustain an injunction or a receiver; nor, upon such a bill, will a receiver of the rents and profits of the testator's real estate be granted where the plaintiff does not allege in his bill, and clearly prove, the insufficiency of the personal estate to pay the debts, and does not pray by his bill for the application to that object of the realty, or the rents and profits thereof, Sanders *v.* Christie, 1 Grant's Ch. (Up. Can.) 139. As to insufficiency of mere general charges of misconduct against an executor, without any specifications of fact, see Blair *v.* Green, 45 N. J. Eq. 676.

1. McCord *v.* Weil, 29 Neb. 682.

2. Reg. *v.* Cruise, 2 Ir. Ch. 66.

But the receiver in the cause is the proper person to present the petition and to make the verifying affidavit. Daly *v.* Lynch, 9 Ir. Eq. 3.

3. Henshaw *v.* Wells, 9 Humph. (Tenn.) 584; Ladd *v.* Harvey, 21 N. H. 521; Malcolm *v.* Montgomery, 2 Moll. 500; Merrill *v.* Elam, 2 Tenn. Ch. 515; Merchants' Nat. Bank *v.* Raymond, 27 Wis. 571.

See also as to receiver at hearing without prayer, Osborne *v.* Harvey, 1 Y. & C., C. C. 116, and as to appointment in general without prayer, Commercial, etc., Bank *v.* Corbett, 5 Sawy. (U. S.) 177; Clyburn *v.* Reynolds, 31 S. Car. 91, 116, and as to receiver without prayer in supplemental bill, Hall *v.* Kirby, Exch. 11 June, 1831, noted in 5 Chitty's Eq. Index (4th ed.), p. 5212.

4. Pare *v.* Clegg, 7 Jur., N. S. 1136, as to propriety of indorsing writ with claim for receiver, L. R., 1 Ch. Div. 690.

5. Connelly *v.* Dickson, 76 Ind. 444. See Bowman *v.* Bell, 14 Sim. 392. But *compare contra*, Barlow *v.* Gaines, 8 Beav. 330.

6. See Connelly *v.* Dickson, 76 Ind. 444.

7. See Wright *v.* Vernon, 3 Drew. 120.

grounds to induce the court to interfere; and when a default is entered, the rule would doubtless be to require affidavit, before the property shall be taken out of the custody of its true owners.[1]

(2) *Affidavit in Opposition to Motion.*—On a motion on bill and notice for the appointment of a receiver, as well as for an injunction, the affidavit of the defendant may be read in opposition.[2]

(3) *Answer Aided by Affidavits.*—It has been said that where an application for a receiver is made after answer, the plaintiff can rely only upon the admissions in the answer.[3]

But where a notice of a motion for a receiver had been given, and before the motion was heard the answer came in, Lord Eldon permitted the plaintiff's affidavits to be read, and regarded the answer as a counter affidavit.[4]

And as the object of the court is to be informed of the true circumstances of the case, there seems to be no reason why affi-

1. Baker *v.* Backus, 32 Ill. 116. Where statements, not founded on allegations in the bill, are introduced into affidavits in support of an application for a receiver, the court will disregard them, and a defendant acts properly in not answering them. Dawson *v.* Yates, 1 Beav. 306. On a motion for a receiver in New York, affidavits may be read in support of the bill; but they cannot be read to enlarge the case made by the bill. Hayes *v.* Heyer, 4 Sandf. Ch. (N. Y.) 487. In *Mississippi*, on a sworn bill, no affidavits are required to support the bill on a motion for a receiver before answer. Simmons *v.* Henderson, Freem. Ch. (Miss.) 500. The propriety in *Alabama* of affidavits in support of application, and counter-affidavits in opposition thereto, is declared in Micou *v.* Moses, 72 Ala. 440, discussing requisites of such affidavits, at p. 441.

An affidavit upon which a provisional remedy, like that of a receivership is based, is sufficiently verified in *North Carolina* when made before a commissioner for that State resident in another State, and authenticated by his official signature and seal. Young *v.* Rollins, 85 N. Car. 489; 12 Am. & Eng. R. Cas. 458.

2. Kean *v.* Colt, 5 N. J. Eq. 374. But under the Irish practice authorizing a conditional order for a receiver the only cause which can be shown against making such order absolute is the filing of the answer; and an affidavit is insufficient, M'Cartney *v.* O'Neill, 5 Ir. Eq. 494. Nor is the filing of an affidavit "cause shown" against an order of appointment unless the party serves notice of motion to show cause and moves accordingly, Jameson *v.* Scarry, 9 Ir. Eq. 476. As to where leave given to show cause after appointment of receiver, see Cassidy *v.* Hopkins, 10 Ir. Eq. 209. As to what is good cause shown, see Warren *v.* Warren, 13 Ir. Eq. 70. As to need of petition to show cause, under Mortgage Act, see Pakenham *v.* Darcy, 7 Ir. Eq. 476.

A verified answer, which is used in opposition to a motion for the appointment of a receiver before the time for replying has expired, will be treated as an affidavit to which complainant may file and use counter affidavits, where it does not deny the equity of the bill except in one particular, which is conclusive on defendant at the time, and where the denial itself is too indefinite, Rankin *v.* Rothschild, 78 Mich. 15.

3. See Ladd *v.* Harvey, 21 N. H. 520. As to answer insufficiently denying allegations in trust case, see McCandless *v.* Warner, 26 W. Va. 782. For instance of answer overthrowing case made by bill, see Drury *v.* Roberts, 2 Md. Ch. 161.

4. Goodman *v.* Whitcomb, 1 J. & W. 591. So where there were two material defendants, and one only had answered, the plaintiff was permitted to read his affidavit in support of the application, and the answer which had come in was treated as an affidavit, Kershaw *v.* Mathews, 1 Russ. 362.

davits, taken with proper restrictions, should not be considered in connection with the answer, particularly in a case where the other party has produced affidavits on his side, and where he has not objected to the character of the evidence.[1]

(4) *Affidavit in Reply to Answer.*—Upon motion for a receiver upon bill and answer, an affidavit may, under the *Irish* chancery practice, be read in reply to the answer, at least where it is in explanation of a doubtful passage in an answer not disclosing the whole truth;[2] but under the *English* equity rule the plaintiff must go to the expense of amending his bill, and cannot introduce affidavits to meet the answer, either generally[3] or presumably, on applications for receivership, unless the object be not to contradict the answer, but to support a particular material allegation not noticed in the answer.[4]

In *Mississippi*, on motion for a receiver, on bill and answer, where the answer is a denial of the equity of the bill, the plaintiff, if he wishes to succeed, must introduce evidence to disprove the answer.[5]

(5) *Affidavits in Reply to New Matter in Defendant's Affidavit.*—On a motion for a receiver, under the *New Jersey* practice, if a defendant sets up in his affidavits any new matter not directly responsive to the matters set up in complainant's affidavits, and relies upon such new matter, the complainant may read affidavits in reply to this new matter.[6]

q. ANSWER—(1) *Appointment on Answer.*—A receiver will not be appointed, on the admissions in the answer, under the *Irish* practice, unless the motion is made immediately on the answer being filed,[7] nor will the court entertain an application for a receiver upon the answer, where the bill is not filed by a creditor, and where no special case, as of irreparable mischief, is made out.[8]

1. Gilchrist, C. J., in Ladd *v.* Harvey, 21 N. H. 520. But the general rule is that the answer is to be taken as true, when responsive to the allegations of the bill, unless discredited by two witnesses or one witness with pregnant circumstances; and in the absence of such discrediting, proof in its support is not required, Thompsen *v.* Diffenderfer, 1 Md. Ch. 495. As to evidence insufficient to discredit answer, see Voshell *v.* Hynson, 26 Md. 94. As to effect of stronger affidavits in support of answer than in support of bill, see Rhodes *v.* Lee, 32 Ga. 472.

2. Bell *v.* M'Loghlin, F. & K. 274.

3. See Clapham *v.* White, 8 Ves. 36; Smythe *v.* Smythe, 1 Swanst. 253; Norway *v.* Rowe, 19 Ves. 153.

4. See [illegible] to injunction asked in connection with a receiver, Jefferys *v.* Smith, 1 J. & W. 300.

5. Simmons *v.* Henderson, Freem. Ch. (Miss.) 500.

6. Sobernheimer *v.* Wheeler, 45 N. J. Eq. 619.

7. Young *v.* Graham, 1 Hog. 178. On a motion for a receiver on the defendant's answer, the plaintiff may use an affidavit to ascertain the exact amount of arrears of annuity due to him. Hogan *v.* Bodkin, 1 Hog. 374.

8. Galway *v.* Barrow, 2 Jones 724. So, when the answer has been filed six months a receiver will not be granted thereon without an affidavit. Loveday *v.* D'Isterre, H. & J. 151, nor by absolute order, where the first answer had been filed eleven months before the motion, although the last answer, by another of

(2) *Appointment Before Answer.*—When a receiver is appointed before the coming in of the answer, the defendant will be allowed to move to discharge the receiver after the answer is interposed; and if the bill and answer, taken together, show that a receiver ought not to have been appointed, the receiver should be discharged.[1]

(3) *Effect of Oral Answer.*—If a petition for a receiver, made pending a suit and setting forth new facts, which could not be brought before the court on a mere motion, be not regularly and properly denied by a written answer under oath, but be met by an oral showing of cause against it, the whole of the petition, or so much of it as is not so denied, must be taken to be true.[2]

r. PARTIES TO PROCEEDINGS.—There must be a case in court and an opposite party, to warrant the appointment of a receiver,[3] and the need of adversary parties to the proceeding precludes partners from obtaining a receiver, without any suit pending between them, upon mutual request put in the form of complaint and answer.[4]

(1) *Right of Opposite Party to be Heard.*—Indeed, it is regarded as indispensable that the person, natural or artificial, whose property is to be taken from him and placed in the power of a receiver, should be made a party to the proceeding, and be given an opportunity to resist the application, the granting of which may work him irretrievable injury.[5]

(2) *Stranger Cannot Institute or Conduct Proceeding.*—Nor can a stranger, who has no interest in the subject-matter of the litigation or connection therewith, inaugurate or conduct a proceeding for the appointment of a receiver.[6]

(3) *Party at Whose Instance Appointment Made.*—The practice is, in fact, to appoint receivers only at the instance of a party who has an acknowledged interest or a strong presumption of title in himself;[7] and accordingly a receiver will not be appointed at the instance of a person who has been cast in an action for equitable relief against one who has been adjudged to be the legal and fit custodian of the property.[8]

the defendants, had been filed in the preceding term. Spratt *v.* Ahearne, H. & J. 800.

1. Phœnix Mut. L. Ins. Co. *v.* Grant, 3 McArthur (D. C.) 220, 223.

2. Chase's Case, 1 Bland (Md.) 212; 17 Am. Dec. 278.

3. Hardy *v.* McClellan, 53 Miss. 512. As to requirement that an action must be pending, see *In re* Hancock, 27 Hun (N. Y.) 576, and subject of *Prerequisites to Appointment*, under the present general subdivision.

4. Pressley *v.* Harrison, 102 Ind. 12.

5. Baker *v.* Backus, 32 Ill. 96. For an instance arising under the *Irish* practice, where leave was given to the plaintiff to move for a receiver in a suit defective for want of parties, see Sullivan *v.* Sullivan, 8 Ir. Eq. 73.

6. O'Mahoney *v.* Belmont, 62 N. Y. 143. Sureties of an intestate cannot maintain a bill for a receiver against parties alleged to be intermeddling with his estate, and to have custody of the assets thereof without lawful authority. Walker *v.* Drew, 20 Fla. 918.

7. Fellows *v.* Heermans, 13 Abb. Pr. N. S. (N. Y.) 8.

8. Fellows *v.* Heermans, 13 Abb. Pr. N. S. (N. Y.) 8.

(4) *Parties in Particular Instances.*—For various special cases involving the parties to proceedings for appointment, see the notes below.[1]

s. ORDER FOR RECEIVER—(1) *Description of Property.*—An order for a receiver ought to state distinctly, on the face of it, over what property the receiver is appointed.[2]

(2) *Form of Order.*—The form of an order for the appointment of a receiver of an insolvent bank is set out in the case cited in the note below.[3]

(3) *Conditional Order.*—The order for the appointment of a receiver may be made subject to conditions;[4] and the vacation of the order may be allowed only upon terms.[5]

(4) *Interlocutory Order.*—A receiver for a creditor will not be appointed by an interlocutory order, under the *Irish* practice, unless in exceptional cases.[6]

(5) *Effect of Order.*—The effect of an order appointing a receiver is developed in the note below.[7]

1. **Infant Claiming Against Estate.**—Where an infant is entitled to property as heir, or to income under a contested will, and files a bill for maintenance and a receiver, all the persons named in the will as executors or trustees are necessary parties to the suit. Rice *v.* Tonnele, 4 Sandf. Ch. (N. Y.) 578.

Executors' Bill of Revivor.—Where no amendment of a bill had been made by striking out the names of co-plaintiffs as ordered, and the executors of the plaintiff file a bill of revivor as if the party they represent were the sole plaintiff, their motion for a receiver, in the revived cause, is irregular. Hughes *v.* Dumbell, 1 Russ. 321.

Receiver of Corporation.—An order appointing a receiver of an extinct corporation cannot properly be made except in a proceeding to which its successor or substitute is a party. Young *v.* Rollins, 85 N. Car. 488; 12 Am. & Eng. R. Cas. 457. The fact that an insolvent national bank was alone made a party defendant to an application for a receivership over it, was held not a material defect of parties upon such an interlocutory proceeding, in Elwood *v.* First Nat. Bank, 41 Kan. 479.

2. Crow *v.* Wood, 13 Beav. 273. See also O'Mahoney *v.* Belmont, 62 N. Y. 148.

3. Matter of Franklin Bank, 1 Paige (N. Y.) 85. As to order held to amount to appointment of receivers of railroad corporation, see *In re* Fifty-four First Mortgage Bonds, 15 S. Car. 313; 9 Am. & Eng. R. Cas. 746; *Ex parte* Brown, 15 S. Car. 531.

Order Where Receiver by Stipulation.—The scope of an order in such a case is considered in Hooper *v.* Winston, 24 Ill. 365.

Order Providing Against Conflict With Prior Receiver.—See Thau *v.* Bankers, etc., Tel. Co., 56 N. Y. Super. Ct. 588.

4. See Frelinghuysen *v.* Colden, 4 Paige (N. Y.) 207; Central Trust Co. *v.* St. Louis, etc., R. Co., 41 Fed. Rep. 554; 42 Am. & Eng. R. Cas. 30.

5. See West *v.* Chassen, 12 Fla. 336.

6. Plasket *v.* Lord Dillon, 1 Hog. 201, specifying the exception as arrears of interest or annuity, or the fact that the fund is a failing one.

According to the *Irish* practice, under the New Rules in vogue in 1844, the order for a receiver was made absolute in the first instance, but under the Old Rules any party might come in and show cause against a conditional order which might affect him. Wilson *v.* Owens, 8 Ir. Eq. 516.

7. **Effect on Property.**—A mere order that a receiver shall be appointed does not place the property *in custodia legis.* Dutcher *v.* Culver, 24 Minn. 593.

Effect on Collection of Rents.—Where the order appointing a receiver gives him "full power to collect the rents, take care of and preserve the same," he is thereby authorized to collect the rents to become due as well as those already due. Cox *v.* Volkert, 86 Mo. 511.

Effect of Appointment or Order on Maintenance of Actions.—The granting

(6) *Property Affected by Order.*—This subject in some of its special phases will be found developed in the note below.[1]

(7) *Validity of Order.*—Various interesting aspects of this subject are brought out in the note below.[2]

(8) *Evading Obedience to Order.*—Obedience to an order appointing a receiver cannot be evaded on the ground that the order is not sufficiently specific.[3]

of an injunction against a bank, and the appointment of receivers therefor, do not incapacitate the bank for maintaining actions in its own name, at the instance of the receivers; nor does the omission of the receivers to be sworn vitiate their proceedings. American Bank *v.* Cooper, 54 Me. 441. For construction of an order appointing a receiver for a corporation at the instance of stockholders, and held merely to confer authority to bring suit in case the court should levy an assessment, see Glenn *v.* Macon, 32 Fed. Rep. 8; 20 Am. & Eng. Corp. Cas. 572.

No Relation Backwards.—The order appointing a receiver, cannot, as against third persons, date or relate back beyond the time of granting it. As to the operation of the order from its date, see Wilson *v.* Allen, 6 Barb. (N. Y.) 545; Rutter *v.* Tallis, 5 Sandf. (N. Y.) 610; West *v.* Fraser, 5 Sandf. (N. Y.) 654; Lottimer *v.* Lord, 4 E. D. Smith (N. Y.) 191; and it is irregular and improper to insert a clause to that effect in the order. Artisans Bank *v.* Treadwell, 34 Barb. (N.Y.) 559.

1. Order Covering Portion of Property Only.—A receivership of an insolvent corporation, obtained at the instance of a judgment creditor, should, under the *New York* statutes as they stood in 1843, have extended to all the property of the corporation; but the corporation could not complain of an order appointing a receiver of so much property only as was necessary to satisfy the complainant's debt, where it did not appear that there were any other debts. Morgan *v.* New York, etc., R. Co., 10 Paige (N. Y.) 294; 40 Am. Dec. 248.

Order Affecting Property Charged in Another Jurisdiction.—It appears that a bill may be so framed as to require the Irish Court of Chancery to appoint a receiver of estates charged by the decree of the English Court of Chancery; but the order must be founded on that decree and very specially framed; and the appointment must direct the receiver to account before the Master in England, the original jurisdiction, Houlditch *v.* Lord Donegal, Beatty 151.

2. When Order Void as Beyond Statutory Authority. — An interlocutory order of the chancellor, in *Alabama*, directing "that a receiver be appointed," etc., "and that it be referred to the register, to appoint a fit and proper person to be the receiver aforesaid," etc., is void as a delegation of power beyond the statutory authority of the court; and the writ of prohibition should go from the supreme court to revoke it, and prevent proceedings under it. *Ex parte* Smith, 23 Ala. 114 *et seq.*

Omission by Judge Not Invalidating Order.—The omission of the judge to ascertain all the creditors having supplementary proceedings does not, in *North Carolina*, require the reversal of an order appointing a receiver where some of the creditors actually appear and make themselves parties, and all have an opportunity to interpose before the final distribution of the fund. Corbin *v.* Berry, 83 N. Car. 27.

Order on Insufficient Showing Erroneous but Not Void.—If, in making the appointment, the court proceeded upon an insufficient showing, the order is erroneous, but not void or open to collateral attack. Edrington *v.* Pridham, 65 Tex. 616.

Order Vacating Attachment, Etc. — In proceedings against an insolvent debtor under the *Minnesota* statute, an order appointing a receiver is erroneous if it vacates prior attachments or garnishments of the debtor's property; for the statute gives that effect only to the appointment and qualification of the receivers. *In re* Shakopee Mfg. Co., 37 Minn. 93; 17 Am. & Eng. Corp. Cas. 147.

Order in Supplementary Proceedings. —In favor of validity of an appeal from order denying motive to set aside, see Terry *v.* Bange, 57 N. Y. Super. Ct. 551 *et seq.*

3. Edrington *v.* Pridham, 65 Tex. 617. Nor on the ground of its illegality and invalidity solely. King *v.* Barnes, 51 Hun (N. Y.) 560.

(9) *Vacating Ex Parte Order.*—After an *ex parte* appointment of a receiver has been made, the order may be vacated upon a proper showing either before or after the trial; and accordingly such action upon the order is justifiable, notwithstanding the pendency of a motion for a new trial.[1]

(10) *Appeal From Decree for Injunction and Receiver.*—A decree granting an injunction and appointing a receiver is a unit, and on appeal therefrom the higher court has power to reverse the decree *in toto* and is not limited to such action on the part relating to an injunction.[2]

t. EXTENSION OF RECEIVERSHIP—(1) *In General.*—Whenever the appointment of a receiver has been completed, whether in the suit first commenced or not, the court, instead of appointing another receiver, would undoubtedly extend the receivership over the second suit.[3] But it does not follow if, for any reason, the appointment in the one suit is completed, while the order in the other is unexecuted, that such completed appointment must be revoked, when it is not shown that it is not, in all respects, a suitable and proper appointment, and such as may, with entire propriety, be extended over both suits.[4]

(2) *Under Irish Practice.*—Under the *Irish* practice, a receiver will not be appointed over the possession of another receiver; but the proper motion is, that the receiver already appointed shall be extended to the cause in which it is sought to appoint one.[5]

1. Copper Hill Min. Co. *v.* Spencer, 25 Cal. 15.

Setting Aside for Priority of Jurisdiction.—An *ex parte* order for a receiver and an injunction will be set aside where it appears that another court gained jurisdiction by priority of application to it for an injunction. McCarthy *v.* Peake, 18 How. Pr. (N. Y.) 139; 9 Abb. Pr. (N. Y.) 165.

2. Schlecht's Appeal, 60 Pa. St. 176.

3. Lottimer *v.* Lord, 4 E. D. Smith (N. Y.) 192. *Compare* Osborn *v.* Heyer, 2 Paige (N. Y.) 343.

4. Lottimer *v.* Lord, 4 E. D. Smith (N. Y.) 192.

5. Valle *v.* O'Reilly, 1 Hog. 199, also discussing costs of objecting defendant. See also, as to requiring security proportionate to additional lands covered by appointment, Marchioness of Downshire *v.* Tyrrell, Hayes 355; as to discharge of one of the receivers, Biddulph *v.* Hickman, 1 Hog. 245; Irving *v.* Waller, 1 Hog. 259; or of all but one, where there are several, Kelly *v.* Rutledge, 8 Ir. Eq. 229; as to when discharge by consent refused, Largan *v.* Bowen, 1 S. & L. 297; as to removal confined to prior creditor, Burke *v.* Browne, 6 Ir. Eq. 215; as to when receiver will not be extended, Weldon *v.* O'Reilly, F. & K. 320; refusing to extend receivership in court of exchequer to court of chancery (but see Mills *v.* Mills, 9 Ir. Eq. 2). Harvey *v.* Wallace, 11 Ir. Eq. 339; refusing to extend receiver over second matter in which he was petitioner, though respondent consented; as to confinement of receiver to necessary portion of estate, Magrath *v.* Veitch, 1 Hog. 111.

Papers on Motion.—Where an application is made to extend a receiver from one cause to another, the notice of motion and affidavit should be entitled in both causes. Tenant *v.* Watson, 4 Ir. Eq. 700. As to statement in order in ordinary cases, that no other receiver appointed over any part of the lands, see Clarke *v.* M'Mahon, 9 Ir. Eq. 462.

Parties to be Heard.—On motions to extend receiverships, the only persons entitled to be heard are the petitioner and the debtor, and not the parties who have appointed or previously extended the receiver. Walsh *v.* Walsh, 11 Ir. Eq. 607.

When Prior Receiver Retained.—A prior receiver will be retained, if obtained at the instance of a *puisne* credit-

u. APPEAL FROM DECREE OR ORDER OF APPOINTMENT—(1) *Requisites of Record.*—On an appeal from an interlocutory decree granting an injunction and appointing a receiver, copies of the affidavits and testimony taken on the motion should, in *Pennsylvania*, be filed and accompany the record, in order that the Supreme court may rehear and decide the case on its merits.[1] But affidavits, read on the hearing of a motion for an interlocutory order appointing a receiver, become, in *Indiana*, a part of the record only by bill of exceptions, or proper order of court.[2]

(2) *Objection Not Raised Below.*—An omission to object to the receiver's failure to give the required bond precludes objection on that account on appeal.[3]

v. RIGHT OF APPEAL—(1) *Denial of Appeal in Various States.*—Under the statutes and decisions of many of the States, no appeal lies, generally on account of a want of finality, from an order appointing or refusing to appoint a receiver.[4]

or, though a prior incumbrancer should file a bill in another court and obtain a receiver. Cuppage *v.* Atkinson, Hayes & Jones 517.

Rents Received.—As to right to rents in relation to extension of receivership, see Moore *v.* Marquis of Donegal, 11 Ir. Eq. 413; Abbott *v.* Stratten, 9 Ir. Eq. 241, *et seq.;* 3 J. & L. 617, *et seq.;* Murtagh *v.* Tisdall, 2 Ir. Eq. 41, 50 *et seq.;* Davoren *v.* Collins, 2 Jones 809; Salt *v.* Donegall, Ll. & G. temp. Sugd. 82, 95, *et seq.;* Agra Bank *v.* Barry, 3 Ir. Eq. 449; Holland *v.* Cork, etc., R. Co., 2 Ir. Eq. 423; Morrogh *v.* Hoare, 5 Ir. Eq. 198, *et seq.;* Hollier *v.* Hedges, 2 Ir. Eq. 376.

Receiver in Several Causes.—As to effect of order for appointment of such receiver, directing all parties to come in under one cause, see Young *v.* Wilton, 10 Ir. Eq. 268.

1. Schlecht's Appeal, 60 Pa. St. 175.

2. Barnes *v.* Jones, 91 Ind. 166; *citing* as to reference in bill of exceptions, Stewart *v.* Rankin, 39 Ind 161; Sidener *v.* Davis, 69 Ind. 336; Douglass *v.* State, 72 Ind. 385; Colee *v.* State, 75 Ind. 511; Chambers *v.* Butcher, 82 Ind. 108, and Sanders *v.* Farrell, 83 Ind. 28.

3. Shulte *v.* Hoffman, 18 Tex. 682.

4. This is the case in *Alabama*, as to refusal to vacate order. Miller *v.* Lehman, 87 Ala. 519.

California.—Emeric *v.* Alvarado, 64 Cal. 622, reviewing the local authorities; French Bank Case, 53 Cal. 549. The former of these cases explains Williamson *v.* Monroe, 3 Cal. 385, upon the ground that the order for the appointment of a receiver may then (1853) well have been appealable under the statutes, though it does not clearly appear from what the appeal was taken, Guy *v.* Ide, 6 Cal. 99, 101; on the ground that no point was made as to the appealability of the order, and, besides, the order appealed from was one made after final judgment, Neall *v.* Hill, 16 Cal. 149; 76 Am. Dec. 508; on the ground that the appeal was from a final judgment, whereby the receiver was appointed; Whitney *v.* Buckman, 26 Cal. 453, upon the ground that it held that the order appointing a receiver, which was not appealed from, could not be reviewed on an appeal taken from a subsequent order for the payment of money by the receiver, though it may be that the indicated view of the court was correct, that an appeal could have been taken from the order of appointment, as a special order made after final judgment; and Corcoran *v.* Doll, 35 Cal. 479, because there the appeal was from an order granting an injunction also.

Illinois.—As to writ of error, Coates *v.* Cunningham, 80 Ill. 468.

Kansas.—Kansas Rolling Mill Co. *v.* Atchison, etc., R. Co., 31 Kan. 91, holding order appointing receiver not such a final order as is reviewable by the supreme court, and following Hottenstein *v.* Conrad, 5 Kan. 252, which relates also to an order overruling a motion to vacate such an appointment.

Montana.—Wilson *v.* Davis, 1 Mont. 100.

Nebraska.—McCord *v.* Weil, 29 Neb. 682.

(a) **Ground For Such Denial.**—The doctrine of such of these cases as do not turn on the phraseology of enactments concerning appeals in general or in particular cases, seems to be based on the idea that the appointment of a receiver ordinarily neither settles nor prejudices rights, but is resorted to merely for the purpose of preserving the property in controversy, pending the litigation, for the benefit of the successful party;[1] and that it is therefore essentially not of a final nature, but merely interlocutory, and accordingly not appealable.[2]

(2) *Allowance of Appeal in Other States.*—But in other States such an appeal is authorized.[3]

Nevada.—Meadow Valley Min. Co. *v.* Dodds, 6 Nev. 263; followed in Emeric *v.* Alvarado, 64 Cal. 624.

New York.—McKelsey *v.* Lewis, 3 Abb. N. Cas. (N. Y.) 64, as to appointment of receiver, relying upon the ground that such a direction is aside of the merits, for which reason a motion for a receiver cannot be reheard (Sheldon *v.* Weeks, 2 Barb. (N. Y.) 533), and an appeal does not lie from an order directing sale of property and bringing of proceeds into court (Chapman *v.* Hammersley, 4 Wend. (N. Y.) 173.)

So an order revoking the appointment of a receiver and appointing a new one was held discretionary and not appealable in Siney *v.* New York Consolidated Stage Co., 18 Abb. Pr. (N. Y.) 437; Connolly *v.* Kretz, 78 N. Y. 620. But an order refusing to appoint a receiver in proceedings supplementary to execution has been held appealable. Hervy *v.* Gibson, 10 Bosw. (N. Y.) 595; Dallard *v.* Taylor, 33 N. Y. Super. Ct. 497, relying upon change in rule that discretionary order not appealable, made by *In re* Duff, 41 How. Pr. (N.Y.) 351.

Ohio.—Eaton, etc., R. Co. *v.* Varnum, 10 Ohio St. 623.

But see *contra*, as to writ of error, Cincinnati, etc., R. Co. *v.* Sloan, 31 Ohio St. 6.

Pennsylvania.—Holden *v.* McMakin, 1 Pars. Eq. Cas. (Pa.) 287, discussing distinction between interlocutory orders and final decrees. Any different intendment from Schlecht's Appeal, 60 Pa. St. 176, is negatived in Emeric *v.* Alvarado, 64 Cal. 625.

Tennessee.—See Johnston *v.* Hanner, 2 Lea (Tenn.) 11.

1. See opinion by Cooper, J., in Baird *v.* Cumberland, etc., Turnpike Co., 1 Lea (Tenn.) 397.

2. See Coates *v.* Cunningham, 80 Ill. 468, and full discussion by Parsons, J., in Holden *v.* McMakin, 1 Pars. Eq. Cas. (Pa.) 287. *Consult* also McCord *v.* Weil, 29 Neb. 682.

3. This is the case in *Florida*, as may be assumed from State *v.* Johnson, 13 Fla. 44, as to appointment of receiver in connection with the granting of an injunction.

Indiana.—Under Act of 1875, Buchanan *v.* Berkshire L. Ins. Co., 96 Ind. 529, holding that irrespective of such or any provision for direct appeal, the action of the lower court would be reviewed on appeal from the final judgment. Dale *v.* Kent, 58 Ind. 585; Brinkman *v.* Ritzinger, 82 Ind. 363. But under the Code of 1852, there was no appeal from an interlocutory order appointing a receiver. Wood *v.* Brewer, 9 Ind. 87; Fuller *v.* Adams, 12 Ind. 560. As to review on appeal, see Naylor *v.* Sidener, 106 Ind. 183.

Concerning time of taking appeal, see Vance *v.* Schayer, 76 Ind. 194, 195; Pressley *v.* Lamb, 105 Ind. 171, 188, 189.

Iowa.—Callanan *v.* Shaw, 19 Iowa 183, referring to consideration of such an appeal in Adair *v.* Wright, 16 Iowa 385.

Michigan.—Barry *v.* Briggs, 22 Mich. 204, fully discussing general grounds; Lewis *v.* Campau, 14 Mich. 459; 90 Am. Dec. 245; Perrin *v.* Lepper, 56 Mich. 352, holding that an order appointing a receiver is final and appealable where it takes from an administrator the entire custody and management of the estate; Simon *v.* Schloss, 48 Mich. 234; Morey *v.* Grant, 48 Mich. 330, as to decree in partnership case, not final in terms; Taylor *v.* Sweet, 40 Mich. 739, explaining doctrine on subject.

An appeal was taken without question in McCombs *v.* Merryhew, 40 Mich. 722.

(a) **Grounds for Such Allowance.**—This view seems also largely to depend on the interpretation of statutes concerning appellate proceedings. But it is sometimes placed on the more general ground that the effect produced by an adjudication in a chancery suit upon the rights and interests of the parties is a better test of its character, as constituting in reality an interlocutory order or a final decree, than the stage of the cause at which it is made; that whenever a legal right is divested by an order of a court of chancery, an appeal lies to determine whether it is legal or unauthorized; and that accordingly an order appointing a receiver is appealable when it takes from a party a possession to which he was entitled of right.[1]

But this doctrine, supported on the basis of the injustice of denying an appeal in cases which may involve not merely an abuse of discretion, but even an excess of authority,[2] appears to admit of an exception in cases where the appointment of a receiver does not divest legal rights, but is merely ancillary to other equitable relief.[3]

(3) *Doctrine of Federal Courts.*—In the Federal courts the appealable character of the appointment of a receiver similarly

But an interlocutory order appointing a receiver cannot be appealed from when the appointment is sought merely as ancillary to other equitable relief, and does not divest legal rights, Duncan *v.* Campau, 15 Mich. 416; and an order appointing a receiver to take possession of securities in controversy claimed by a trustee, is interlocutory and discretionary, and not appealable, Brown *v.* Vandermeulen, 41 Mich. 419. So an order denying the appointment of a receiver in a foreclosure suit is interlocutory and not appealable, Beecher *v.* Marquette, etc., Rolling Mill Co., 40 Mich. 309.

As to an order appointing a receiver regarded as not final so as to be appealable, if at all lawfully enforceable, see Salling *v.* Johnson, 25 Mich. 491.

As to appeal from preliminary injunction giving possession of lands, mentioning like view concerning receivers, see concurring opinion by Cooley, J., in Arnold *v.* Bright, 41 Mich. 210, and as to appeal from injunction and receiver on bill by incompetent person to set aside a trust deed, see Hodges *v.* McDuff, 69 Mich. 32. As to the appealable character of an order adjudging an illegally appointed receiver guilty of contempt in disobeying an order of court, see People *v.* Jones, 33 Mich. 304.

As to when an order discharging a receiver is not appealable, see Colgate *v.* Michigan Lake Shore R. Co., 28 Mich. 289, and as to when an order for the sale of assigned property by a receiver is appealable, see First Nat. Bank *v.* Barnum Wire, etc., Works, 58 Mich. 316; 55 Am. Rep. 660.

Minnesota.—Appointment in supplementary proceedings, as "an order upon a summary proceeding in an action after judgment," affecting a substantial right of the appellant, Knight *v.* Nash, 22 Minn. 453; order refusing to appoint as an order refusing a provisional remedy, Grant *v.* Webb, 21 Minn. 41.

New Jersey.—Appointment in connection with injunction may be assumed appealable from Weissenbom *v.* Sieghortner, 21 N. J. Eq. 483.

North Carolina.—Coates *v.* Wilkes, 92 N. Car. 383.

West Virginia.—Hutton *v.* Lockridge, 27 W. Va. 435, where the appointment of a receiver of lands requires the possession of real estate to be changed.

1. See the opinions of Campbell, C. J., in Barry *v.* Briggs, 22 Mich. 204, and of Cooley, J., in Taylor *v.* Sweet, 40 Mich. 739.

2. See the first of the opinions just cited, at p. 208.

3. See Duncan *v.* Campau, 15 Mich. 416.

seems to depend on the final or interlocutory character of the decree in which such appointment is made, according as the receiver is merely to hold the property temporarily or is given absolute control thereof.[1]

(4) *Writ of Error.*—In *Ohio*, an order appointing a receiver is not a final order from which an appeal can be taken to a district court;[2] but a writ of error, which brings up the matter not for retrial like an appeal, but merely for review on questions of law, lies from an order annulling an order which vacated orders granting an injunction and the appointment of a receiver.[3]

In *Illinois*, however, a writ of error will not lie on a decree appointing a receiver, which is regarded as purely interlocutory because it settles no rights.[4]

(5) *Supersedeas or Bill of Review.*—In *Tennessee*, an order appointing a receiver is within the power of the court and will not be revised by the higher court on a *supersedeas*,[5] or on a bill of review.[6]

(6) *Certiorari.*—The writ of *certiorari* may be obtained in *California* to review an order appointing a receiver.[7] But as is held

1. The doctrine of the Supreme Court of the United States, as stated by Chief Justice Taney, is that the decree must be regarded as a final one to a certain extent, and to authorize an appeal therefrom, when it decides the right to the property in contest, and directs it to be delivered by the defendant to the complainant, and the latter is entitled to have the decree carried into execution; and that it is immaterial that the accounts between the parties remain to be adjusted by a further decree. Forgay *v.* Conrad, 6 How. (U. S.) 204; but that this rule does not extend to the cases of orders such as are frequently and necessarily made in the progress of a cause, whereby money is directed to be paid into court, or property to be delivered to a receiver or property held in trust to be delivered to a new trustee appointed by the court, or concerning other matters of a like description, for such orders are interlocutory only, and intended to preserve the subject-matter in dispute from waste or dilapidation, and to keep it within the control of the court until the rights of the parties concerned can be adjudicated to a final decree. Forgay *v.* Conrad, 6 How. (U. S.) 204, as just cited. Yet the rule is deemed applicable by Chief Justice Waite to a decree setting aside as fraudulent and void proceedings at a meeting of stockholders of a corporation and of the board of directors thereof and appointing a receiver, though the court added to the decree a clause reserving to itself such further directions respecting costs, etc., as might be necessary to carry the decree into execution. Winthrop Iron Co. *v.* Meeker, 109 U. S. 183; for the receiver to whom the delivery was to be made in this instance was not appointed to hold the property until the rights of the parties could be adjudicated, but to stand subject to the discretion of the court in the place of, and as and for the corporation, because under the circumstances, the corporation was incapacitated from acting for itself, and his position was like that of the guardian of the estate of an incompetent person. See Winthrop Iron Co. *v.* Meeker, 109 U. S. 184.

2. Eaton, etc., R. Co. *v.* Varnum, 10 Ohio St. 623.

3. Cincinnati, etc., R. Co. *v.* Sloan, 31 Ohio St. 6.

4. Coates *v.* Cunningham, 80 Ill. 468.

5. Baird *v.* Cumberland, etc., Turnpike Co., 1 Lea (Tenn.) 395; Bramlee *v.* Tyree, 1 Lea (Tenn.) 533; Roberson *v.* Roberson, 3 Lea (Tenn.) 51.

6. Johnston *v.* Hanner, 2 Lea (Tenn.) 11.

7. French Bank Case, 53 Cal. 549. See Emeric *v.* Alvarado, 64 Cal. 622. Such a writ was also made the means of review of the jurisdiction to appoint, Bateman *v.* Superior Court, 54 Cal. 286.

in *New Jersey* the court will not, on *certiorari*, reverse the order appointing a receiver, if there is any evidence which goes to support the allegations required by the statute to be stated in the petition, and the judges consider and decide that a case for a receiver is made out.[1] Under such circumstances the reviewing court will not weigh the evidence, but it is sufficient if there is that which gives the judge below jurisdiction or power to make the order.

(7) *Mandamus.*—*Mandamus* does not lie in *Michigan*, whether an appeal does or not, to review an order for the appointment of a receiver for an assigned estate.[2]

w. REVIEW ON APPEAL.—It is the general rule under the *Georgia* decisions that the discretion of the lower court in appointing or refusing to appoint a receiver, will not be interfered with by the appellate court unless there has manifestly been an abuse of such discretion, or a violation of some recognized principle of law.[3] And a like doctrine appears to prevail in *New York*,[4] and in *Alabama*.[5]

In *Michigan* in reviewing the action of the judge of the lower court in appointing a receiver, two things will be considered. First, whether the discretion vested in him has been abused; and, second, whether a right has been impaired by such appointment.[6]

(1) *Where Order Made After Final Judgment.*—On an appeal from an order made after final judgment directing a receiver to pay moneys in his hands over to the prevailing party, the superior court cannot in *California*, review the order appointing the receiver.[7]

(2) *Where Interlocutory Order.*—Upon an appeal from an interlocutory order appointing a receiver, in *Indiana* no formal ruling will be made upon the sufficiency of the complaint as a pleading in the action; although it may be looked to, in connection with the evidence in determining whether a receiver ought to be appointed.[8]

1. Journeay *v.* Brown, 26 N. J. L. 116.

2. Scott *v.* Wayne Circuit Judge, 58 Mich. 314. As to denial of *mandamus* to regain possession of attached property by petitioner who had appealed from an order affirming the appointment of a receiver, and given a *supersedeas* bond, see *Ex parte* Tilman (Ala. 1891). 9 So. Rep. 527.

3. Gardner *v.* Howell, 60 Ga. 20. See also, Reid *v.* Reid, 38 Ga. 29.

So in the case of an injunction and receiver. See Barlow *v.* Eason, 60 Ga. 596; Augusta Ice Mfg. Co. *v.* Gray, 60 Ga. 346; Jones *v.* Johnson. 60 Ga. 262; Douglas *v.* Fitzgerald, 56 Ga. 526; Gunby *v.* Thompson, 56 Ga. 319; Esterland *v.* Dye, 56 Ga. 285; Wolfe *v.* Claflin, 81 Ga. 65.

The same rule applies to the granting or refusing of an injunction alone. See Tison *v.* Dart, 60 Ga. 596; Girardey *v.* Moore, 56 Ga. 526; Ellis *v.* Jones, 56 Ga. 504; Banand *v.* Genesi, 42 Ga. 641; and to the refusal to grant a motion to revoke the appointment of a receiver, Cohen *v.* Meyers, 42 Ga. 49; and to the refusal to dissolve an injunction and revoke the appointment of a receiver, Robenson *v.* Ross, 40 Ga. 385.

4. See Ostrauder *v.* Weber, 114 N. Y. 103.

5. Miller *v.* Lehman, 87 Ala. 517, 519.

6. Turnbull *v.* Prentiss Lumber Co., 55 Mich. 397; 8 Am. & Eng. R. Cas. 257.

7. Whitney *v.* Buckman, 26 Cal. 454.

8. Naylor *v.* Sidener, 106 Ind. 183.

x. EFFECT OF APPEAL.—An appeal which, when perfected, vacates the judgment which is the basis of the appointment of a receiver, necessarily vacates the right to a receiver.[1] But an appeal from an adjudication of involuntary insolvency does not suspend the functions of the receiver.[2]

It may, indeed, be imperatively necessary to the preservation of the estate that such suspension should not take place. Nor does the pendency of a writ of error to an order made at chambers continuing an application for a receiver until the hearing prevent the court from granting the application, on the same bill and the same facts, in term time, and before the main case is brought on for final hearing.[3]

y. SUPERSEDEAS UPON APPEAL.—A *supersedeas* granted upon an appeal from an order allowing a preliminary injunction and appointed a receiver *pendente lite*, suspends the operation of the order, and prohibits the further action of the receiver in carrying out the mandate of the order from which the appeal is taken.[4]

But in a proper case a receiver may be appointed to preserve the rents and profits of land, notwithstanding the case is pending in the supreme court upon an appeal and *supersedeas*.[5]

z. WHEN APPOINTMENT WILL NOT BE VACATED.—Where the chancellor, at the instance of a member of a firm, bringing a bill against another, who has assumed its debts on dissolution and covenanted to save the other partners harmless, appointed a receiver to take charge of the old stock and such property as has been purchased by the proceeds of sales of what was once joint property, the appellate court will not direct such order to be vacated unconditionally where the party complained of is pursuing such a course as to disposition of property, etc., as will render any relief that may be given by decree inoperative.[6]

aa. QUESTIONING REGULARITY OF APPOINTMENT. — The

following Hursh *v.* Hursh, 99 Ind. 500, and distinguishing Main *v.* Ginthert, 92 Ind. 180.

What Constitutes Error.—An order appointing a receiver will not be reversed for error, in West Virginia, unless such error is prejudicial to the appellant. Clark *v.* Johnston, 15 W. Va. 810.

But the chancellor has been held, in Georgia, to have erred in permitting a voluntary bond to become part of the cases as cause shown against a prayer for an injunction and a receiver where such bond was not an adequate substitute for these remedies. Harrison *v.* Cotton States L. Ins. Co., 78 Ga. 732.

1. Allen *v.* Chadburn, 3 Baxt. (Tenn.) 226. But the office of receivers was held not vacated by an appeal, in Swing *v.* Townsend, 24 Ohio St. 2.

2. *In re* Real Estate Associates, 58 Cal. 356.

3. McCaskill *v.* Warren, 58 Ga. 287.

4. State *v.* Johnson, 13 Fla. 43 *et seq.*

5. Hutton *v.* Lockridge, 27 W. Va. 433.

6. West *v.* Chassen, 12 Fla. 333 *et seq.* Where, upon a suit between partners for a dissolution, the partnership property comes into the hands of a receiver, before one claiming a special lien levies his attachment upon it, and such claimant desires to vacate the order appointing the receiver, he must proceed by filing a petition setting forth the facts upon which he relies to obtain a vacation of the appointment; and a summary proceeding by motion is not the appropriate method. Jacobson *v.* Landolt, 73 Wis. 145.

opposing party cannot question the regularity of the order appointing a receiver, or the proceedings generally, upon a mere formal motion to substitute one person for another as receiver in the action; and such is the case, although the motion be founded, by the notice, upon the pleadings, decree, and proceedings in the action, as well as upon affidavits.[1] Nor can a stockholder of a corporation, after having joined in an application made to the court by the receiver for authority to sell the assets of the corporation, be permitted to question the regularity or validity of the receiver's appointment, or of the order directing the sale.[2]

bb. COLLATERAL ATTACK ON APPOINTMENT.—The legality of the appointment of a receiver cannot be questioned in a collateral proceeding by defendants who have fully and completely recognized such officer as legally appointed.[3]

IV. POWERS, RIGHTS, DUTIES AND LIABILITIES—1. Functions—*a.* OFFICE ONE OF CONFIDENCE AND TRUST.—The office of receiver is one of confidence and trust. The primary object of his appointment is to preserve the fund or property so that it may be appropriated as the final decree shall direct. The custody of receivers is the custody of the law, and is in its nature provisional and suspensive.[4] In recent years both in *England* and in the *United States*, there has been a strong tendency towards enlarging the scope of receiverships.[5]

1. Fassett *v.* Tallmadge, 13 Abb. Pr. (N. Y.) 13.

Against disposing of question on affidavits, see Palen *v.* Bushnell, 51 Hun (N. Y.) 425. Against raising objection on general demurrer, see Walsh *v.* Byrnes, 39 Minn. 527.

2. Battershall *v.* Davis, 31 Barb. (N. Y.) 327. So the regularity of the appointment of a receiver of a life insurance corporation upon petition of the attorney-general, cannot be questioned collaterally by any other tribunal than the one by which he was appointed. Attorney-General *v.* Guardian Mut. L. Ins. Co., 77 N. Y. 275. Nor can a borrower, after making payments to a receiver appointed for his creditors in proceedings to which he was not a party, afterwards question the validity of the appointment in proceedings against himself for the enforcement of his debt. Burton *v.* Schildbach, 45 Mich. 513.

A person claiming title to United States bonds by assignment from a national bank, cannot, in a suit to enforce his rights, question the validity of the appointment of a receiver of such bank in regard to other property than the bonds. Van Antwerp *v.* Hulburd, 8 Blatchf. (U. S.) 285.

3. Skinner *v.* Lucas, 68 Mich. 432. See also Burton *v.* Schildbach, 45 Mich. 513. Against collateral questioning of appointment claimed to be void, see Connor *v.* Bray, 83 Ala. 217.

4. "A receiver is an indifferent person between parties, appointed by the court to receive the rents, issues or profits of land or other thing in question in this court, pending the suit, where it does not seem reasonable to the court that either party should do it. Wyatt's Prac. Reg. 355. He is an officer of the court; his appointment is provisional." Booth *v.* Clark, 17 How. (U. S.) 331.

In Myers *v.* Estell, 48 Miss. 401, the court said: "Receivership is one of those remedial agencies devised originally in order to preserve the fund or thing from removal beyond the jurisdiction or from spoliation, waste or deterioration, pending the litigation. This was the original purpose; a preservation of the thing so that it might be appropriated as the final decree shall appoint." See also Hooper *v.* Winston, 24 Ill. 353; Miller *v.* Bowles, 10 Nat. Bank. Reg. 515; Beverley *v.* Brooke, 4 Gratt. (Va.) 208.

5. In Davis *v.* Gray, 16 Wall. (U. S.) 221, Justice Swayne said: "In the

[illegible] RT.—A receiver represents the court,[1] [illegible] benefit of all parties who may estab- [illegible]

[illegible] ND RECEIVER.—Where a receiver has [illegible] over property in controversy, and [illegible] been appointed over the same prop- [illegible] the functions of second receiver are [illegible] the first; and he is only entitled to the [illegible] after the first receivership has termi-

[illegible] FUNCTIONS BY APPEAL.—Where an ap- [illegible] the order of court appointing a receiver, and [illegible] *supersedeas*, the receiver can no longer exer- [illegible] and if he does so, he may be punished as for

[illegible] equity jurisdic- [illegible] clothe such [illegible] powers than [illegible] In some of [illegible] statutes charged [illegible] the affairs of [illegible] when insolvent, [illegible] expressly to sue in [illegible] is not unusual for [illegible] them in charge [illegible] companies which [illegible] financial embarrass- [illegible] require them to operate [illegible] difficulties are re- [illegible] arrangements are made [illegible] be sold with the least [illegible] interests of those con- [illegible] such cases the receiver is [illegible] the jurisdiction invoked. [illegible] the statutes, we see no [illegible] a court of equity, in the [illegible] its undoubted authority, [illegible] accomplish all the best results [illegible] secured by such legisla- [illegible] without its aid."

[illegible] New York, etc., Tel. Co. *v.* [illegible] N. Y. 168, Earl, J., said: [illegible] commenced against the [illegible] Company, the court had [illegible] possession the property [illegible] company to dispose of, manage [illegible] it for the benefit of all [illegible] interested therein, or having any [illegible] against the same; and the re- [illegible] was merely its officer, arm or [illegible] take possession of the prop- [illegible] manage and dispose of the [illegible] its direction and subject to [illegible] He could at any time be [illegible] by the court and another [illegible] appointed, or the property [illegible] taken out of his hands and restored to its owner or otherwise be disposed of under the judgment in the actions in which he was appointed."

In Attorney-Gen'l *v.* North American L. Ins. Co., 89 N. Y. 103, the court said: "The receiver is the officer of the court. It made him and can unmake him. He has no independent authority or power. He is the mere agent or instrument through whom the law takes into its own custody the assets and property of the insolvent corporation, closes its business and makes its final distribution. The receiver is under the control of the court. He can do nothing without its orders." See also Beverley *v.* Brooke, 4 Gratt. (Va.) 208; Hills *v.* Parker, 111 Mass. 510; 15 Am. Rep. 63; Davis *v.* Gray, 16 Wall. (U. S.) 218.

2. A receiver is appointed in behalf of all parties, and not of a complainant or of a defendant only. He owes an equal duty to all alike, and he is responsible to the court alone. Booth *v.* Clark, 17 How. (U. S.) 331; Delany *v.* Mansfield, 1 Hog. 234; *Ex parte* Jay, L. R., 9 Ch. 133; Beverley *v.* Brooke, 4 Gratt. (Va.) 208; Lottimer *v.* Lord, 4 E. D. Smith (N. Y.) 183; Curtes *v.* Leavitt, 15 N. Y. 9; Libby *v.* Rosekrans, 55 Barb. (N. Y.) 202; Baker *v.* Backus, 32 Ill 79.

3. Bailey *v.* Belmont, 10 Abb. Pr., N. S. (N. Y.) 270; Bailey *v.* O'Mahoney, 33 N. Y. Supr. Ct. 239.

4. State *v.* Johnson, 13 Fla. 33. In Everett *v.* State, 28 Md. 190, it was held that if an appeal be taken from the order appointing the receivers, and the latter are directed to return the property over which the receivership

e. TERMINATION OF FUNCTIONS.—The receiver's functions terminate upon an order for his removal, but not merely upon an abatement of the cause in which he is appointed.[1]

2. Powers in General—*a.* NATURE OF.—Common-law receivers have no powers except such as are conferred upon them by the order of their appointment, and the course and practice of the court.[2]

extended, upon an affirmance of the order, the receivers can prosecute the bond given to secure a return to them of the property, without a previous order of the court.

1. In Newman *v.* Mills, 1 Hog. 291, a receiver continued to collect rent after the abatement of the action in which he was appointed.

2. "A receiver is, as a general rule, a mere custodian, and has no powers except those expressly conferred upon him by the order of his appointment, or by special directions of the court from time to time. His general duty may be said to be to take possession of the estate in the room and place of the owner thereof; and, under the supervision of the court, to manage the property so as to preserve the same, and (if possible) to make it profitable for those who may ultimately be declared the owners thereof. The powers of a receiver are limited. All his actions are under the immediate control of the court, and in order to a safe custody of the estate, he must constantly apply to the court for its advice and sanction. Bispham's Eq., § 580.

In the leading case of Davis *v.* Gray, 16 Wall. (U. S.) 203, the general powers of a common-law receiver as derived from the order of his appointment are carefully considered. In that case the complainant, a citizen of New York, who had been appointed receiver of the Memphis, El Paso and Pacific Railroad Company, filed a bill in the U. S. circuit court to restrain the governor and commissioner of the land office of the State of Texas from issuing any further patents to third parties for lands reserved to the company. By the terms of his appointment the receiver was authorized "to bring such suits in the name of said company, or in the name of said receiver as he may be advised by counsel to be necessary and proper in the discharge of the duties of his office, and for acquiring, securing, and protecting the assets, franchises and rights of the said company, and of the said receiver, and of securing and protecting the land grant, and land reservation of the said company." Swayne, J., said: "The authority given by the decree is ample. Still, the question arises whether it was competent for him to proceed in his own name instead of the name of the company whose rights he seeks by this bill to assert. A receiver is appointed upon a principle of justice for the benefit of all concerned. Every kind of property of such a nature that, if legal, it might be taken in execution, may, if equitable, be put into his possession. Hence the appointment has been said to be an equitable execution. He is virtually a representative of the court, and of all the parties in interest in the litigation wherein he is appointed. Jeremy's Equity, 249; Davis *v.* Duke of Marlborough, 2 Swanst. 125; Shakel *v.* Duke of Marlborough, 4 Madd. 463. He is required to take possession of property as directed, because it is deemed more for the interests of justice that he should do so than that the property should be in the possession of either of the parties in the litigation. Wyatt's Practical Register, 355. He is not appointed for the benefit of either of the parties, but of all concerned. Money or property in his hands is in *custodia legis. In re* Colvin, 3 Md. Ch. Dec. 278; Delany *v.* Mansfield, 1 Hog. 234. He has only such power and authority as are given him by the court, and must not exceed the prescribed limits. The Chautauqua Co. Bank *v.* White, 6 Barb. (N. Y.) 589; Verplanck *v.* Mercantile Ins. Co., 2 Paige (N. Y.) 452. The court will not allow him to be sued touching the property in his charge, nor for any malfeasance as to the parties, or others, without its consent; nor will it permit his possession to be disturbed by force, nor violence to be offered to his person while in discharge of his official duties. In such cases the court will vindicate its au-

b. STATUTORY POWERS.—The powers of receivers are sometimes fixed and determined by statute.[1]

c. DISCRETIONARY POWER.—Receivers have a certain amount of discretionary power in the management and control of the property intrusted to their care. If they exercise this discretion carefully, and in good faith, they will be sustained by the court. Thus, a receiver has the power to accept or reject bids.[2] He has not, however, any discretion in the application of the funds in his

thority, and, if need be, will punish the offender by fine and imprisonment for contempt. De Groot *v.* Jay, 30 Barb. (N. Y.) 483; Angel *v.* Smith, 9 Ves. 335; Russell *v.* East Anglian R. Co., 3 M. & G. 104; Parker *v.* Browning, 8 Paige (N. Y.) 388; 35 Am. Dec. 717; Noe *v.* Gibson, 7 Paige (N. Y.) 513; 2 Story's Equity, § 833 A. & B. The same rules are applied to the possession of a sequestrator, 2 Daniel's Ch. Pr. 1433. Where property in the hands of a receiver is claimed by another, the right may be tried by proper issues at law, by a reference to a master, or otherwise, as the court in its discretion may see fit to direct. Empringham *v.* Short, 3 Hare 470. Where property in possession of a third person is claimed by the receiver, the complainant must make such person a party by amending the bill, or the receiver must proceed against him by suit in the ordinary way. Parker *v.* Browning, 8 Paige (N. Y.) 388; 35 Am. Dec. 717; Noe *v.* Gibson, 7 Paige (N. Y.) 513; 2 Story Equity, *supra*, 2 J. & W. 176; 2 Daniel's Ch. Pr. 1433. After tenants have attorned to the receiver, he may distrain for rent in arrear in his own name. 2 Daniel's Ch. Pr. 1437. In a suit between partners he may be required to carry on the business, in order to preserve the good will of the establishment, until a sale can be effected. Marten *v.* Van Schaick, 4 Paige (N. Y.) 479. Here the property in question is not in the possession of the defendants. The possession of the receiver has not been invaded. He has not been in possession, is not seeking possession, and there is no question in the case relating to that subject. But the order of the court expressly requires the receiver to secure and protect 'the assets, franchises, and rights,' and 'the land grant and reservation of said company.' He is seeking to perform that duty by enjoining the appellants from doing illegal acts, which the bill alleges, if done, would render the rights and title of the company to the immense property last mentioned, of greatly diminished value, if not wholly worthless. We think it is competent for him to perform this function in the mode he has adopted. The decree, in the case wherein he was appointed, expressly authorizes him to sue for that purpose in his own name. The order was made by a court of adequate authority in the regular exercise of its jurisdiction. No appeal has been taken, and the order stands unreversed."

1. The distinction between a common law and statutory receiver, appears in Verplank *v.* Mercantile Ins. Co., 2 Paige (N. Y.) 452, where the chancellor said: "It is not a common-law receivership to protect the fund pending the litigation; but the receiver is a statutory assignee, vested with nearly all the powers and authority of the assignee of an insolvent debtor. (2 R. S. 464, § 42; 469, § 67, etc.) It would therefore be a violation of one of the fundamental principles of justice to appoint such a receiver, without any restriction of his powers, on an *ex parte* application; and thus to condemn and deprive a company of its chartered privileges unheard. A different kind of receivership is authorized by the 36th section of the same title, on the application of a judgment creditor. (2 R. S. 463.) That is the same kind of receiver which was authorized by the 17th section of the act of 1825, on the application of the attorney-general, or of any creditor of the corporation. (Laws of 1825, p. 453.) Those were strictly common-law receivers such as are usually appointed by this court in suits between party and party, and to protect the fund during the litigation. They have no powers except such as are conferred upon them by the order for their appointment, and the course and practice of the court."

2. Knott *v.* Morris Canal, etc., Co., 4 N. J. Eq. 423.

hand, but he must be governed entirely by the order of the court.[1]

3. **Powers in Particular Matters**—(See also sub-section of this article, *Receivers in Particular Cases*)—*a.* ORIGINATING PROCEEDINGS BY APPLYING TO COURT.—In the *United States* receivers have power to originate proceedings of their own motion to secure orders of the court as to the conduct and management of the estate.[2] In *England* and *Ireland*, however, it has been generally held, except in extreme cases, that such proceedings should originate with the parties themselves.[3]

b. TO RECEIVE MONEY NOT DUE.—Under certain circumstances a receiver may accept the payment of money not due, and may give a receipt therefor.[4]

c. OVER MONEY DEPOSITED IN BANK.—Where receivers are appointed to carry on a business, and the appointment involves the receiving and paying out of moneys, the receivers may handle and use the funds in bank, for the purposes of the business without special order of court.[5]

d. TO APPOINT DEPUTIES AND ASSISTANTS.—A receiver may not appoint a deputy without a special order of court; but he may employ a competent person to take charge of the property, and such person may be paid out of the funds in the hands of the receiver.[6]

e. TO OBTAIN WRIT OF ASSISTANCE.—Where necessary, a receiver may obtain a writ of assistance to aid him in executing his office. Thus where a receiver is unable to distrain for rent

1. Johnson *v.* Gunter, 6 Bush (Ky.) 534; Collins *v.* Case, 25 Wis. 651.

2. Cammack *v.* Johnson, 2 N. J. Eq. 163; *In re* Van Allen, 37 Barb. (N. Y.) 225; Missouri Pac. R. Co. *v.* Texas, etc., R. Co., 31 Fed. Rep. 862; 31 Am. & Eng. R. Cas. 76.

3. Ireland *v.* Eade, 7 Beav. 55; Parker *v.* Dunn, 8 Beav. 497; O'Connor *v.* Malone, 1 Ir. Eq. 20; Wrixon *v.* Vize, 5 Ir. Eq. 276; Comyn *v.* Smith, 1 Hog. 81; Callaghan *v.* Reardon, S. & S. 682; Clark *v.* Fisher, S. & S. 684.

4. Olcott *v.* Heermans, 3 Hun (N. Y.) 431.

5. In Southern Development Co. *v.* Houston, etc., R. Co., 27 Fed. Rep. 344, Pardee, J., said: "By the orders appointing them, the complainants, as joint receivers, were authorized and directed to carry on and operate the railways and property of the Houston & Central Railway Company; and such carrying on and operating contemplated and required the handling, receiving and paying out of money, the payment and collection of bills, and the transaction of such financial business as would require the medium of and accommodation of banks. In the transaction of this business, moneys were not deposited as special funds to be drawn out on order of the court, but were deposited generally to the credit of the receivers, and to be handled and used by the bank, like the deposits of its other patrons, in a banking, loan and discount business.

6. In ——— *v.* Lindsey, 15 Ves. 90, a motion was made for the appointment of a receiver, upon an estate in England. Sir Samuel Romilly, in support of the motion, suggested that as a receiver in India would be out of the jurisdiction, some person in England should be the receiver, who might appoint his own agent in India. The Lord Chancellor Eldon approved this course. See also Corey *v.* Long, 12 Abb. Pr., N. S. (N. Y.) 427; Dickerson *v.* Van Tine, 1 Sandf. (N. Y.) 724; Taylor *v.* Sweet, 40 Mich. 736; Frank *v.* Denver, etc., R. Co., 23 Fed. Rep. 757.

on account of the disordered condition of the country, and the unruly character of the tenants, the court will grant him a writ of assistance.[1]

f. TO OBTAIN WRIT OF SEQUESTRATION.—Where a party refuses to deliver over property to a receiver, who is entitled to its custody, the receiver may have an order to sequester property.[2]

g. TO OBTAIN ATTACHMENT.—Since a receiver is an officer of the court, and the property in his hands is held to be in the custody of the court, any interference with the receiver in the performance of his duties is considered a contempt of court, and is punishable by attachment.[3] To render a person liable, however,

1. Green *v.* Green, 2 Sim. 394.

2. People *v.* Rogers, 2 Paige (N.Y.) 103.

3. In Noe *v.* Gibson, 7 Paige (N.Y.) 513, a receiver applied for an attachment against a person who took a vessel from his possession under a distress warrant for rent. The vice chancellor denied the application. On appeal the chancellor granted the writ, saying: "The vice-chancellor has clearly mistaken the law and practice of this court if he supposed the respondents were justified in taking this vessel out of the custody of the receiver, upon a distress warrant for rent, without the permission of the court first obtained for that purpose. It is evident from the affidavits that before there was any attempt to levy upon the vessel, for the alleged arrears of rent, the property was legally as well as actually in the custody of the court, through its officer. Any attempt, therefore, to take the property out of the custody of the receiver, or of the persons employed by him to take care of it, was a contempt of court. The landlord and his bailiff may have mistaken their legal rights; and if so that may be sufficient to protect them from punishment for a willful contempt. But it forms no ground for excusing them from restoring the vessel, which they have improperly rescued from the custody of the law in which it had been placed by the order of the court. So far as the defendant was himself concerned, there is no excuse whatever for this interference on his part, to deprive the receiver of the possession of the property. And if, as there is much reason to suspect, the landlord has been induced to distrain upon the property at his instigation, he ought to be punished by imprisonment for this most unjustifiable attempt to prevent the course of justice, in addition to a fine sufficient in amount to pay the costs and expenses of the proceedings, and to make good the injury sustained by his willful contempt. It is well settled that after a receiver has been appointed and has taken the rightful possession of the property, it is a contempt of court for a third person to attempt to deprive him of that possession by force, or even by a suit or other proceeding against him, without the permission of the court by whom the receiver was appointed. (Angel *v.* Smith, 9 Ves. 335.) Where the receiver is in possession of property upon which a third person has a claim for rent, the proper course for the landlord is to apply to the court, upon notice to the receiver, for an order that the receiver pay the rent, or that the landlord be at liberty to proceed by distress or otherwise as he may be advised. (Smith's Off. of Rec. 77.) And if the claim is contested, the court will permit the claimant to go before the master, and be examined *pro interesse suo.* The same principles are applicable to every other interference with the possession of a receiver, sequestrator, committee, or custodee, who holds the property as the officer of this court, as his possession is in law the possession of the court itself. Johnes *v.* Claughton, Jac. 572; Lees *v.* Waring, 1 Hog. 216; Crone *v.* O'Dell, 2 Hog. 144; Sweet *v.* Austin, Conroy 174; Lynch *v.* Blake, Conroy 201; Kaye *v.* Cunningham, 5 Madd. 406; *In re* Heller, 3 Paige (N. Y.) 199; *In re* Hopper, 5 Paige (N. Y.) 489. The landlord and his bailiff in the present case, therefore, instead of attempting to take the vessel out of the custody of the receiver or of his agents, should have applied to the court for an order di-

to an attachment for contempt, there must be an actual interference with the possession of the receiver.[1]

A person may be adjudged guilty of contempt in interfering with the possession of a receiver, although he has no formal notice of the appointment of the receiver; actual knowledge of the appointment is all that is necessary.[2]

h. TO COMPROMISE DEBTS.—Where the receiver deems it for the best interest of the estate, he may, under a proper order of the court, compromise a debt.[3]

i. TO SELL TIMBER.—Where a landed estate is in the hands of a receiver, and timber has fallen, and is likely to decay and become a loss, the receiver may, under an order of court, sell the timber, and apply the proceeds to the purposes of the trust.[4]

j. TO INSURE PROPERTY.—A receiver has power to insure the property intrusted to him, and he may make a valid contract of

recting the receiver to pay the rent out of the proceeds of the vessel; as was done in the case of Dixon *v.* Smith, 1 Swanst. 457. And if the landlord's claim upon the vessel for the arrear of rent was disputed, the court would have given him leave to go before the master and be examined *pro interesse suo;* to the end that upon the coming in of the master's report such an order might be made in the case as just required. Daniel's Ch. Pract. 644; 2 Story's Eq. 177. It is not too late to make such an application now. But that is no ground for refusing an attachment against the respondents, as it appears that the vessel was worth several hundred dollars, while the rent claimed was less than eighty."

See De Visser *v.* Blackstone, 6 Blatchf. (U. S.) 235; Lane *v.* Sterne, 3 Giff. 629; Skip *v.* Harwood, 3 Atk. 564; Anonymous, 2 Mol. 499; Broad *v.* Wickham, 4 Sim. 511; Russell *v.* East Anglian R. Co., 3 M. & G. 104; Langford *v.* Langford, 5 L. J., N. S. Ch., 60; Hull *v.* Thomas, 3 Edw. Ch. (N. Y.) 236; Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 46 Vt. 792; Spinning *v.* Ohio L. Ins., etc., Co., 2 Disney (Ohio) 336.

1. In Albany City Bank *v.* Schermerhorn, 9 Paige (N. Y.) 372, the court said: "If the receiver was not in possession, either by himself or his tenants by attornment, or by his agents, he cannot enforce a delivery of this property to him by proceedings as for a contempt against the sheriffs who levied thereon; although he may have an equitable right to recover the same by a bill in this court, founded upon the previous order to appoint a receiver."

2. In Hull *v.* Thomas, 3 Edw. Ch. (N. Y.) 236, an order for an injunction and receiver was granted, and a person who was in court at the time told the parties against whom the order went, of the appointment. The parties then disposed of notes, which were the subject of the injunction and receivership. The court held that they were in contempt.

In Skip *v.* Harwood, 3 Atk. 564, there was a bill between two partners, after a dissolution, for an account and a receiver. The defendant, Harwood, was present in court during the hearing, which occupied three days, and knew of the order appointing a receiver, but before the decree was drawn or entered, he removed a large portion of the firm assets. Lord Hardwick said: "Where a person as Mr. Harwood has done, attends a cause to which he is a defendant, the whole time of the hearing, and had notice of the decree by being present when it was pronounced in court, if he does any act that is a contravention to the decree, he is guilty of a contempt, and punishable for it, notwithstanding the decretal order is not drawn up; and there are several instances of this kind, or otherwise it would be extremely easy to elude decrees, some of which in their nature require a considerable length of time before they can be completely drawn up."

3. *In re* Croton Ins. Co., 3 Barb. Ch. (N. Y.) 642.

4. Crofts *v.* Poe, J. & C. 193.

insurance, binding upon the owner, although his action is subject to the approval of the court.[1]

k. TO CONDUCT A BUSINESS.—See sub-section of this article, *Receivers in Particular Cases.*

4. **Rights in General.**—Receivers have the general right to apply to the court by which they are appointed, for general advice and instruction; and in particular cases for specific orders or instructions as to the management of the property and interests which have been intrusted to them.[2] They are entitled to the protection of the court; and in a proper case, the court may interfere by attachment to enforce the receiver's rights.[3]

1. In Thompson *v.* Phœnix Ins. Co., 136 U. S. 293, Mr. Justice Harlan said: "Due regard must always be had not only to the nature and surroundings of the property in the custody of the receiver, but to the exigencies of the moment when he may be required to take action involving the safety of property in his charge. We do not doubt that under some circumstances a receiver would be derelict in duty, if he did not cause property in his hands to be insured against fire. The case last cited is authority for the principle that, without the previous sanction of the court, a receiver may incur expenses that are absolutely essential for the preservation of the property in his custody. But if this were not so, and if, without the previous order of the court, he applies funds in his hands for such a purpose, the contract of insurance will not, for that reason, be void, as between him and the insurance company. It appears from the policy that the company was informed as to the capacity in which Kearney acted, namely, 'as receiver for Holladay *v.* Holladay.' According to the amended bill, it knew the precise nature and extent of the interest represented by him, and that he had no personal interest in the property insured. If the court, whose officer he was, had directed him to procure insurance, present objection could not be urged with the slightest expectation of its being sustained. And yet, whether Kearney exceeded his authority, or rightly applied the funds in his hands, are questions in which no one is concerned except himself, the court to which he was amenable, and the parties interested in the property in his charge. If he was not, technically, authorized to use the funds in his hands to pay for instance, still, upon the settlement of his accounts, if he acted in good faith, the court might allow him any sums paid out for that purpose. He held such relations to, and was under such personal responsibility for the safety of property, that he could make a valid contract of insurance, although his use of the funds in his hands for that purpose was subject to the approval of the court."

In Brown *v.* Hazlehurst, 54 Md. 26, objections were made to allowing a receiver for sums paid by him, without the previous sanction of the court for insurance. The court said: "There is doubt of the general rule, and it is a wholesome one, that a receiver will not be permitted to lay out more than a small sum at his own discretion, in the preservation or improvement of the property under his charge; but he should, in all cases where it is practicable, or the circumstances of the case will permit, before involving the estate in expenses, apply to the court for authority for so doing. But this general rule, however salutary it may be, should not be so rigidly and sternly enforced as to work wrong and injustice, where the receiver has acted in good faith, and under such circumstances as will enable the court to see that if previous authority had been applied for, it would have been granted. The justice and right of the matter must depend, to a great extent, upon the special circumstances of each case that may be presented."

2. Cammack *v.* Johnson, 2 N. J. Eq. 163; In *In re* Van Allen, 37 Barb. (N. Y.) 225; Missouri Pac. R. Co. *v.* Texas, etc., R. Co., 31 Fed. Rep. 862; 31 Am. & Eng. R. Cas. 76.

3. Noe *v.* Gibson, 7 Paige (N. Y.) 513; Hull *v.* Thomas, 3 Edw. Ch. (N. Y.) 236; De Visser *v.* Blackstone, 6 Blatchf. (U. S.) 235.

Where a receiver is sued in his official capacity, a personal judgment cannot be entered against him.[1]

A receiver may employ counsel to advise him as to his duty, and he is entitled to credit for counsel fees in his account.[2]

5. Particular Rights—(See also, this title, sub-section, *Receivers in Particular Cases*)—*a.* EXEMPTION FROM ARREST.—In *Ireland* a receiver is exempt from arrest on civil process, while in attendance at court upon duties connected with his receivership.[3]

b. POSSESSION OF PROPERTY.—A receiver has the right to the possession of the property, which it is his duty to manage and control under the order of his appointment.[4]

c. TO MAKE REPAIRS.—Receivers have not a general right to expend funds in their hands for repairing the property under their control. They should first apply to court for an order permitting such expenditure. If, however, a receiver has made repairs without an order of court, and it appears that such repairs are reasonable, and that the court would have directed them if application had been made, the receiver may be allowed credit for them in his accounts.[5]

d. TO APPEAL FROM COURT'S ORDERS.—A receiver has a right to appeal from an order of a court charging him with personal liability for funds or assets received in the administration of the receivership.[6]

1. Woodruff *v.* Jewett, 37 Hun (N. Y.) 205.

2. **Counsel Fees.**—Hubbard *v.* Camperdown Mills, 25 S. Car. 581; *In re* Bank of Niagara, 6 Paige (N. Y.) 213. But see Corey *v.* Long, 12 Abb. Pr., N. S. (N. Y.) 427.

Fees will not be allowed for services which are of no benefit to the estate. Platt *v.* Archer, 13 Blatchf. (U. S.) 351; Utica Ins. Co. *v.* Lynch, 2 Barb. Ch. (N. Y.) 573. Counsel fees will not be allowed to a receiver for unsuccessfully resisting an application to compel him to account. Clapp *v.* Clapp, 49 Hun (N. Y.) 195; Union Bank Case, 37 N. J. Eq. 420; nor for resisting an application for his removal. *In re* Colvin, 4 Md. Ch. 126.

In State *v.* Butler, 15 Lea (Tenn.) 114, it appeared that the Legislature of *Tennessee* repealed the charter of the City of Memphis, and under the general law the Governor appointed an officer of the extinct corporation to be known as receiver and back tax collecter," who was required to make a statement of his collections to the court and his compensation was fixed by the act at $2,000 per annum; but after two years the court was authorized to fix the salary, not, however, to exceed this sum. The receiver appointed was an attorney-at-law, and numerous suits were litigated by him, to the prosecution and defense of which he gave his services as an attorney. The legislature subsequently amended the acts referred to so as to authorize the court to allow the receiver reasonable compensation for such legal services as he might have rendered. Upon the petition of the receiver for additional compensation for his legal services, it was held, that, independent of the act as amended, the court would not have allowed him any additional compensation for such service but that under the act he was entitled to the same.

3. Brabazon *v.* Tyenham, 2 Ir. Ch., N. S. 563.

4. 2 Story Eq. Jur. (13th ed). p. 160, § 833; Kerr on Receivers, p. 197.

5. Attorney-Gen'l *v.* Vigor, 11 Ves. 563; Blunt *v.* Clitherow, 6 Ves. 799; Thornhill *v.* Thornhill, 14 Sim. 600.

6. In Hinckley *v.* Gilman, etc., R. Co., 94 U. S. 467, it appeared that in the progress of a suit for the foreclosure of a mortgage executed by a rail-

e. TO BRING ACTIONS.—See *infra*, this title, *Remedies Concerning—Actions by.*

6. Duties in General.—The general duties of a receiver are to take and guard securely the property intrusted to his care;[1] to apply to the court for directions as to its management, control and distribution;[2] and when he has obtained an order of court, to strictly comply with its terms.[3] It is his duty to act impartially as to all the parties interested in the estate,[4] and not to interfere in the litigation, unless it is necessary for him to do so.[5]

road company, a receiver was appointed, and thereafter a final decree was rendered under which the mortgaged property was sold and subsequently conveyed to the purchasers. Upon a settlement of the accounts of a receiver a balance was found due from him of $18,776.25 for which a decree was entered directing its payment into court. The receiver, thereupon, took an appeal from such decree, and upon a motion to dismiss it, it was held, that he had a right to appeal and the motion was denied.

In How. *v.* Jones, 60 Iowa 70, a receiver appealed from a decree requiring him to pay over to the clerk of the court the amount of money paid to and received by him, found by the court to be $1,308.95, without any evidence and opportunity of the receiver to show his expenses. Upon motion to dismiss it was held that he had a right to appeal.

In Akers *v.* Veal, 66 Ga. 302, it was held that a receiver may demand a jury to pass upon exceptions taken by him to the report of an auditor appointed by the court to pass upon the receiver's accounts.

Under *Alabama* Code, 1886, § 3611, giving an appeal as a matter of right only to the parties or their personal representatives, an appeal by a receiver from an order allowing claims on the funds in his hands in favor of one not a party to the original suit will be dismissed. Dorsey *v.* Sibert (Ala. 1891), 9 So. Rep. 288.

Receivers appealing in good faith from the judgments of the State courts should not be required to give supersedeas bonds. Central Trust Co. *v.* St. Louis, etc., R. Co., 41 Fed. Rep. 551; 42 Am. & Eng. R. Cas. 26.

1. "The general duty of a receiver may be said to be to take possession of the estate and premises, or any other property the subject matter of dispute in the cause, in the room or place of the owner thereof; and, under the sanction of the court, when necessary, to do all such acts of ownership as to the receipt of rents, compelling payment of them, management, and letting the lands and houses, and otherwise making the property as productive for the parties to be ultimately declared to be entitled thereto as the owner himself could do if he were in possession." Kerr on Receivers, p. 196. See also Bisph. Eq., p. 618, § 518; 5 Chitty's Eq. Index 5236; Fost. Fed. Prac. p. 372; 2 Dan. Ch. Pr. 1748.

2. *In re* Van Allen, 37 Barb. (N. Y.) 225; Smith *v.* New York Consolidated Stage Co., 28 How. Pr. (N. Y.) 377; 18 Abb. Pr. (N. Y.) 431; Curtis *v.* Leavitt, 1 Abb. Pr. (N. Y.) 274; Lottimer *v.* Lord, 4 E. D. Smith (N. Y.) 191; Kalbfleisch *v.* Kalbfleisch, 59 Hun (N. Y.) 619; Cammack *v.* Johnson, 2 N. J. Eq. 163.

3. Beach on Receivers, p. 291.

4. In People *v.* Security L. Ins., etc., Co., 79 N. Y. 267, Danforth, J., in speaking of the duty of a receiver to act impartially, said: "He is not to advocate the cause of one claimant as against another, between them he is indifferent, owing a like duty to all, and for that very reason should as far as possible, see to it that each has an equal opportunity to enforce his claim. He stands as their representative and is bound to give them reasonable aid." See also First Nat. Bank *v.* Barnum Wire, etc., Works, 58 Mich. 315; 55 Am. Rep. 660; Holbrook *v.* American F. Ins. Co., 6 Paige (N. Y.) 220; *In re* Van Allen, 37 Barb. (N. Y.) 230.

5. "The receiver ought not to interfere in any litigation between the parties. If he does so, he will not be allowed the costs of a motion for such a purpose. It is the duty of a receiver to receive the rents and collect the moneys without raising any controverted question between the parties." Kerr on Receivers, page 221. But

7. Particular Duties.—See *infra*, this title, *Receivers in Particular Cases.*

8. Liabilities—*a.* RESPONSIBILITY TO THE APPOINTING COURT.—A receiver is directly responsible to the court by which he was appointed,[1] and if he misappropriates the property in his hands, relief may be had against him at any time, and the parties interested need not wait until he files his account.[2] A court of

this statement of the *English* and *Irish* rule is probably too broad to be applied in the United States, where no important step can be taken by a receiver except under the order and direction of the court.

1. Conkling *v.* Butler, 4 Biss. (U. S.) 22; Henry *v.* Kaufman, 24 Md. 1; 87 Am. Dec. 591.

But a receiver appointed in an attachment suit begun at the common pleas and transferred to the circuit court of another county, becomes an officer of the latter court, and for disobedience to its orders to account, is liable to be punished by it for contempt. *In re* Haley, 99 Mo. 150. And where receivers are operating a railway under appointment from a court of chancery in one State, and the courts of that State hold them liable as common carriers and they are acting in that capacity, they are liable to an action in the courts of another State for a breach of duty as common carriers. Paige *v.* Smith, 99 Mass. 395.

A person who owes money which came to his hands as receiver, is in a fiduciary capacity within the meaning of the English Debtors' Act of 1869, abolishing imprisonment for debt, and excepting the case of a default by "a trustee or person acting in a fiduciary capacity and ordered to pay by a court of equity any sum in his possession, or under his control" (§ 4), and he is liable to attachment from breach of an order to pay such sums, made after he has been discharged from his receivership. *In re* Gent, L. R., 40 Ch. Div. 190; 37 W. R. 15.

Where a receiver makes disbursements, by order of the court, out of a fund transferred to him by a depositary under an order of court improvidentially awarded, he cannot, when required to return the fund, be compelled to return the disbursements also as a personal liability. *In re* Home Provident Safety Fund Assoc. (Supreme Ct.), 15 N. Y. Supp. 211.

After judgment in an action against an executor, a receiver of the estate was appointed and directed to pay the judgment out of the funds transferred to him. The receivership was afterwards extended, by order, to judgments recovered against the executor in a second suit by the same plaintiffs, and in a third suit by other parties, and the receiver was directed to pay those judgments out of the fund after reserving the amount of the first judgment, from which an appeal had been taken; but he paid out the whole fund, less his commissions, etc., on the two latter judgments. All the suits were brought by the same attorney. *Held*, that on the reversal, on appeal, of the original order appointing the receiver, as erroneous, though not void, the receiver must restore defendant the amount of such two judgments so paid by him. Willis *v.* Sharp, 58 Hun (N. Y.) 608.

2. In De Winton *v.* Mayor, etc., of Brecon, 28 Beav. 200, which was a motion for the repayment of a sum, which it was alleged had been improperly paid by a receiver, the master of the rolls said: "On the question of form, I entertain no doubt that this is a wrong payment on the part of the receiver, and that the corporation to whom the money was ordered to be paid is entitled to come here to stop it. It would to me, at least, be a novel view of the case, if a party to a cause, interested in moneys received by a receiver which are directed to be applied under an order of the court, and who complains that the receiver is misapplying those funds, is to be told, that the time has not come to stop the misapplication of those funds, and that he must wait until the receiver passes his accounts, and then have the items disallowed. If the court has distinct evidence before it that sums of money received by the receiver are being misapplied, and paid to persons having no title to them, then, although the time for passing his accounts has not yet arrived, the court will, I apprehend, di-

equity, however, will not permit the liability of a receiver to be enforced against him in a court of law, without its consent has been first given.[1]

b. FOR NEGLIGENCE OR MISCONDUCT IN THE PERFORMANCE OF THEIR DUTIES.—Where a receiver mismanages the estate under his control, or willfully violates the orders of the court, and wrongfully exceeds his powers, he will be liable for any loss which may result from such misconduct.[2] Where, however, a receiver

rect that the matter be suspended until the receiver has passed his accounts, and that the funds be secured in the meantime."

1. See this title, subsection, *Action Against Receivers.*

2. Thus, in Union Bank Case, 37 N. J. Eq. 420, there came into the hands of the receiver of a bank a note for $1,500 indorsed by A, for whom the bank discounted it. One month after the receiver was appointed, the maker died, leaving an estate in Pennsylvania where it was administered, sufficient for the payment of his debts. The receiver appeared to have done nothing towards the collection of the note beyond inquiring of A, who was the maker's father-in-law, as to the insolvency of the latter's estate. A himself was insolvent, and the claim was lost. The court held that the receiver had been so derelict in his duty as to be chargeable with the claim.

In Clapp *v.* Clapp, 49 Hun (N. Y.) 195, proceedings were begun to remove executors, and a receiver was appointed to manage the property of the decedent, and liquidate the account of the executors. The receiver entered into the possession of certain real estate of the decedent, but took no steps to obtain the property of the testator from the executors. The court held that he was properly chargeable with the property of which the executors had become possessed. But in Griffith *v.* Griffith, 2 Ves. 400, it was held that if a loss occurred because of the owner being allowed to remain in possession, the fault was that of the parties in interest and not of the receivers. The reason for this decision lies in the fact that in *England* the parties were expected to take the initiative in instituting proceedings to enforce the rights of the receiver, and that it was not the duty of the receiver to institute proceedings to enforce his possession.

In Carr *v.* Morris, 85 Va. 21, a receiver was ordered to lend a fund in his hands at six per cent. interest, on a bond secured by a deed of trust of real estate, to run to himself, and to make report of his doings. He loaned the money at eight per cent. on notes running to another, secured by a deed of trust of real estate, which was practically worthless, and neglected to collect the debt upon default, and made no report to the court. It was held that he was liable for the loss.

In Thompson *v.* Holladay, 15 Oregon 34, a receiver lent money to one of the parties to the suit and took a mortgage on property belonging to the receivership. *Held*, that the court in the distribution of proceeds, would not respect this mortgage, and would protect the receiver no further than by permitting him to take a personal decree.

In McCay *v.* Black, 14 Phila. (Pa.) 635, a receiver of a partnership was ordered to sell the assets, but instead of doing so he used the funds of the firm in purchasing goods to continue the business. The court held that he was properly charged with the amount of the inventory, and if he failed to realize its equivalent, the burden rested upon him to show, in a way ordinarily satisfactory to business men, just where the discrepancy lay.

In Brooks *v.* Miller, 29 W. Va. 499, commissioners were directed by a decree to loan a fund and take bonds from the borrowers. From their report it appeared that portions of the fund were loaned to themselves individually, and the court directed them to hand over the bonds to the beneficiary. *Held*, that the latter was not prevented by the decree under which he received the bonds from holding the commissioners and their sureties jointly liable for the fund.

In Ricks *v.* Broyles, 78 Ga. 610, money in the hands of a receiver awaiting the result of litigation is in his possession as custodian. He alone is responsible therefor, and it is at his

acts with due caution, and for what, in his judgment, is for the best interest of the estate, and a loss occurs without any fault on his part, he will not ordinarily be liable for the loss.[1]

own risk that he parts with it without any express order of court.

In Com. *v.* Eagle F. Ins. Co., 14 Allen (Mass.) 244, it was held that if two receivers are appointed to close up the concern of a corporation, and one of them misappropriates the funds by using them for his own profit, and the other is guilty of gross neglect of his duties, giving no attention to the matters intrusted to his care and supervision, they will be jointly liable for the balance found justly due upon stating their account, and will be chargeable with interest.

In Wilde *v.* Baker, 14 Allen (Mass.) 349, it was held that moneys paid by members of a mutual fire insurance company to the receiver of the company, on an assessment laid by him upon all the members of the company cannot be recovered back, although the assessment is afterwards adjudged to be void; and if the receiver refuses to comply with an order of court to distribute such moneys among the creditors of the company, he and his sureties will be liable upon his bond.

It is a violation of his trust for a receiver to loan money to himself, or to a firm of which he is a member. Ryan *v.* Morrill, 83 Ky. 352.

1. Knight *v.* Lord Plymouth, 3 Atk. 480, is reported as follows: "A person who had been appointed receiver under an order of this court of Lord Plymouth's estate, having received the sum of seven hundred pounds and upwards in rents, did not think it safe to remit the money to London, and therefore paid it to Winsmore, a considerable tradesman in Worcester, and took bills of exchange from him, drawn on persons in London. Mr. Winsmore very soon after becomes a bankrupt, and there was an application to the court some time ago against the receiver, that he may make good to the estate the loss that has happened; lord chancellor referred it to a master to inquire into the fact, and to state it with all the circumstances to the court. It came on to-day upon the master's report, and upon the state of it, as certified by the master, it appeared that the receiver did it only for the greater safety, as it was a large sum of money to remit in specie, and that he had no notice of Winsmore's being in declining circumstances, who, till a week before he broke, had as great credit as any person in Worcester. Upon the circumstances of the case, his lordship said, it would be very hard to oblige the receiver to make good a loss which was not owing to any default of his, but as the sum was large, it was a necessary precaution to remit it by bills, rather than in specie, and at the time the money was paid to Winsmore, he had no reason to doubt its being lodged in a safe hand, and therefore indemnified the receiver in the act he had done. But said, at the same time, he would not lay it down generally, that the court will indemnify a receiver appointed by them, if it should appear that he had been guilty of any fraud or collusion in a transaction of this kind, and that the money was lost by his willful default, and placing it in what he knew at the time to be an improper hand; for he should then be of opinion that the court, as he is an officer appointed by them, would oblige him to answer the loss out of his own pocket."

Where title to land sold by a receiver proves defective, but the sale has been made without fault on the part of the receiver, he is not liable personally for the expenses to which the purchaser has been subjected. Manning *v.* Monaghan, 23 N. Y. 544; Drake *v.* Goodridge, 6 Blatchf. (U. S.) 151.

Where a receiver has used proper care in employing an attorney, he is not liable for a loss occurring through the attorney's misconduct. Union Book Case, 37 N. J. Eq. 420. In Powers *v.* Loughridge, 38 N. J. Eq. 396, the receiver of a partnership employed a lawyer in Philadelphia to collect a claim in favor of the partnership against the estate of a debtor outside of the State and in Philadelphia. The receiver, through his regular attorney, made due inquiry as to the character of the lawyer before putting the claim into his hands, and was satisfied that he was worthy of confidence, and there was no evidence that he was not a lawyer of good standing at that time. Such lawyer, after collecting the claim, absconded, and never paid it over, nor any part of it, and was wholly

c. FOR LOSS OF MONEY DEPOSITED IN BANK.—Where a receiver deposits money in bank in his name as receiver, and without any arrangement which limits or restricts his control over the fund, and the money is lost by the failure of the bank, he will not be personally liable. But if he deposits the moneys of the trust in his own name,[1] or under some arrangement which limits his control over the fund, and a loss occurs, he will be liable for the loss.[2]

insolvent. It was held that the receiver should not bear the loss.

1. *In re* Stafford, 11 Barb. (N. Y.) 353, a receiver deposited the funds of the estate in his own name, and not as a receiver. The bank failed, and it was held that the receiver was liable for the loss of the deposit. The court said: "The question in this case is to be determined upon the same principles as other cases of trust. The receiver was in fact, a trustee, and is entitled to the protection and subject to the same liabilities as other trustees. I understand it to be a general rule, applicable to all persons standing in that relation, whether they be receivers, guardians, executors or administrators, or trustees of any other description, that so long as they keep themselves strictly within the line of duty and exercise reasonable care and diligence, they cannot be made responsible for any loss or depreciation of the fund intrusted to them; but if they do not strictly pursue that line, and a loss ensue, they are liable to make that loss good, although such loss may have been wholly unexpected, and little likely to have happened from the course pursued, and although the conduct of the trustee has been entirely free from any improper motive. If this rule be applicable to the case in hand, and I am unable to see why it is not, it is clear the receiver must himself bear the loss which he seeks to charge upon the estate. Instead of depositing the funds to the credit of the estate separately, he mingled them with his own, and involved them in a general account of debtor and creditor between himself and the bank. It may be assumed that he was actuated by no improper motive. He did not suppose it possible that any one could be injured by thus disposing of the funds. The same would have been equally true had he loaned them temporarily to a friend, in whose honesty and responsibility he had confidence. Yet, it would not be pretended that, in such a case, he could escape liability for any loss which might occur, though equally unexpected, as in this case. He would have been liable in that case, as he is in this, upon the ground that, in the management of the fund, he had allowed himself to pass beyond the line of his duty." See also Wren *v.* Kirton, 11 Ves. 378; Drever *v.* Mawdesley, 13 L. J., N. S. Ch. 433; Utica Ins. Co. *v.* Lynch, 11 Paige (N. Y.) 520; *In re* Commonwealth F. Ins. Co., 32 Hun (N. Y.) 78.

A receiver deposited some of the funds of the receivership in a bank which became insolvent; but the deposit was not unusual, and the bank was in good credit, and the act was one which a prudent, conservative business man might well have done. *Held*, that the receiver should not suffer therefor. Brett *v.* Brett, 42 Hun (N. Y.) 660, mem.

2. In the leading case of Salway *v.* Salway, 2 R. & M. 215, a receiver deposited in bank the sums which he received, to the joint account of his sureties, under an arrangement with them, that all drafts upon the deposits should be drawn by one of the sureties, and signed by himself. The bankers having subsequently failed, it was held that the receiver was liable for the loss. The Lord Chancellor Brougham said: "It is admitted on all hands, that if a receiver puts a fund out of his own control, so that other persons shall be able to deal with it, he guarantees the solvency of those persons, and becomes answerable for any loss that may ensue. However good his intention, the departing with the control to the extent of giving that control to another, would be enough to make him a guarantee of the fund. The principle is so obvious that I say nothing of the authorities. His honor, indeed, has observed that the receiver here has not so far parted with the control as to enable the other per-

d. UPON CONTRACTS AND COVENANTS.—A receiver is not personally liable on a covenant or contract made in his official

son to deal with it without his concurrence. He parts with his exclusive control by associating and incorporating with himself the authority of another person. Anderson was to make the drafts; he, the receiver, was to sign them; and consequently, Anderson was a necessary party to the drawing out of every shilling of the funds on deposit. The question, therefore, assumes a very serious aspect; and if I am to affirm this judgment, when possessed of the knowledge of an arrangement, by which an individual, not an officer of the court, not answerable to the court, nor recognized by it, is called in to the extent of exercising a veto, I cannot shut my eyes to the consequences. To hold that a receiver, although the court confides in him, and appoints him *propter delictum personæ*, is entitled, notwithstanding, to mix up with his delegated authority another person to whom the court is a total stranger, would be a doctrine pregnant with the greatest danger, and one for which I can find no authority. The case of Knight *v.* Lord Plymouth, 3 Atk, 480; 1 Dick. 120, has been much doubted, and in Wren *v.* Kirton, 11 Ves. Jr. 377, it is clear that Lord Eldon was prepared, if necessary, to have gone against it. Lord Hardwicke, it is well known, has been peculiarly unfortunate in the reporters of his decisions, and there may, therefore, have been circumstances in Knight *v.* Lord Plymouth, 3 Atk. 480, which, if known, would have thrown a better light upon the decision in that case. But it is unnecessary to discuss or pronounce upon the comparative authority of those cases now; for the present, as must indeed generally happen in questions of this nature, must, after all, be determined upon its own circumstances. I could not affirm the decision of the court below without laying down this rule, that a receiver under the control of the court, and paid out of the estate, is, nevertheless, entitled to substitute for his own discretion, responsibility and integrity, the discretion, responsibility and integrity of a stranger. If it be asked, what harm arises from this? I answer, the greatest—the total loss, it may be, of the property. It is not one part of the discretion of the trustee, taking him to be a mere naked trustee; it is not one part of the discretion of an agent, to whom the receiver may more properly be likened, to keep the funds in the hands of the bankers so long only as they shall be safely there lodged, and to seize the moment when peril threatens to withdraw them to a place of safety? Will it be said that he is able to exercise that discretion when he has tied up his own hands, and can no longer exercise it himself, but must apply for the consent and co-operation of another? That control was not given without an object; for it was given partly to induce the sureties to undertake the responsibility. It has been urged that this arrangement was made in order to impose a check upon the receiver. But though any good consideration could be properly given for that purpose by the receiver himself, yet, if the consideration consists of something which directly tends to introduce the control of another, and that an irresponsible person unknown to this court, I take it, the receiver shall be answerable for what has happened to the fund which he has so dealt with, not merely in a case where the peril can be sworn to be the cause of the loss, but where he has not so rightly conducted himself as to exonerate him from the loss—where he has not so conducted himself as a prudent person would have done.

"Cases of this description must rest upon their own merits. But they are of great importance to the parties and to the court. Receivers might be very prone to extract a general rule, amounting to a license to neglect the strict line of their duty, if this judgment had not been critically considered, and if the doctrines that appear to be held by the master of the rolls had been confirmed."

Pending an action upon a guardian's bond, the clerk of the court was appointed receiver of the infants' estate, with power to expend the income thereof for their maintenance and education. The receiver deposited money coming to the infants in a bank in another State, receiving a certificate of deposit, but taking no security, which bank afterward failed. *Held*, that the receiver was personally liable for the loss of the funds. Conigland *v.* Gooch, (N. Car. 1887) 1 S. E. Rep. 653.

capacity;[1] nor is he liable on the covenants of the original parties.[2]

e. FOR FAILURE TO PAY BALANCE INTO COURT.—A receiver who fails to comply with an order, requiring him to pay money into court, may be committed for disobeying the order.[3]

1. Livingston *v.* Pettigrew, 7 Lans. (N. Y.) 405.

A receiver who, in order to derive an income for the estate from a piece of property unfavorably situated and difficult to rent, himself conducts a boarding house thereon in company with another person, receiving no personal profit therefrom, does not thereby make himself liable for the rent. Hynes *v.* McDermott, 14 Daly (N. Y.) 104.

Where a mining company operates its various mines under one system, and the proceeds of the ore extracted from each are used indiscriminately, for the common benefit of all, a receiver appointed on the foreclosure of mortgages covering a part only of the company's property, with power to take possession of the mortgaged premises and to carry on the mines, who is permitted by the company to take possession of its entire property, and to work all its mines, rendering them more valuable and more capable of paying creditors, cannot be considered a trespasser, and is not personally liable to a general creditor of the company for sums realized by him from a mine not covered by the mortgage. Staples *v.* May (Cal. 1890), 23 Pac. Rep. 710.

An attorney was employed by the receiver of an insolvent firm, without agreement as to the amount of his compensation. When the receiver made his final settlement, the attorney appeared, and claimed that a larger sum than had been paid by the receiver should be allowed him for services in settling the estate. The court declined to make any further allowance, accepted the final account of the receiver, and discharged him from the trust. *Held*, a bar to an action against the receiver individually to recover additional compensation. Walsh *v.* Raymond, 58 Conn. 251.

But under certain circumstances a receiver is personally liable for contracts. Thus, where the attorney for a receiver employs a stenographer to take testimony on a preference to state the receiver's accounts, the receiver is personally liable for the stenographer's fees. Ryan *v.* Rand, 20 Abb. N. Cas. (N. Y.) 313.

And where a receiver of a corporation employed plaintiff to take charge of the company's property and pay such sums as were necessary for its protection, and there was no express agreement that plaintiff should exonerate the receiver and look alone to the trust estate for his compensation, the receiver was held individually liable for plaintiff's services and disbursements. Rogers *v.* Wendell, 54 Hun (N. Y.) 540.

In Sayles *v.* Jourdan, 50 Hun (N. Y.) 604, defendant being appointed receiver of a railroad company and a hotel owned by it, assumed to run the hotel, and employed another party to act as manager. With knowledge of this, plaintiff supplied merchandise to the hotel. Shortly thereafter, defendant, as receiver, executed a lease of the hotel to his manager, who ran the business without any outward change being made, except that he was referred to as lessee upon the published time-tables of the road. Without notice of this change, plaintiff continued to supply merchandise to the hotel. *Held*, that the defendant was liable in his individual capacity for the price of the goods so supplied.

2. In Com. *v.* Franklin Ins. Co., 115 Mass. 278, it was held that receivers of an insolvent insurance company are not responsible merely by accepting the trust, and receiving the assets of the company, on the covenants of a lease previously made by the company. To bind them there must be an election on their part, or some act equivalent in law to an election.

3. In Davies *v.* Cracraft, 14 Ves. 143, an order was made on a receiver to pay money by a certain day. The register took the objection, that the order could not be for commitment in the first instance, but there must be a previous order in the alternative, that he shall pay by a certain day, or stand committed. Lord Chancellor Eldon agreed to the practice, as stated by the register, and made the order accord-

f. FOR PROFITS EARNED UPON FUNDS IN THEIR HANDS.—A receiver is accountable for interest and profits earned upon the trust funds in his hands. Where a receiver has used the funds in his own business, and made a profit thereon, he must account for the whole of the profit. If, however, the profit is less than the ordinary rate of interest, the court at its discretion may compel him to pay the legal rate of interest.[1]

g. FOR COSTS.—A receiver is not personally liable for costs in actions prosecuted or defended by himself, except where he has been guilty of bad faith, or gross mismanagement.[2] Costs in such cases are properly payable out of the funds in the hands of the receiver.[3]

h. LIABILITY OF RECEIVERS IN THE OPERATION OF RAILROADS FOR THE NEGLIGENCE OF SUBORDINATES.—See *infra*, this title, *Railroad Receivers.*

i. WHEN LIABILITY CEASES.—After a receiver has been discharged and the property has been taken out of his possession, the liability of the receiver ceases, not only as to creditors,[4] but

ingly, that the receiver should within a week after personal service of the order pay, or stand committed. See also *In re* Bell's Estate, L. R., 9 Eq. 172; Anonymous, Mos. 40.

1. In Utica Ins. Co. *v.* Lynch, 11 Paige (N. Y.) 520, a receiver deposited sums of money received by him in his official capacity with his own funds, and afterwards drew out large sums which he loaned to his friends. The court held that he was properly chargeable with interest. To the same effect are Com. *v.* Eagle F. Ins. Co., 14 Allen (Mass.) 344; *In re* Commonwealth F. Ins. Co., 32 Hun (N. Y.) 78; How *v.* Jones, 60 Iowa 70; Radford *v.* Folsom, 55 Iowa 276; Hooper *v.* Winston, 24 Ill. 353; Battaile *v.* Fisher, 36 Miss. 321; Hinckley *v.* Railroad Co., 100 U. S. 153; Attorney-Gen'l *v.* North American L. Ins. Co, 89 N. Y. 107.

2. Devendorf *v.* Dickinson, 21 How. Pr. (N. Y.) 275.

3. In Columbian Ins. Co. *v.* Stevens, 37 N. Y. 536, an application was made by the successful parties in a suit for an order upon a receiver to pay the costs out of the funds in his hands. The application was refused, but on appeal it was held that it should have been granted. Woodruff, J., said: "If it be assumed that the company was insolvent, and that the funds which the receiver holds or may collect may not prove sufficient to satisfy all the creditors of the company, this does not, in my opinion, upon clear and just rules governing the subject, impair the defendant's right to be paid in full, the fund being confessedly sufficient. The receiver is *pro hac vice* the representative of the company, its creditors and stockholders. The action is prosecuted for the increase of a fund which is to be paid to them. It is not according to any rule of justice or equity toward third parties, that actions like the present should be prosecuted by the company or such representative, otherwise than at the expense and risk of the fund which it is sought thereby to increase. In my opinion the right of the defendant to this protection and indemnity against groundless prosecution is clear, and it is not necessary to invoke the three hundred and seventeenth section of the code for its maintenance, further than to say that its provisions warrant the charge of these costs upon the fund; and such charge should be absolute and prior to the claims of those for whose benefit the action is prosecuted, if the rules of equity require it. Whether that section imperatively entitles the prevailing party to such priority of payment in all cases mentioned in that section, it is unnecessary in this case to decide. If the views thus expressed are in conformity with established rules relating to the subject, as they are, in my judgment conformable to that which is obviously just, then it was not a matter of discretion to refuse the order sought."

4. In New York, etc., Tel. Co. *v.*

also as to claims for torts occasioned by the negligence of the receiver himself, or of his subordinates.[1]

V. Management and Control of Property — 1. Receiver's Title—*a*. In General.—A receiver, strictly speaking, is appointed for the preservation of the property or fund during litigation, and deals only with the possession, the title to the property not being in any manner affected.[2]

Jewett, 115 N. Y. 166, while proceedings were pending to compel the receiver to pay the claims of a creditor, the receiver was discharged, and the property, a railroad, was taken out of his hands. The court held that the liability of the receiver ceased upon his discharge. The court said: "But the claim is made on the part of the telegraph company that the receiver was discharged without any notice to it, and that it had no opportunity to be heard in the proceeding taken for his discharge. The discharge was granted on the 30th day of December, 1879, while this proceeding was pending. But the court had the power to discharge the receiver and take the property out of his hands, and distribute the same in pursuance of its judgment without any notice to the telegraph company. The jurisdiction of the court and the validity of its order did not depend upon any notice of the company. The general creditors of the Erie Railway Company were all represented in the actions, in which Jewett was appointed receiver, by the people and their debtor, and they were not, as matter of law or of right, entitled to any personal notice of any of the proceedings in these actions. Herring *v.* New York, etc., R. Co., 105 N. Y. 376. It is possible that the claim of creditors in such a case as this may be prejudiced and, perhaps, defeated by the discharge of the receiver; but such a result will rarely happen to vigilant creditors. In this case the receiver was appointed on the 26th day of May, 1875, in actions and proceedings so notorious that they must have come to the early knowledge of all the creditors within this State, and yet for nearly three years thereafter this claim was not made. The creditor must have known that these actions and proceedings were running to a termination, and that the time would come when the mortgage would be foreclosed, and the property of the railroad company be disposed of and the receiver discharged. The sale, which must have been open and notorious, took place, and the receiver was discharged after an accounting in public legal proceedings on the 30th of December, 1879. If the telegraph company did not have knowledge of such discharge prior thereto, the fact was brought to the notice of its counsel by the affidavit of Jewett, made early in 1882, in which he alleged his discharge as a defense to this proceeding; and thereafter, during all the subsequent litigation, such discharge was set up and relied upon as a defense. After such discharge, the sole remedy of the creditor was to apply to the court to vacate its order so that its rights as a creditor might be protected; and that, during the whole time since, the litigation has proceeded without any effort on its part to get any relief whatever from the court vacating its order discharging the receiver. So long as that order stands, however unfortunate it may be to the creditor, it certainly cannot be entitled to the order which it seeks in this proceeding."

1. Farmers' L. & T. Co. *v.* Iowa Cent. R. Co., 7 Fed. Rep. 537.

2. Fosdick *v.* Schall, 99 U. S. 235; Bank of Bethel *v.* Pahquioque Bank, 14 Wall. (U. S.) 383; Field *v.* Jones, 11 Ga. 413; Ellicott *v.* Warford, 4 Md. 80; Williamson *v.* Wilson, 1 Bland (Md.) 421; *In re* Colvin, 3 Md. Ch. Dec. 278; Manlove *v.* Burger, 38 Ind. 211; St. Louis, etc., Coal, etc., Co. *v.* Sandoval Coal, etc., Co., 111 Ill. 32; Tillinghast *v.* Clamplin, 4 R. I. 173; 67 Am. Dec. 510; Fincke *v.* Funke, 25 Hun (N. Y.) 618; Wilson *v.* Wilson, 1 Barb. Ch. (N. Y.) 592; Wilson *v.* Allen, 6 Barb. (N. Y.) 545; Skip *v.* Harwood, 2 Atk. 564; Gresley *v.* Addersley, 1 Swanst. 473; Kerr on Receivers (3d Eng. ed.), pp. 132, 133; Yeager *v.* Wallace, 44 Pa. St. 294; *Ex parte* Dunn, 8 S. Car. 207.

Legal Title.—In *Ex parte* Dunn, 8 S. Car. 207, the court by Moses, C. J., says: "The mere appointment does not affect the title to the property or rights

b. RECEIVER PENDENTE LITE.—Where there is an action to try the title to specific property, to wind up a partnership, dissolve a corporation; or, in other cases, where it is necessary, in order to preserve the property from waste, that it should be taken out of the hands of the litigants and put in charge of an indifferent third party, a receiver *pendente lite* will be appointed. He acquires no title whatever, but only the right of possession as an officer of the court, to the property over which he is put in charge.[1]

of any who may have an interest therein. Whatever vested rights creditors may have by the order of the court, in regard to the final disposition of the property or its profits in the hands of the receiver, are not impaired or affected by the mere change in the possession of the property." In Ellis *v.* Boston, etc., R. Co., 107 Mass. 1, Wells, J., at page 28, says: The decree appointing a receiver "had no effect to change the title or create any lien upon the property. Its purpose, like that of an injunction *pendente lite*, was merely to preserve the property until the rights of all parties could be adjudged."

In Yeager *v.* Wallace, 44 Pa. St. 294, the court by Strong, J., says: "I do not find it has ever been decided that a receiver can sue in his own name for any debt, claim or demand of a party of whose effects he has been appointed receiver, or to recover the possession or control of any real estate or choses in action of such party, unless some statute has enabled him. He has always been regarded, not as having the legal right, but as a mere custodian to take charge of the property during a pending litigation. If possession be withheld from him by the party whose property has been taken charge of by the court, delivery to the receiver is enforced by attachment. If a third person, not a party to the proceedings in equity, withhold the property, suit may be brought by the receiver with the consent of the court, but he must bring it in the name of him who has the legal right."

Distress for Rent.—In Pitt *v.* Snowden, 3 Atk. 750, the court by Lord Chancellor Hardwicke said a receiver must distrain in the name of him who had the legal right. If a tenant has attorned to a receiver, then the legal right becomes vested in the receiver, and he may distrain in his own name. Daniel's Ch. Pl. & Pr. 1748.

Trover.—In Yeager *v.* Wallace, 44 Pa. St. 294, it was held that a receiver could not bring trover in his own name against a person who had converted some of the property, prior to the receiver's appointment. After the receiver once obtains possession of the property, he may bring trover in his own name for a subsequent conversion. Singerly *v.* Fox, 75 Pa. St. 112.

Insurance.—A fire insurance policy issued to a firm contained a condition that if the insured property be sold or transferred, or any change took place in title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance, the policy should be void. A receiver of the partnership was appointed, and a loss subsequently took place. The court held that there was no change of title effected, and the company must pay the loss. Keeney *v.* Home Ins. Co., 71 N. Y. 396; 27 Am. Rep. 60.

Patents.—A receiver cannot convey the legal title to a patent unless the owner joins. Gordon *v.* Anthony, 16 Blatchf. (U. S.) 234, nor can the receiver of the owner of a patent bring suit thereon in his own name. Dick *v.* Struthers, 25 Fed. Rep. 103.

1. In Keeney *v.* Home Ins. Co., 71 N. Y. 396; 27 Am. Rep. 60; Andrews, J., said, at page 401: "A receiver *pendente lite* is a person appointed to take charge of the fund or property to which the receivership extends while the case remains undecided. The title to the property is not changed by the appointment. The receiver acquires no title, but only the right of possession as the officer of the court. The title remains in those in whom it was vested when the appointment was made. The object of the appointment is to secure the property pending the litigation, so that it may be appropriated in accordance with the rights of the parties, as they may be determined by the judgment in the action."

c. CREDITORS' SUITS.—The general rule as to receiver's title is greatly modified in the case of receivers appointed at the suit of judgment creditors. In such cases he is appointed not alone for the purpose of preserving the property, but also to apply the effects to the payment of the pursuing creditor, and to work out the equitable lien which the creditor first filing his bill obtains on the debtor's property. In order to do this it is held that the receiver acquires an equitable title, and, as we have seen, an assignment will be compelled to give him the legal title. The title of the receiver in these cases varies as to different classes of property, and will be found treated in detail in the note below.[1]

d. ASSIGNMENT TO RECEIVER—(1) *When Necessary.*—When it is necessary for the receiver to have the legal title, the court will compel the person over whose property he is appointed receiver, to execute a formal assignment.[2]

1. Albany City Bank *v.* Schermerhorn, 1 Clarke Ch. (N. Y.) 297; Iddings *v.* Bruen, 4 Sandf. Ch. (N. Y.) 223; Mann *v.* Pentz, 2 Sandf. Ch. (N. Y.) 257; Chautauqua Co. Bank *v.* Risley, 19 N. Y. 369; Wilson *v.* Wilson, 1 Barb. Ch. (N. Y.) 592; Moak *v.* Coates, 33 Barb. (N. Y.) 498; St. Louis, etc., Coal, etc., Co. *v.* Sandoval Coal, etc., Co., 111 Ill. 32.

Vice-Chancellor Whittlesey, in Albany City Bank *v.* Schermerhorn, 1 Clarke Ch. (N. Y.) 299, says, at page 300: "The mere filing of a creditor's bill creates a lien upon the choses in action and equitable assets, but such is not its operation upon personal property tangible by execution . . . Another judgment creditor may levy upon, and sell any personal property of the debtor which he can find."

In Iddings *v.* Bruen, 4 Sandf. Ch. (N. Y.) 223, the assistant vice chancellor presents the doctrine clearly as follows, at page 252: "The complainant on the 24th day of May, 1839, was appointed the receiver of all the property and effects of B, in a suit by J C. The bill of J C was filed and the subpœna to answer served, on the 22d of December, 1838; upon which day therefore he acquired a lien upon B's equitable interests and things in action. An order for the appointment of a receiver was made on the 13th of March, 1839, and upon the complainant's appointment in pursuance of the order, he became vested with those equitable interests and things in action to the same extent and with the same rights that B held and possessed them on the 22d day of December preceding."

From the cases and opinions cited above the receiver's title in creditor's suits in the various classes of property may be stated as follows:

Equitable Interests.—The receiver's title vests at the time of bill filed, and the creditor at whose suit he is appointed has a lien from that date.

Choses in Action.—The receiver's title and creditor's lien are the same as in the case of equitable interests.

Tangible Personalty.—The receiver's title and creditor's lien accrue at the time of receiver's appointment, and other creditors may take the property in execution between the time of the filing of the bill and appointment of the receiver.

Real Estate.—The rule as to receiver's title in general holds good in this case, and a conveyance is necessary to vest title in the receiver. Chautauqua Co. Bank *v.* Risley, 19 N. Y. 369; Wilson *v.* Wilson, 1 Barb. Ch. (N. Y.) 592; Moak *v.* Coates, 33 Barb. (N. Y.) 498; St. Louis, etc., Coal, etc., Co. *v.* Sandoval Coal, etc., Co., 111 Ill. 32, and in the case of a conveyance, the receiver's title does not, by relation, go back of the actual time of conveyance. Moak *v.* Coats, 33 Barb. (N. Y.) 498.

Curtesy.—Where the common law estate by curtesy is recognized, it is held that the estate is such an interest as will pass to a receiver on proceedings by a judgment creditor, and the receiver is entitled to rent due on account of such estate at the time of his appointment. Beamish *v.* Hoyt, 2 Robt. (N. Y.) 307.

2. Chautauqua Co. Bank *v.* Risely, 19 N. Y. 369; Mann *v.* Pentz, 2 Sandf. Ch.

(2) *What Passes.*—Where the defendant executes, in pursuance of an order of the court, a formal assignment to the receiver, only property and effects will pass, under the general words used, in which the defendant has some beneficial interest.[1]

e. SUPPLEMENTARY PROCEEDINGS.—In States which adopted the code practice a statutory proceeding at law has taken the place of the former creditor's suit in equity for a receiver. In this statutory action, termed a proceeding supplementary to executions, the receiver's title is dependent upon the terms of the statute. As a rule it is provided that the appointment shall vest the receiver with the legal title. An assignment is therefore unnecessary.[2]

(N. Y.) 257; Green *v.* Winter, 1 Johns. Ch. (N. Y.) 60; Chipman *v.* Sabbaton, 7 Paige (N. Y.) 47; Fincke *v.* Funke, 25 Hun (N. Y.) 616; Albany City Bank *v.* Schermerhorn, 1 Clarke Ch. (N. Y.) 297.

Courts of chancery not being competent to deal directly with the legal title to property, we have seen that the appointment of a receiver gave him no title at law. The difficulty was overcome by holding that the decree vested him with an equitable title, and that the court, when necessary, would, by a proceeding *in personam*, compel the defendant to transfer the legal title to the receiver either by the delivery of possession or by the execution of a conveyance valid at law. It is said in Chipman *v.* Sabbaton, 7 Paige (N. Y.) 47, that this will be done "to enable such receiver to test the validity of any assignment or other disposition they might have previously made of their property, and to bring a suit in his own name in cases in which he was legally authorized to sue in that manner, either in law or at equity." In Albany City Bank *v.* Schermerhorn, 1 Clarke Ch. (N. Y.) 297, Vice-Chancellor Whittlesey said: "The receiver, by virtue of the appointment has a right to the possession of the property. He may require an assignment to exercise his right, but the order gives him his right." In Iddings *v.* Bruen, 4 Sandf. Ch. (N. Y.) 223, it is said, at page 252, "The subsequent assignment by him (the defendant) to the receiver transferred no additional or greater right to the latter. Its effect was to vest in him the legal title, the whole equitable interest being in him before."

Where the defendant denies under oath that he possesses any property, he may nevertheless be compelled to make a general formal assignment. Chipman *v.* Sabbaton, 7 Paige (N. Y.) 47.

1. **Prior Assignment.**—Where the defendant has already executed an assignment to a receiver appointed in a prior suit, the second assignment will not affect the property covered by the first, except as to proceeds which are not needed to satisfy the claims of the plaintiffs in the first suit. Cagger *v.* Howard, 1 Barb. Ch. (N. Y.) 368.

Trust Property.—Property which is held for others under a valid and subsisting trust will not pass, though no reservation of it be contained in the assignment Cagger *v.* Howard, 1 Barb. Ch. (N. Y.) 368.

Property Exempt from Levy on Execution.—Where a defendant may legally waive the exemption law, the assignment will carry exempt property unless it is specially excepted. Cagger *v.* Howard, 1 Barb. Ch. (N. Y.) 368; Fitzhugh *v.* Everingham, 6 Paige (N. Y.) 29.

Choses in Action.—"The right to an action for an injury to the property of the judgment debtor, before the filing of complainant's bill, whereby the property to which creditor was entitled to resort for the payment of his debt is destroyed or diminished in value, will pass by the assignment. Hudson *v.* Plets, 11 Paige (N. Y.) 180. A mere right of action for a personal tort will not pass. Hudson *v.* Plets, 11 Paige (N. Y.) 180.

2. Manning *v.* Evans, 19 Hun (N. Y.) 500; Moak *v.* Coats, 33 Barb. (N. Y.) 498; Porter *v.* Williams, 5 How. Pr. (N. Y.) 441; People *v.* Hulburt, 5 How. Pr. (N. Y.) 446; Wing *v.* Disse, 15 Hun (N. Y.) 190.

Real Estate.—In New York the decisions of whose courts have had the greatest influence in shaping the law of

f. LIMITATIONS.—The receiver's title is subject to all valid and subsisting liens at the time of his appointment. He gets only such title as the defendant or judgment debtor has to the estate of which he takes possession.[1]

the United States concerning receivers in proceedings supplementary to execution, it is held that under the provisions of the code of that State, there is no distinction between the receiver's title to real and personal property in supplementary proceedings. The title to both vests in the receiver by virtue of his appointment, without any conveyance. Wing *v.* Disse, 15 Hun (N. Y.) 190, was an action by a receiver to recover real estate. The debtor never made any conveyance to the receiver, but after the receiver's appointment had conveyed to a third party. It was held that the receiver had title, and he recovered from the person to whom the debtor had conveyed. In Manning *v.* Evans, 19 Hun (N. Y.) 500, an order on the defendant to convey real estate to the receiver was refused on the ground that title passed by the fact of the receiver's appointment, and an assignment was therefore unnecessary. It was formerly held in New York that the provisions of the code, while they vested title to personal property on the receiver, did not have the same effect as to real estate. See Moak *v.* Coats, 33 Barb. (N. Y.) 498, and Chautauqua Co. Bank *v.* Resley, 19 N. Y. 369. These cases are, it is believed, entirely overthrown by Porter *v.* Williams, 9 N. Y. 142; 59 Am. Dec. 519, and the cases cited above. See High on Receivers, § 447.

Seat in Exchange.—A seat or membership in a stock or other exchange is such property as will be passed to a receiver in supplementary proceedings. Powel *v.* Waldron, 89 N. Y. 331; 42 Am. Dec. 301.

Death of Debtor.—When a receiver is appointed in supplementary proceedings, but the debtor dies before the appointment is actually made, it is held in North Carolina that the receiver acquires no title to the debtor's property, but that the debtor's estate must be administered according to the statute of distributions of decedents. Rankin *v.* Minor, 72 N. Car. 424.

1. Gere *v.* Dibble, 17 How. Pr. (N. Y.) 31; *In re* North American Gutta Percha Co., 17 How. Pr. (N. Y.) 549; Rich *v.* Loutrel, 18 How. Pr. (N. Y.) 121; Bailey *v.* O'Mahoney, 33 N. Y. Super. Ct. 239: Bowling Green Sav. Bank *v.* Todd, 64 Barb. (N. Y.) 146; Von Roun *v.* Superior Court, 58 Cal. 358; Union Trust Co. *v.* Weber, 96 Ill. 346; 3 Am. & Eng. R. Cas. 583; Lorch *v.* Aultman, 75 Ind. 162; Conley *v.* Deere, etc., Co., 11 Lea (Tenn.) 274.

Sheriff's Levy.—Where a sheriff levied on personal property and afterward a receiver took possession of the property, the sheriff's levy having been made after the commencement of proceedings, but before the receiver's appointment, it was held that the receiver took subject to the levy. Becker *v.* Torrance, 31 N. Y. 631; Davenport *v.* Kelly, 42 N. Y. 193; Van Alstyne *v.* Cook, 25 N. Y. 489. Where judgment creditors have levied on property, and a receiver is afterwards appointed who takes possession of the property and sells it, the sheriff who made the levy is entitled to the proceeds of such sale. *In re* North American Gutta Percha Co., 17 How. Pr. (N. Y.) 549.

Judgments.—Where there are judgments which are a lien on real estate prior to the receiver's appointment, he takes the land subject to the lien of the judgments. Gere *v.* Dibble, 17 How. Pr. (N. Y.) 31.

Taxes.—The appointment of a receiver over property subject to taxation does not affect the lien of the taxes. Union Trust Co. *v.* Weber, 96 Ill. 346; 3 Am. & Eng. R. Cas. 583.

Attorney's Fees.—Where attorneys of a bank are employed to foreclose a mortgage, and pending the foreclosure a receiver is appointed over the bank, the receiver takes title to the proceeds of the mortgage, subject to the attorneys' lien for their fees. The attorneys will be required to pay over to the receiver only the balance remaining after deducting the fees. But an individual member of the firm of attorneys in such case will not be allowed any lien on such proceeds for fees due him for services rendered the bank by him individually. Bowling Green Sav. Bank *v.* Todd, 64 Barb. (N. Y.) 146.

Commercial Paper.—A receiver acquires no better title in the case of commercial paper than the debtor had, and

g. PROPERTY EXEMPT FROM EXECUTION.—The receiver has no title to property which is by law exempt from levy and sale under execution, nor to the proceeds of insurance policies upon, nor to rights of action for injury to such exempt property.[1]

h. PENSIONS.—A receiver is not entitled to money due the defendant for a pension.[2]

i. TRUST FUNDS.—Whether or not a receiver is entitled to the income of property held in trust for the defendant, depends upon the law of the various States as to the liability of such trust property or income for the debts of the beneficial owner.[3]

does not stand in the position of a *bona fide* holder for value. Briggs *v.* Merrill, 58 Barb. (N. Y.) 389; Daniel's Negotiable Instruments, 781.

Collateral.—Where one is in possession of a fund which he is entitled to hold as security for the payment of notes on which he is accommodation endorser, he cannot be required, where no danger to the fund is shown, to pay it over to the receiver, but may retain it until payment of the notes. Brady *v.* Furlow, 22 Ga. 613.

1. The rule above stated is established in *New York*, in the case of receivers appointed on proceedings supplementary to execution. The same doctrine was held in the earlier chancery practice in that State, though the cases were not such as to bring it out clearly. Cagger *v.* Howard, 1 Barb. Ch. (N. Y.) 368; Fitzhugh *v.* Everingham, 6 Paige (N. Y.) 29.

It is believed that the rule will hold good in other States, though the question seems not to have yet arisen elsewhere, and the cases in point are all decisions of *New York* courts.

Finnin *v.* Malloy, 33 N. Y. Super. Ct. 382; Cooney *v.* Cooney, 65 Barb. (N. Y.) 524; Tillotson *v.* Wolcott, 48 N. Y. 188; Sands *v.* Roberts, 8 Abb. Pr. (N. Y.) 343; Andrews *v.* Rowan, 28 How. Pr. (N. Y.) 126; Hudson *v.* Plets, 11 Paige (N. Y.) 180.

The rule holds good, even though the order of appointment is in general terms, without accepting exempted property. Such order, however broad its language, must be understood as limited in its operation by the statute exempting the property from execution, and the law attaches to the order and becomes a part of it. High on Receivers, § 441; Finnin *v.* Malloy, 33 N. Y. Super. Ct., 382.

A judgment creditor has an action against his receiver for property taken by the latter which is exempt from execution. Finnin *v.* Malloy, 33 N. Y. Super. Ct. 382.

Where a debtor had recovered a judgment against a creditor who had seized and sold property which was exempt from execution, and the receiver of the debtor collected the judgment, he was ordered to release it in favor of the debtor. Tillotson *v.* Wolcott, 48 N. Y. 188.

A receiver has no right of action for the insurance on exempt property which is destroyed by fire subsequent to his appointment. Sands *v.* Roberts, 8 Abb. Pr. (N. Y.) 343.

A receiver will not be allowed an order directing a defendant to assign to him a policy of insurance upon furniture of the defendant destroyed by fire, which was exempt from execution. Cooney *v.* Cooney, 65 Barb. (N. Y.) 524.

The receiver has no right to the insurance on exempt property, whether the loss occurred before or after his appointment. Sands *v.* Roberts, 8 Abb. Pr. (N. Y.) 343.

2. A receiver who collected from the police commissioners a quarterly payment on an annual pension granted the defendant as an ex-policeman, was ordered to repay the money to the defendant. Nagle *v.* Stagg, 15 Abb. Pr., N. S. (N. Y.) 348.

In this case it is said that any payment on a pension which has accrued prior to the appointment of the receiver may be seized by him after actual payment thereof to the defendant, but not before.

The statutes of the United States regulate the liability of pensions from the general government to the debts of the pensioner.

3. In general throughout the *United States* and in *England* the beneficial interest of the *cestui que trust* is liable for the payment of his debts, but in some of the States under certain condi-

j. WHEN RECEIVER'S TITLE VESTS.—The title of the receiver when appointed, vests by relation at the time of granting the order, even though he remains out of possession pending the performance of preliminary conditions necessary to qualify him to act.[1] But it will not vest as to tangible personalty, by relation to the time of the commencement of the suit in which the receiver is appointed.[2] In *Maryland* the rule is different.[3]

tions trust property may be free from such liability. See Bispham's Equity, § 61, 4th ed., for a detailed treatment of this question. The question has seldom arisen in the case of receivers, but the rule stated in the text is clearly correct, and may be derived from the decisions in the following New York cases, which were decided on that principle, though the rule was not stated in terms: Graff *v.* Bonnett, 31 N. Y. 9; Campbell *v.* Foster, 35 N. Y. 361; McEwen *v.* Brewster, 17 Hun (N. Y.) 223; Manning *v.* Evans, 19 Hun (N. Y.) 500.

1. Murphy *v.* Du Berg, 11 Abb. N. Cas. (N. Y.) 112; Rutter *v.* Tallis, 5 Sandf. (N. Y.) 610; Fessenden *v.* Woods, 3 Bosw. (N. Y.) 550; Steele *v.* Sturges, 5 Abb. Pr. (N. Y.) 442; Maynard *v.* Bond, 67 Mo. 315; Hardwick *v.* Hook, 8 Ga. 354.

Reference.—Where an order of reference is made to a master in chancery for the appointment of a receiver, and the appointment is afterwards made in pursuance of such order, the receiver's title is held to have vested as of the date of the original order, and to have attached upon all property to which the receivership could extend, in like manner and effect as if the original order had named the receiver, instead of directing a reference for that purpose. In Rutter *v.* Tallis, 5 Sandf. (N. Y.) 610, there was a reference ordered to select a suitable person for receiver. Afterward a creditor levied on property of the defendant, and still later the receiver was appointed in pursuance of the order. *Held*, that the sheriff must turn the property over to the receiver.

Bond.—Where the order appointing him provides that before entering upon his duties the receiver shall execute a bond, the receiver's title on perfecting his bond will take effect back to the date of appointment. In such a case a sheriff, who levies upon the property between the time of appointment and perfecting of the bond, will be required to surrender the property to the receiver. Steele *v.* Sturges, 5 Abb. Pr. (N. Y.) 442; Maynard *v.* Bond, 67 Mo. 315.

Notwithstanding the fact that when the bond is perfected, the receiver's title will vest at a prior time by relation, yet until it is so perfected he has no authority to act. Johnson *v.* Martin, 1 Thomp. & C. (N. Y.) 504. So when creditors of the defendant levy upon the property which is the subject-matter of the receivership, between the date of appointment and the time of giving the required security, such levy does not constitute a disturbance of the receiver's possession. Defries *v.* Creed, 34 L. J. N. S. Ch. 607; Edwards *v.* Edwards, L. R., 2 Ch. Div. 291. See *Ex parte* Evans, L. R., 13 Ch. Div. 252

Subrogation.—Where the order appointing a receiver authorized him to collect rents of certain property and sue for them, he was subrogated to the defendants' title, and his right of action related back to the commencement of such title. Hardwick *v.* Hook, 8 Ga. 354.

Partnership.—Where a partner makes application for a receiver of the copartnership effects for the purpose of liquidating debts, the court will compel him to pay over to the receiver assets collected by him shortly prior to his application. Murphy *v.* Du Bery, 11 Abb. N. Cas. (N. Y.) 112.

2. But the receiver's title to tangible personalty will not vest by relation back to the date at which the suit was commenced, in which the receiver was appointed. Thus where there was levy between the commencement of the suit and the receiver's appointment, the receiver took subject to the levy. Artisans' Bank *v.* Treadwell, 34 Barb. (N.Y.) 553.

Death of Defendant.—In *North Carolina*, where order of reference had been made, but defendant died before receiver was actually appointed, it was held that the receiver acquired no title, and that the estate must be administered according to law regulating estates of decedents. Rankin *v.* Minor, 72 N. Car. 424.

3. In *Maryland* it is held that the

k. TITLE AS BETWEEN RECEIVER AND VARIOUS PARTIES—(1) *Purchasers.*—Under the chancery practice a purchaser with notice of creditor's proceedings for the appointment of a receiver, takes subject to the receiver's title,[1] but the rule does not extend to *bona fide* purchasers without notice.[2]

(2) *Assignee in Bankruptcy.*—When a receiver appointed by a State court was in possession of the fund or property, it was held that the *United States* courts would not interfere with the receiver, where the defendant subsequently was adjudicated a bankrupt.[3]

(3) *Assignee for Benefit of Creditors.*—After a receiver has been appointed in a creditor's suit, the defendant cannot by a subsequent assignment give a preference as to what may remain in the receiver's hands after satisfaction of the creditors at whose instance he was appointed.[4] A receiver subsequently appointed cannot compel an assignee for the benefit of creditors to turn over the assets.[5]

(4) *Adverse Claimants*—(a) **When Receiver Has Possession.**—Where there are adverse claimants to property in the receiver's possession they must not interfere with the receiver without leave of the court, which will upon motion and sufficient reason shown, make an order permitting an action to be brought against the receiver, or may allow the claimant to be examined in his own behalf.[6]

receiver's title to tangible personalty accrues only at the time he actually reduces the property to possession. Farmers' Bank *v.* Beaston, 7 Gill & J. (Md.) 421; 28 Am. Dec. 226. See the remarks of Archer, J., at page 428.

1. Weed *v.* Smull, 3 Sandf. Ch. (N. Y.) 273. See also *supra*, this title, *Management and Control of Property, Receiver's Title, Title as Between Receivers and Various Parties.*

2. Dudley *v.* Gould, 6 Hun (N.Y.) 97.

3. Sedgwick *v.* Menck, 6 Blatchf. (U. S.) 156; Beecher *v.* Biniger, 7 Blatchf. (U. S.) 170; Alden *v.* Boston, etc., R. Co., 5 Bankr. Reg. 230; *In re* Clark, 4 Ben. (U. S.) 88; Davis *v.* Railroad Co., 1 Woods (U. S.) 661; *In re* Hulst, 7 Ben. (U. S.) 40. *Contra*, *In re* Merchants' Ins. Co., 3 Biss (U. S.) 162; Platt *v.* Archer, 9 Blatchf. (U. S.) 559; Buck *v.* Piedmont, etc., L. Ins. Co., 4 Hughes (U. S.) 415.

The bankruptcy court refused, on the petition of the assignee in bankruptcy, to direct its marshal to take the assets out of the receiver's hands. *In re* Clark, 4 Ben. (U. S.) 88. And the bankrupt will be enjoined from interference with the receiver. *In re* Clark, 4 Ben. (U. S.) 88. Where a receiver was appointed by the State court in foreclosure of a mortgage an assignee in bankruptcy subsequently appointed cannot dispossess him. Davis *v.* Railroad Co., 1 Woods (U. S.) 661. There are some cases adverse to the rule as stated in the text, though they are plainly repugnant to the weight of authority.

4. McGowan *v.* Myers, 66 Iowa 99. The assets, in such a case, are considered to be in court for equitable distribution.

5. Coleman *v.* Salisbury, 52 Ga. 470.

6. Angel *v.* Smith, 9 Ves. 335; Ames *v.* Birkenhead Docks, 20 Beav. 332; Russell *v.* East Anglian R. Co., 3 M. & G. 104; De Winton *v.* Mayor, etc., of Brecon, 28 Beav. 200; Evelyn *v.* Lewis, 3 Hare 472; Brooks *v.* Greathed, 1 J. & W. 176; *Ex parte* Cochrane, L. R., 20 Eq. 282; Riggs *v.* Whitney, 15 Abb. Pr. (N. Y.) 388; Noe *v.* Gibson, 7 Paige (N. Y.) 513; Vincent *v.* Parker, 7 Paige (N. Y.) 65; Miller *v.* Loeb, 64 Barb. (N. Y.) 454; Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 46 Vt. 792; Spinning *v.* Ohio Life Ins., etc., Co., 2 Disney (Ohio) 336; Brien *v.* Paul, 3 Tenn. Ch. 357; *In re* Day, 34 Wis. 638; Fort Wayne, etc. R. Co. *v.* Mellett, 92 Ind. 535; 17 Am. & Eng. R. Cas. 293.

[illegible] **When Others Have Possession.**—Where property claimed by the receiver is in the possession of third persons under color of title, the receiver will not be permitted to summarily take possession, but will be compelled to establish his title by action.[1]

[illegible] *Other Receivers.*—When different receivers have been appointed over the same fund or estate in different proceedings, both are not permitted to act.[2] The question of precedence in such case depends upon priority of appointment.[3]

An action of trespass cannot be maintained against a receiver to reclaim property which has come into the possession, *Ex parte* Cochrane, L. R., [illegible] Nor an action of [illegible] without the leave of the court. Angel *v.* Smith, 9 Ves. 335. Nor is such action allowed to be prosecuted in another court. Fort Wayne, [illegible] R. Co. *v.* Mellet, 92 Ind. 535; 17 [illegible] R. Cas. 293. An execution issued on a judgment subsequent to the receiver's appointment will be declared void, even if the judgment was obtained prior to the appointment. [illegible] *v.* Sampson, 14 How. (U. S.) [illegible]

Bank Deposit.—An auctioneer sold goods for one, and with his knowledge and consent deposited the proceeds to his own credit in bank. A receiver was appointed over the auctioneer. Subsequently the auctioneer drew a check in favor of the vendor for the amount due him, and at the same time an assignment of the deposit to that amount. *Held*, that the vendor acquired no right to the deposit. Levy *v.* Cavanagh, 2 Bosw. (N. Y.) 100.

Property of Others.—When the debtor is in possession of property belonging to or claimed by a third person under a title apparently valid, and which is held by the debtor as his agent, the court will not order such property delivered to the receiver, for it is averse to thus summarily dispose of the title of third persons, but will leave the question to be decided in an action by the receiver against the one claiming title. Rodman *v.* Henry, 17 N. Y. [illegible]

1. The only right of receiver where there has been a prior assignment by fraud, is a right of action to set aside the transfer. Brown *v.* Gilmore, 16 How. Pr. (N. Y.) 527. In Parker *v.* Browning, 8 Paige (N. Y.) 388; 35 Am. Dec. 717, Walworth, Chancellor, said, at page [illegible]: "In cases of this description it is more in accordance with the spirit of our institutions to permit the parties claiming to proceed at law where they may have the benefit of a jury trial, than to attempt to settle it by reference to a master. . . . And if the property is in possession of a third person, who claims the right to retain it, the receiver must either proceed by suit in the ordinary way, to try his right to it, or the complainant should make such third person a party to the suit, and apply to have the receivership extended to the property in his hands."

2. It is not allowable to have more than one receiver, whether appointed by the same or different courts, except in the case of joint receivers. The title of one is necessarily exclusive of the other. People *v.* Central City Bank, 53 Barb. (N. Y.) 412; Deming *v.* New York Marble Co., 12 Abb. Pr. (N. Y.) 66.

Creditor's Suit.—In the case of a creditor's suit, where more than one suit is pending against the debtor the receiver in the first suit may, if he consent, be appointed receiver in the other suits. Where the suits are all before the same chancellor or vice-chancellor, he may, having jurisdiction over the receiver, compel him to accept the receivership in the second suit. Cagger *v.* Howard, 1 Barb. Ch. (N. Y.) 368; Osborn *v.* Heyer, 2 Paige (N. Y.) 342.

Two Receivers.—Under the code of civil procedure of *New York* the same rule is adopted in supplementary proceedings, but the appointment of a receiver in a subsequent action may sometimes be made. In such case the second receiver will have a right only to what remains of the fund after the first suit is satisfied. Bailey *v.* O'Mahoney, 33 N. Y. Super. Ct. 239.

3. People *v.* Central City Bank, 53 Barb. (N. Y.) 412; Deming *v.* New York Marble Co., 12 Abb. Pr. (N. Y.) 66. When necessary the courts will take into consideration fractions of a day in determining priority of appoint-

l. SET-OFF AGAINST RECEIVERS—(1) *In General.*—A receiver takes title to the property placed in his charge subject to all subsisting liens against it.[1] It follows that choses in action of the defendant pass to him subject to any equitable set-off which might have been set up in defense in an action by the defendant himself.[2]

(2) *Limitation on Right.*—The right of set-off is not permitted where the demand attempted to be set off was acquired after the appointment of a receiver;[3] nor where it arises out of a right independent of that sued upon;[4] nor where the effect would be to practically give a preference to the one creditor over others.[5]

ment. People *v.* Central City Bank, 53 Barb. (N. Y.) 412. The question of which receiver received the assets, fees, etc., will not affect priority. Where one receiver was appointed at 11 a. m. and a second at 4 p. m., and the second obtained possession first, he was ordered to surrender to the other receiver. People *v.* Central City Bank, 53 Barb. (N.Y.) 412. Where there was an appeal from an order of reference for the appointment of a receiver, and pending the appeal a receiver is appointed in another suit; the receiver thus appointed was ordered to surrender to one appointed under the reference, upon the appeal being disaffirmed. Deming *v.* New York Marble Co., 12 Abb. Pr. (N. Y.) 66. A subsequently appointed receiver will not be allowed to in any way interfere with the possession of the first. Ward *v.* Swift, 1 Hare 309.

1. See *supra*, this title, *Management and Control of Property; Limitations.*

2. Colt *v.* Brown, 12 Gray (Mass.) 233; Hade *v.* McVay, 31 Ohio St. 231; Cox *v.* Volkert, 86 Mo. 505; Clarke *v.* Hawkins, 5 R. I. 219; Davis *v.* Stover, 58 N. Y. 473; Cook *v.* Cole, 55 Iowa 70; Van Wagoner *v.* Paterson Gas Light Co., 23 N. J. L. 283; State Bank *v.* Bank of New Brunswick, 3 N. J. Eq. 266; Berry *v.* Brett, 6 Bosw. (N. Y.) 627.

A lessee, in an action by a receiver for rent is allowed all set-offs and counter claims which he might have pleaded against the lessor himself. Cox *v.* Volkert, 86 Mo. 505. Where the receiver of a bank brought suit on a note the defendant was allowed to set off bills and notes of the bank which he had received in the ordinary course of business, before the appointment of the receiver; but he was not allowed to set off those received afterward. Colt *v.* Brown, 12 Gray (Mass.) 233; Clarke *v.* Hawkins, 5 R. I. 219. A right of set-off against a note was allowed, though the note was not yet due when the receiver was appointed. Berry *v.* Brett, 6 Bosw. (N. Y.) 627.

3. United States Trust Co. *v.* Harris, 2 Bosw. (N. Y.) 75; Osgood *v.* Ogden, 4 Keyes (N. Y.) 70; Lanier *v.* Gayoso Savings Institution, 9 Heisk. (Tenn.) 506; Van Dyck *v.* McQuade, 85 N. Y. 616. And the burden of proof rests upon the defendant to show that such demand accrued in his favor prior to the receivership. Smith *v.* Mosby, 9 Heisk. (Tenn.) 501.

4. Williams *v.* Traphagen, 38 N. J. Eq. 57; 5 Am. & Eng. Corp. Cas. 22; Osgood *v* Ogden, 4 Keyes (N. Y.) 70; Clark *v.* Brockway, 3 Keyes (N. Y.) 13; Gillet *v.* Phillips, 13 N. Y. 114; Singerly *v.* Fox, 75 Pa. St. 112; Litchfield Bank *v.* Church, 29 Conn. 137; Farmers', etc., Bank *v.* Jenks' Bank, 7 Met. (Mass.) 592. In an action by the receiver of an insolvent bank against a shareholder to recover unpaid subscription to capital stock the defendant was not allowed to set off his individual deposit in the bank. Williams *v.* Traphagen, 38 N. J. Eq. 57; 5 Am. & Eng. Corp. Cas. 22. In an action brought by receivers of a corporation against a stockholder to recover illegal dividends no set-off was allowed. Osgood *v.* Ogden, 4 Keyes (N. Y.) 70. In an action by receivers to recover notes illegally transferred to one of the directors, the defendant was not allowed to set off the amount actually paid by him for such notes. Gillet *v.* Phillips, 13 N. Y. 114.

5. In an action by a receiver appointed on behalf of creditors, the defendant will not be allowed to set off a judgment which he has obtained against the receiver on a note of the

m. EFFECT OF RECEIVER'S TITLE ON STATUTE OF LIMITATIONS.—The general rule is that the appointment of a receiver does not affect in any manner the application of the Statute of Limitations.[1]

n. EFFECT OF IRREGULAR OR ERRONEOUS APPOINTMENT.—The receiver's title cannot be attacked on the ground that his appointment is illegal, so long as there is a subsisting order appointing him. Parties dissatisfied must apply to the court itself to question the validity of the appointment, and will not be permitted to interfere collaterally.[2]

debtor, since that would virtually give him a preference over creditors. Clark *v.* Brockway, 3 Keyes (N. Y.) 13. Where a receiver of a partnership sells the assets under an order of court, in an action to recover the purchase money, the purchaser cannot set off a claim which he holds against the firm. Singerly *v.* Fox, 75 Pa. St. 112.

1. Anonymous, 2 Atk. 15.

A payment made by a receiver to one of the parties in a cause, out of funds collected in his receivership, will not be regarded as such a payment by the debtor as will amount to an acknowledgement of the debt as will take the case out of the statute. Whitley *v.* Lowe, 2 De G. & J. 704.

The appointment of a receiver will not stop the running of the statute. An annuity payable out of certain land was in arrear since 1830, and in 1832 a receiver was appointed over said land, and thereafter collected the rents. In 1839 the heirs of the annuitant attempted to have the receiver pay the arrears of the annuity, but it was held that they were barred by the Statute of Limitations. Kyme *v.* Dignan, 4 Ir. Eq. 562; Harrison *v.* Dignan, 1 C. & L. 376.

In 1857 a receiver was appointed over a partnership, and an injunction restraining the partners from collecting any assets of the firm. No assignment was made to the receiver, and he had therefore no authority to sue. The action was discontinued more than six years later, and then the firm brought suit on a claim due them at the time of the granting of the injunction and the appointment of the receiver. *Held*, that the appointment of a receiver did not affect the rule that the time during which a party is restrained from suing shall not be counted as part of the time limited by the statute of limitations. Fincke *v.* Funke, 25 Hun (N. Y.) 616.

In Wrixon *v.* Vize, 3 D. & W. 104, it was held that the appointment of a receiver will prevent time from running in favor of a stranger to suit. The circumstances of this case were peculiar, and it does not affect the general rule. The appointment of a receiver for a partnership, suspends the running of the statute in equity against claims by firm creditors for the payment of partnership debts out of the firm assets in the receiver's hands. Kirkpatrick *v.* McElroy, 41 N. J. Eq. 540.

2. Russell *v.* East Anglian R. Co., 3 M. & G. 104; Ames *v.* Birkenhead Docks, 20 Beav. 332; Woodward *v.* Earl of Lincoln, 3 Swanst. 626; Cook *v.* Citizen's Nat. Bank, 73 Ind. 256; Richards *v.* People, 81 Ill. 551; Howard *v.* Palmer, Walk. (Mich.) 391; American Bank *v.* Cooper, 54 Me. 438; People *v.* Sturtevant, 9 N. Y. 263; 59 Am. Dec. 536; Sullivan *v.* Judah, 4 Paige (N. Y.) 444; Moat *v.* Holbein, 2 Edw. Ch. (N. Y.) 188; Richards *v.* West, 3 N. J. Eq. 456.

In Russell *v.* East Anglian R. Co., 3 M. & G. 104, Lord Truro says: "It is not open to any party to question the orders of this court, or any process sued under the authority of this court, by disobedience. I know of no act which this court may do, which may not be questioned in proper form, and on a proper application; but I am of opinion that it is not competent for anyone to interfere with the possession of a receiver, or to disobey an injunction, or any other order of the court, on the ground that such orders were improvidently made. Parties may take a proper course to question their validity, but while they exist they must be obeyed."

Neglect to Take Oath.—Where a

2. Receiver's Possession—*a.* NATURE—(1) *Is Possession of Court.*—A receiver is the ministerial officer of the court which appoints him, and his possession is exclusively the possession of the court, the property being regarded as in the custody of the law.[1]

(2) *Not Adverse to Either Party.*—The possession of the receiver is therefore not technically adverse to either party to the litigation, so as to oust any right.[2] But the receiver's possession relieves the previous holder of further responsibility.[3]

(3) *How Far for Party Who Prevails.*—The possession of the receiver is that of all the parties to the suit according to their titles.[4] Where the litigation was as to title, the receiver's possession during the contest will be regarded as that of the party who ultimately recovers.[5]

statute required receivers to be sworn, it was held that the omission did not vitiate their proceedings. American Bank *v.* Cooper, 54 Me. 438.

Contempt.—It is generally in proceedings for contempt of court by interference with the receiver's possession that this question arises. See *infra*, this title, *Management and Control of Property, Receiver's Possession, Interference With, Is Contempt of Court.*

1. Angel *v.* Smith, 9 Ves. 335; Robinson *v.* Atlantic, etc., R. Co., 66 Pa. St. 160; Skinner *v.* Maxwell, 68 N. Car. 400; Mays *v.* Rose, Freem. Ch. (Miss.) 703; Ohio, etc., R. Co. *v.* Fitch, 20 Ind. 498; Ellicott *v.* Warford, 4 Md. 80; Albany City Bank *v.* Schermerhorn, 9 Paige (N. Y.) 372; De Visser *v.* Blackstone, 6 Blatchf. (U. S.) 235; *In re* Merchants' Ins. Co., 3 Biss. (U. S.) 165.

In Angel *v.* Smith, 9 Ves. 335, Lord Eldon observed that after tenants had attorned to a receiver appointed over the premises, the court itself became the landlord.

Like Sheriff.—The receiver of a court of chancery is its executive officer in much the same manner as a sheriff is the executive of a common-law court. *In re* Merchants' Ins. Co., 3 Biss. (U. S.) 165. The property in his possession is regarded as being *in custodia legis* to the same extent as if levied upon under an execution or attachment. *In re* Merchants' Ins. Co., 3 Biss. (U. S.) 165.

Larceny.—When property is in the actual possession of the receiver he has such a special property therein that ownership may be averred in him in an indictment for larceny. State *v.* Rivers, 60 Iowa 381.

2. The appointment of a receiver does not so alter the possession on the person ultimately found to have been entitled thereto, as to stop the running of the Statute of Limitations during the dispute as to the right. Anonymous, 2 Atk. 15; Whitley *v.* Lowe, 2 DeG. & J. 704; Fincke *v.* Funke, 25 Hun (N. Y.) 6; 161, *infra*, this title, *Management and Control of Property, Receiver's Title, Effect of. Receiver's Title on Statute of Limitations.*

3. Where property consisted of slaves who were emancipated after the receiver took possession, the previous owner was not liable for their value; Lee *v.* Cone, 4 Coldw. (Tenn.) 392.

4. Lord Hargreave in the case of *In re* Butler's Estate, 13 Ir. Ch., N. S. 456, said: "The general proposition is, that the possession of the receiver is that of all the parties to the suit, according to their titles. As between the owner and incumbrancers, it is for some purposes the possession of the incumbrancers, who have obtained or extended the receiver; as between the owner whose possession has been displaced and a third party, it is the possession of the former. The receiver is, in fact, his agent; all the rents are applied to his use, either by paying his debts, or paramount charges, or by being handed over to him."

5. If any benefit is to ensue to the successful party from the mere act of possession he will be considered as having been in possession from the first; but the rule is not carried to the extent of prejudicing his rights. Where a defendant's possession was taken away by

(4) *Vesting by Relation.*—The question as to the time when the receiver's right of possession accrues, depends upon the time of the vesting of his title, which is by relation, at the time of his appointment.[1]

(5) *Subject to Liens.*—The receiver takes possession subject to all subsisting liens and claims.[2]

b. EFFECT—(1) *Claimant Must Apply to Court.*—The court will not allow the possession of its receiver to be interfered with or disturbed by any one, whether claiming paramount to or under the right which the receiver was appointed to protect. One who thinks he has a right paramount to that of the receiver, must, before he presumes to take any steps of his own motion, apply to the court for leave to assert his right against the receiver.[3] The court will enforce this rule when necessary by an injunction.[4]

(2) *Not Subject to Legal Process.*—Property which is the subject of the receivership is not liable to the process of another court,[5]

injunction, and a receiver put in charge, and defendant was finally adjudged to be entitled to possession, the receiver's possession during the interval was not treated as that of the defendant so as to prevent him from recovering damages for the injunction. Sturges *v.* Knapp, 33 Vt. 486.

1. *Supra*, this title, *Management and Control of Property, Receiver's Title, When Receiver's Title Vests.*

2. *Supra*, this title, *Management and Control of Property, Receiver's Title, Limitations.*

3. Evelyn *v.* Lewis, 3 Hare 472; Angel *v.* Smith, 9 Ves. 335; Russell *v.* East Anglian R. Co., 3 M. & G. 104; Fry *v.* Fry, 13 Beav. 422; Ames *v.* Birkenhead Docks, 20 Beav. 332; De Winton *v.* Mayor, etc., of Brecon, 28 Beav. 200; Hawkins *v.* Gathercole, 1 Drew. 17; Randfield *v.* Randfield, 1 D. & S. 314; *Ex parte* Cochrane, L. R., 20 Eq. 282; Brien *v.* Paul, 3 Tenn. Ch. 357; Skinner *v.* Maxwell, 68 N. Car. 400; Fort Wayne, etc., R. Co. *v.* Mellett, 92 Ind. 535; Riggs *v.* Whitney, 15 Abb. Pr. (N. Y.) 388; *In re* Day, 34 Wis. 638; Edwards *v.* Norton, 55 Tex. 405; Robinson *v.* Atlantic, etc., R. Co, 66 Pa. St. 160; Dugger *v.* Collins, 69 Ala. 324; Wiswall *v.* Sampson, 14 How. (U. S.) 52.

Ejectment.—A claimant of real estate will not be allowed to bring ejectment against the receiver without first obtaining leave of court. Angel *v.* Smith, 9 Ves. 335. And an action of ejectment will not be maintained against him in another court, but the claimant will be permitted to come in against the receiver in the action in which he was appointed. Fort Wayne, etc., R. Co. *v.* Mellett, 92 Ind. 535; 17 Am. & Eng. R. Cas. 293.

Municipality.—A receiver in possession of a wharf may maintain a bill for an injunction against the authorities of a municipal corporation who interferes with his possession and attempt to collect the wharfage. Grant *v.* Davenport, 18 Iowa 179.

Eminent Domain.—This rule applies, though the party is proceeding in the exercise of a right given by statute. Where a railroad company desires to take real estate in the possession of a receiver, and, without leave of court, instituted proceedings for condemnation in accordance with the statute, an injunction was granted restraining them from interference with the receiver's possession. Tink *v.* Rundle, 10 Beav. 318.

Right of Common.—The appointment of a receiver does not interfere with rights of common actually in use by other parties, but when the receiver has taken possession, the court will not allow interference therewith by the exercise of an alleged right of common which had been abandoned for several years. Johnes *v.* Claughton, Jac. 573.

4. Tink *v.* Rundel, 10 Beav. 318; Attorney-Gen'l *v.* St. Cross Hospital, 18 Beav. 601; Evylin *v.* Lewis, 3 Hare 472; Robinson *v.* Atlantic, etc., R. Co., 66 Pa. St. 160; Skinner *v.* Maxwell, 68 N. Car. 400; Edwards *v.* Norton, 55 Tex. 405.

5. Lane *v.* Sterne, 3 Giff. 629; Rob-

inson *v.* Atlantic, etc., R. Co., 66 Pa. St. 160; Skinner *v.* Maxwell, 68 N. Car. 400; Edwards *v.* Norton, 55 Tex. 405; Dugger *v.* Collins, 69 Ala 324; Schenk *v.* Peay, 1 Dill. (U. S.) 267; Noe *v.* Gibson, 7 Paige (N. Y.) 513; Rogers *v.* Corning, 44 Barb. (N. Y.) 229; Com. *v.* Young, 11 Phila. (Pa.) 606; Richards *v.* People, 81 Ill. 551; Hazelrigg *v.* Bronaugh, 78 Ky. 62; Chafee *v.* Quidnick Co., 13 R. I. 442.

Rodman, J., in Skinner *v.* Maxwell, 68 N. Car. 400, said: "When a court of equity has undertaken to adjudicate upon and distribute a fund among the parties entitled to it, it would be inconvenient for the court of law or any other court, by its process to interrupt the adjudication and create new rights in the property itself. This rule is not understood as absolutely preventing the acquisition of new rights to the fund in controversy after the commencement of the proceedings. Any person claiming to have acquired such an interest *pendente lite*, while he cannot interfere under the process of another court, may apply to the court which has jurisdiction of the fund, *pro interesse suo*, and his claim will be heard. The limits of this principle are somewhat uncertain, . . . but while the property is in the hands of a receiver no right to it can be acquired by sale under execution."

Levy of execution is not allowed on property in possession of a receiver. Com. *v.* Young, 11 Phila. (Pa.) 606; Richards *v.* People, 81 Ill. 551; Hazelrigg *v.* Bronaugh, 78 Ky. 62; Lane *v.* Sterne, 3 Giff. 629. Where there has been a levy prior to the receiver's appointment, the receiver takes subject thereto, and is entitled only to the surplus remaining in the sheriff's hands. But where the levy had not been made until after the appointment of the receiver, the levy was invalid, even though the judgment was prior to such appointment. Dugger *v.* Collins, 69 Ala. 324. When a sheriff levies on property in the hands of a receiver equity will interpose by injunction to restrain an action at law against him for such interference. Fry *v.* Fry, 13 Beav. 422. The proper remedy for a judgment creditor, who desires to question the receiver's right to the property, is to apply to the court appointing him to have the property released from the receiver's custody, in order that he may proceed against it under his judgment. Robinson *v.* Atlantic, etc., R. Co., 66 Pa. St. 160; Dugger *v.* Collins, 69 Ala. 324.

Garnishment, Attachment, etc.—Funds in the possession of the receiver, or subject to his control, are not subject to garnishment, and such process directed against him is a nullity. Field *v.* Jones, 11 Ga. 413; Taylor *v.* Gillean, 23 Tex. 508; Richards *v.* People, 81 Ill. 551; Jackson *v.* Lahee, 114 Ill. 287; Cooke *v.* Orange, 48 Conn. 401; Blake Crusher Co. *v.* New Haven, 46 Conn. 473; Com. *v.* Hide, etc., Ins. Co., 119 Mass. 155; Columbian Book Co. *v.* De Golyer, 115 Mass. 67; McGowan *v.* Myers, 66 Iowa 99; Smith *v.* McNamara, 15 Hun (N. Y.) 447; Gouverneur *v.* Warder, 2 Sandf. (N. Y.) 624.

Where a judgment creditor attached money in a receiver's hands, and under order of a court of law, the receiver paid over the fund, the court refused to allow credit for such payment in passing his accounts. De Winton *v.* Mayor, etc., of Brecon, 28 Beav. 200. In this case Romilly, M. R., said: "The court never allows any person to interfere, either with money or property in the hands of its receiver, without its leave; whether it is done by the consent or submission of the receiver, or by compulsory process against him."

Colorado.—The above rule is however, modified in *Colorado*, where it has been held that receivers of a railroad company appointed beyond the State but operating a railroad within the State, are subject to garnishee proceedings, when such proceedings do not tend to disturb the rights of the receivers under the general orders of the court by which they were appointed. Phelan *v.* Ganebin, 5 Colo. 14; Ganebin *v.* Phelan, 5 Colo. 83.

Maryland.—In Maryland it is held that property is liable to legal process until actually reduced to possession by the receiver. Farmers' Bank *v.* Beaston, 7 Gill & J. (Md.) 421; 28 Am. Dec. 226. This is clearly contrary to the general rule, whereby the receiver takes title by relation, at the date of his appointment. See *supra*, this title, *Management and Control of Property*, *Receiver's Title*, *When Receiver's Title Vests*.

Distress.—Where property is actually removed by the receiver from the demised premises, before distress made, the landlord's right of distress is lost, and he cannot follow the goods. Martin *v.* Black, 9 Paige (N. Y.) 641.

nor of the same court in a proceeding wherein the receiver is not a party.[1] The rule holds good even though the receiver declines to act;[2] or if he takes the property into another State.[3]

(3) *Relieves Defendant from Responsibility.*—Where property is taken from the custody of the defendant and put into the receiver's possession, the defendant is relieved from further responsibility for the property.[4]

c. AID OF COURT FOR OBTAINING POSSESSION—(1) *In General.*—The court will give its assistance to the receiver for obtaining possession of the property over which he is appointed, by an order requiring the delivery of the specific property to him.[5] This order will be made not only against the defendant, but also, in a proper case, against third persons not parties to the record,[6] and will if necessary be enforced by attachment.[7]

(2) *When Possessor Claims Title.*—Where property is in the hands of third persons claiming title, the court will not in general order its surrender to the receiver, but will refrain from interference until the question of title has been settled.[8]

1. Where the court made an order, the effect of which was to divest the receiver's title, in a proceeding wherein the receiver was not a party, the judge having forgotten that a receiver had been appointed over the property, the order was vacated. Rogers *v.* Corning, 44 Barb. (N. Y.) 229.

Appeal.—Where an appeal has been taken against the final decree appointing a receiver, his title will not be divested thereby, and he will be allowed to retain possession, notwithstanding the appeal. Schenk *v.* Peay, 1 Dill. (U. S.) 267.

2. The property is in the possession of the court; so the fact that a receiver declines to act has no effect on the question. Skinner *v.* Maxwell, 68 N. Car. 400.

3. If the receiver in the discharge of his duties removes personal property into another State, his title and right of possession will be respected by the courts of such State, and an attachment will not be sustained against the property while in such State on behalf of creditors' resident there. Chicago, etc., R. Co. *v.* Keokuk, etc., Packet Co., 108 Ill. 317; Pond *v.* Cooke, 45 Conn. 126.

4. Lee *v.* Cone, 4 Coldw. (Tenn.) 392.

5. Green *v.* Green, 2 Sim. 430; Griffith *v.* Griffith, 2 Ves. 400; *In re* Cohen, 5 Cal. 494; Geisse *v.* Beall, 5 Wis. 224; Miller *v.* Jones, 39 Ill. 54; Thornton *v.* Washington Sav. Bank, 76 Va. 432; People *v.* Central City Bank, 53 Barb. (N. Y.) 412; Deming *v.* New York Marble Co., 12 Abb. Pr. (N. Y.) 66.

6. *In re* Cohen, 5 Cal. 494; Geisse *v.* Beall, 5 Wis. 224; Thornton *v.* Washington Sav. Bank, 76 Va. 432. Where a receiver was appointed to take charge of certain trust funds held by the defendant, the court will require defendant's attorney to deliver to the receiver all the trust property which may have come into his hands since the institution of the suit, and to render an account thereof. Geisse *v.* Beall, 5 Wis. 224. When a party to the cause executed a lease of property, both lessor and lessee having knowledge that a receiver had been appointed over the property, the receiver was allowed a writ of possession against the lessee. Thornton *v.* Washington Sav. Bank, 76 Va. 432.

7. Miller *v.* Jones, 39 Ill. 54.

8. Cassilear *v.* Simons, 8 Paige (N. Y.) 273; Parker *v.* Browning, 8 Paige (N. Y.) 389; 35 Am. Dec. 717; Robeson *v.* Ford, 3 Edw. Ch. (N. Y.) 441; Levi *v.* Karrick, 13 Iowa 344; Coleman *v.* Salisbury, 52 Ga. 470; Gelpeke *v.* Milwaukee, etc., R. Co., 11 Wis. 454. The court refuses to interfere by order for the reason that it is not desirable nor proper to thus summarily adjudicate and determine the rights of third person. Says Dixon, C. J., in Gelpeke *v.* Milwaukee, etc., R. Co., 11

d. INTERFERENCE WITH—(1) *In General.*—The court will not, without its permission having first been obtained, permit any interference whatever with the possession of its receiver, either by forcibly taking possession from him, or disturbance of his possession or management, or by legal proceedings against him. And this rule applies where the receiver has not yet actually taken possession. Third persons will be permitted to come in and be heard by the court which appointed the receiver, and such orders will be made as are necessary to protect their interests.[1]

(2) *Is Contempt of Court.*—A receiver is an officer of the court, and the same rule is applied to interference with his possession as governs when sheriffs, trustees or masters in chancery have been invested by judicial order with the control of property.

Wis. 457: "I know of no case where it has been adjudged that the possession of a stranger, who sets up a superior title, in pursuance of which he claims to have entered and to hold, might thus be disturbed. In such cases it is the uniform rule to leave the parties to their remedies by action. . . . Such was not the proper mode of proceeding to determine his rights. It is only adapted to those cases where the court can say clearly and unhesitatingly that the possession is subsequent to the action, and subject to the decree or order which has been made, or that the person holding the same has no legal right. . . . Courts can only act, in such cases, where the rights of the parties are obvious, and not the subject of debts or serious controversy." Where some of defendant's property is claimed by a third person under an assignment, the question as to what property is under defendant's control must first be determined before he will be directed to deliver it to the receiver. Cassilear *v.* Simons, 8 Paige (N. Y.) 273. When a banker holding a specific fund in his possession, makes an assignment for the benefit of creditors, and a receiver is afterward appointed over the fund in question, the court will not on summary motion compel the assignees to pay the money to the receiver. Coleman *v.* Salisbury, 52 Ga. 470. Where a receiver appointed by a United States court is in possession of property the state court will not grant a writ of assistance to its own receiver to enable him to get possession of the same property. Gelpeke *v.* Milwaukee, etc., R. Co., 11 Wis 454.

The practice of the English court of chancery for the obtaining possession by the receiver of real estate was to first make an order to deliver possession, and no further order would be made until service of a writ of execution of such order was made upon the defendant. Green *v.* Green, 2 Sim. 430; Griffith *v.* Griffith, 2 Ves. 400. Under the chancery practice in *New York* where the decree required the defendants to deliver the property to the receiver, it was held that he himself might take the necessary steps to obtain possession. Iddings *v.* Bruen, 4 Sandf. Ch. (N. Y.) 223.

1. Skip *v.* Harwood, 3 Atk. 564; Lane *v.* Sterne, 3 Gif. 729; Angel *v.* Smith, 9 Ves. 335; Astor *v.* Heron, 2 M. & K. 391; Ames *v.* Birkenhead Docks, 20 Beav. 353; Defries *v.* Creed, 34 L. J. Ch. 607; Evelyn *v.* Lewis, 3 Hare 475; Russell *v.* East Anglian R. Co., 3 M. & G. 104: Hawkins *v.* Gathercole, 1 Drew 17; Randfield *v.* Randfield, 1 D. & S. 314; *Ex parte* Day, 48 L. T., N. S. 912; *Ex parte* Cochrane, L. R., 20 Eq. 282; Noe *v.* Gibson, 7 Paige (N. Y.) 513; De Vesser *v.* Blackstone, 6 Blatchf. (U. S.) 235; Hull *v.* Thomas, 3 Edw. Ch. (N. Y.) 236; Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 46 Vt. 792; Spinning *v.* Ohio L. Ins., etc., Co., 2 Disney (Ohio) 336; Robinson *v.* Atlantic, etc., R. Co., 66 Pa. St. 160; Chafee *v.* Quidwick Co., 13 R. I. 442; Secor *v.* Toledo, etc., R. Co., 7 Biss. (U. S.) 513; King *v.* Ohio, etc., R. Co., 7 Biss. (U. S.) 529; Wiswall *v.* Sampson, 14 How. (U. S.) 52; National Bank *v.* Colly, 21 Wall. (U. S.) 609; State *v.* Rivers, 66 Iowa 653. See, for more detailed treatment, *supra*, this title, *Management and Control of Property, Receiver's Possession, Nature, Effect.*

Therefore, any unauthorized interference with the possession of the receiver is a contempt of court and punishable accordingly.[1]

(3) *Irregularity of Appointment Immaterial.*—It is immaterial that the order appointing a receiver may have been improper or erroneous. It is not competent for anyone to interfere with the possession of a receiver on the ground that the order appointing him ought not to have been made. It is enough that it be a subsisting order.[2]

(4) *What Is Sufficient Notice.*—Actual notice of the appointment of a receiver is sufficient to render any interference with him a contempt; a formal notice is not necessary.[3]

(5) *What Constitutes Such Interference.*—In order to constitute an interference amounting to contempt, the receiver must be in possession either actually or constructively, of the property involved,[4]

1. Anonymous, 2 Mod. 499; Lane *v.* Sterne, 3 Giff. 629; Skip *v.* Harwood, 3 Atk. 564; Broad *v.* Wickham, 4 Sim. 511; Russell *v.* East Anglian R. Co., 3 M. & G. 104; Langford *v.* Langford, 5 L. J., N. S. Ch. 60; Helmore *v.* Smith, 35 Ch. Div. 449; Angel *v.* Smith, 9 Ves. 335; Astor *v.* Heron, 2 M. & K. 391; Defries *v.* Creed. 34 L. J., Ch. 607; Fripp *v.* Bridgewater, etc., Canal Co., 3 W. R. 356; Evelyn *v.* Lewis, 3 Hare 475; Hawkins *v.* Gathercole, 1 Drew. 17; Randfield *v.* Randfield, 1 D. & S. 314; *Ex parte* Cochrane, L. R., 20 Eq. 282; Noe *v.* Gibson, 7 Paige (N. Y.) 513; Hull *v.* Thomas, 3 Edw. Ch. (N. Y.) 236; Secor *v.* Toledo, etc., R. Co., 7 Biss. (U. S.) 513; King *v.* Ohio, etc, R. Co., 6 Biss. (U. S.) 229; Beverly *v.* Brooke, 4 Gratt. (Va.) 211; Spinning *v.* Ohio L. Ins., etc., Co., 2 Disney (Ohio) 336; Vermont, etc., R. Co *v.* Vermont Cent. R. Co., 46 Vt. 792; Com. *v.* Young, 11 Phila. (Pa.) 606; Richards *v.* People, 81 Ill. 551; Hazelrigg *v.* Bronaugh, 78 Ky. 62.

Illegal Appointment.—The interference is a contempt even if the order appointing a receiver was erroneous or improvidently made. The court will not in a proceeding to punish a contempt review the questions which were passed upon when the receiver was appointed. It is sufficient that there is an interference with the possession of a receiver appointed under a subsisting order. Richards *v.* People, 81 Ill. 551; Cook *v.* Citizens' Nat. Bank, 73 Ind. 256; People *v.* Sturtevant, 9 N. Y. 263; 59 Am. Dec. 536; Albany City Bank *v.* Schermerhorn, 9 Paige (N. Y.) 372.

2. Ames *v.* Birkenhead Docks, 20 Beav. 353; Russell *v.* East Anglian R. Co., 3 M. & G. 104; Cook *v.* Citizens' Nat. Bank, 73 Ind. 256; Richards *v.* People, 81 Ill. 551; Howard *v.* Palmer, Walk. (Mich.) 391; People *v.* Sturtevant, 9 N. Y. 269; 59 Am. Dec. 536; Albany City Bank *v.* Schermerhorn, 9 Paige (N. Y.) 372; and see *supra*, this title, *Management and Control of Property, Receiver's Title, Effect of Irregular or Erroneous Appointment*, for fuller treatment.

3. Kimpton *v.* Eve, 2 Ves. & B. 348; Skip *v.* Harwood, 3 Atk. 564; Hull *v.* Thomas, 3 Edw. Ch. (N. Y.) 236; Howe *v.* Willard, 40 Vt. 654.

4. Where an officer levied execution on property in the hands of a receiver, who notified the officer in writing at the time of making the levy that he possessed the property in his capacity as receiver, the officer is guilty of contempt if he proceeds with the levy; Lane *v.* Sterne, 3 Gif. 629; or if he knows the property is in possession of the receiver; Noe *v.* Gibson, 7 Paige (N. Y.) 513; or if a landlord has his officer seize on a distress warrant property which they both know to be in the possession of a receiver, both landlord and officer are guilty of contempt. Noe *v.* Gibson, 7 Paige (N. Y.) 513. An attorney who appears for a corporation over which a receiver is appointed, and who afterward attaches funds of the corporation in another State to recover for professional services, is guilty of contempt. Chafee *v.* Quidnick Co., 13 R. I. 442. When a receiver is appointed to collect rents, an interference by the defendant with the rents is a contempt. Anon., 2

and there must be an actual interference with or disturbance of the possession.[1]

(6) *By Whom and How Punished.*—Only the court which appointed the receiver can entertain a proceeding to punish for

Mod. 499. A defendant who has been ordered to surrender all his property under oath to a receiver, is guilty of contempt if he refuses to do so. People *v.* Rogers, 2 Paige (N. Y.) 103. But where, under such an order the defendant executes a legal assignment, and the receiver seeks to obtain actual delivery of a portion of the property claimed by a third person under an assignment from the debtor, the receiver must first, by proper proceedings, determine what property is under defendant's control, and until this is done, and order obtained to deliver the property, defendant is not in contempt. Cassilear *v.* Simons, 8 Paige (N. Y.) 273. A purchaser of property of the defendant at a sheriff's sale is not guilty of contempt for refusing to turn such property over to the receiver if such purchaser has not been made a party, nor had an opportunity of asserting his rights before the court. Robeson *v.* Ford, 3 Edw. Ch. (N. Y.) 441. And one who holds notes which he has been ordered to deliver to a receiver is not guilty of contempt in refusing to deliver them to the plaintiff or to the receiver's attorney, when the receiver himself has not demanded the notes. Panton *v.* Zebley, 19 How. Pr. (N. Y.) 394.

By Receivers. — As between two different receivers appointed in different actions, the court will hesitate to exercise its extreme powers by commitment for interference with possesion of the first receiver by the second. Ward *v.* Swift, 6 Hare 309. Where, in a contest between two receivers, the question of priority was determined adversely to the receiver in possession, he was not punished by attachment for disobedience to the order of the court appointing the other receiver. People *v.* Central City Bank, 53 Barb. (N. Y.) 412.

A receiver has no right to appeal from the order of the court discharging him, and ordering him to turn over the property, and disobedience to the order is contempt, notwithstanding he has appealed to a higher court and filed a bond. But the court will not, in such case, direct an attachment in the first instance, when the receiver disclaims any intentional disregard of the authority of the court. *In re* Colvin, 3 Md. Ch. 300.

1. Where a receiver is in actual possession of real estate, a levy upon and sale of defendant's interest in the real estate is not a contempt. Merely the defendants interest is sold, subject to claims of the receiver and other persons, and the mere formal levy does not constitute such a disturbance as amounts to contempt. Albany City Bank *v.* Schermerhorn, 10 Paige (N. Y.) 263. But where a receiver and manager of a partnership was appointed, the issuing of a circular to the customers of the firm containing statements leading them to believe that the business is in a failing condition, is a libel on the business, and such an interference with the receiver in the discharge of his duties as amounts to contempt. Helmore *v.* Smith, 56 L. J. Ch. Div. 145. If a receiver is appointed of a corporation which has the exclusive right to a patent, one of its former officers who commences making the article, is guilty of contempt. *In re* Woven Tape Skirt Co., 12 Hun (N. Y.) 111.

Property Out of Jurisdiction.—A defendant was in England, and within the jurisdiction of the court of chancery there, which appointed a receiver over his estates in Ireland. The defendant wrote to his solicitor to oppose, as far as the law would permit, the receivers of such rents and profits from the receiving the same. The solicitor accordingly notified defendant's tenants in Ireland that the order of the English court of chancery appointing a receiver, was of no effect in Ireland, and that defendant would still enforce payment of his rents as before. The English receiver was thus prevented from receiving any rents. Langdal, M. R., held as follows: "That this is a contempt, I have no doubt. It is true that this court has not the means of sending its officers to carry into effect its orders in Ireland, but it has jurisdiction over all persons in this country, and can compel obedience to its orders. The defendant sends to his solicitors in Ireland to oppose by all

contempt in interference with his possession.[1] In aggravated cases the court will order a committal, but ordinarily it is satisfied with ordering the party in contempt to pay the costs and the expenses occasioned by his improper conduct.[2] Where the contempt consists in entering upon land in the possession of a receiver, or in bringing an action at law against him, or against a party over whose property a receiver has been appointed, the course of the court is to restrain by injunction the party in contempt from trespassing or prosecuting the action, as the case may be.[3]

(7) *Divesting of Receiver's Control.*—Upon a final decree the receiver ceases to longer act in the capacity of receiver, but becomes a trustee, as to the property in his possession, for the person entitled thereto under the decree.[4] This rule applies even if there is not a formal order made discharging the receiver.[5] The property, therefore, becomes liable in his hands for the debts of the person entitled to it.[6]

3. Receiver's Sales—*a.* IN GENERAL.—In the absence of statutory regulation[7] the powers and duties of a receiver in the matter of sales of property put in his charge rest solely upon the orders of the court which appointed him.[8]

lawful means the receiver appointed by this court from receiving the rents. If he meant by all lawful means in this country, there should be no resistance at all; because a party is not justified in opposing the order of the court; but he says by all lawful means in Ireland—that is to say, because this court cannot send its process into Ireland, therefore Lord Langford's agent is to use all means in Ireland to oppose the order of the court here."

1. The receiver himself has no power to adjudge a party to be in contempt; nor can a referee decide what is a contempt, unless specially given that power; neither does the power inhere in any other court. Geisse *v.* Beall, 5 Wis. 224.

2. Broad *v.* Wickham, 4 Sim. 511; Helmore *v.* Smith, 35 Ch. Div. 449; Ward *v.* Smith, 6 Hare 309; Russell *v.* East Anglian R. Co., 3 N. & G. 119; Hawkins *v.* Gathercole, 1 Drew. 18; Fripp *v.* Bridgwater, etc.. Canal Co., 3 W. R. 356; Lane *v.* Sterne, 3 Giff. 629; *In re* Clark, 4 Ben. (U. S.) 88; Noe *v.* Gibson, 7 Paige (N. Y.) 513; People *v.* Central City Bank, 53 Barb. (N. Y.) 412.

3. Johnes *v.* Claughton, Jac. 573; Aston *v.* Heron, 2 N. & K. 390; Tink *v.* Rundle, 10 Beav. 318; Ames *v.* Birkenhead Docks, 20 Beav. 354; Bayley *v.* Went, 51 L. T., N. S. 765; W. N. (1884) 197; Evelyn *v.* Lewis, 3 Hare 473, Turner *v.* Turner, 15 Jur. 218; Noe *v.* Gibson, 7 Paige (N. Y.) 513.

4. Very *v.* Watkins, 23 How. (U. S.) 469; Glenn *v.* Gill, 2 Md. 1.

5. Very *v.* Watkins, 23 How. (U. S.) 469.

6. Where the person entitled under final decree to the property has taken the benefit of an insolvent law, the receiver will be ordered to turn over the property to the trustee under such insolvent law. Glenn *v.* Gill, 2 Md. 1; Very *v.* Watkins, 23 How. (U. S.) 469.

7. In many of the States there are such statutes, but they are of local interest and will not be treated here. The receiver must, like other trustees, comply strictly with the requirements thereof.

8. While a receiver is ordinarily but a custodian of the property, yet it is sometimes his duty, under order of court, to convert it into cash, and sales by receivers are frequent. In Davis *v.* Grey, 16 Wall. (U. S.) 203, Swayne, J., said: "In the progress and growth of equity jurisdiction it has become usual to clothe such officers with much larger powers than were formerly conferred."

Champerty.—A sale by receivers is in the nature of a judicial sale, and is not

b. ORDER FOR—(1) *Court May Make.*—The court has power to order a sale of property in the hands of its receiver whenever it considers such course necessary for the best interests of all parties.[1]

(2) *Cannot be Attacked Collaterally.*—A sale by the receiver made under order of court cannot, where there has been no fraud, be attacked collaterally,[2] nor by a party subsequently brought

open to objection on the ground of champerty or maintenance. The statute against buying and selling pretended titles cannot apply. Hoyt *v.* Thompson, 5 N. Y. 320.

1. Crane *v.* Ford, Hopk. (N. Y.) 114; Brush *v.* Jay, 113 N. Y. 482; Walker *v.* Morris, 14 Ga. 323: McLane *v.* Placerville, etc., R. Co., 66 Cal. 606; 26 Am. & Eng. R. Cas. 404; Brande *v.* Bond, 63 Wis. 140; Hospes *v.* Northwestern Mfg., etc., Co., 41 Minn. 256; De Visser *v.* Blackstone, 6 Blatchf. (U. S.) 235; First Nat. Bank *v.* Shedd, 121 U. S. 74; 30 Am. & Eng. R. Cas. 439; Mellen *v.* Moline, etc., Iron Works, 131 U. S. 353.

Where a receiver of a railroad was appointed in foreclosure proceedings, though the mortgage did not authorize a sale for default, and the corporation was insolvent and the trustee had no funds to repair the road, which, if unused, must decay, the court was of opinion that sufficient necessity for a sale existed. McLane *v.* Placerville, etc., R. Co., 66 Cal. 606; 26 Am. & Eng. R. Cas. 404.

Where a receiver of a steamboat had operated it some time, and must have fitted it out for another season or else let it lie useless, a sale was ordered. Crane *v.* Ford, Hopk. (N. Y.) 114. But the court ought not, over the objections of a party to the action, direct a sale unless a necessity for the sale is shown to exist. The mere fact of the court having possession by its receiver is not sufficient to authorize an order of sale. Brush *v.* Jay, 113 N. Y. 482.

Jurisdiction.—Where the jurisdiction of an inferior court is denied, an order for sale of property by the receiver should not be made until the question of jurisdiction is determined finally. McNab *v.* Noonan, 28 Wis. 434

2. Libby *v.* Rosekrans, 55 Barb. (N. Y.) 202; Brown *v.* Frost, 10 Paige (N. Y.) 243; American Ins. Co. *v.* Oakley, 9 Paige (N. Y.) 259; Battershall *v.* Davis, 31 Barb. (N. Y.) 323; McCotter *v.* Jay, 30 N. Y. 80; Gould *v.* Mortimer, 26 How. Pr. (N. Y.) 167; People *v.* Sturtevant, 9 N. Y. 265; 59 Am. Dec. 536; Brande *v.* Bond, 63 Wis. 101; Farmers' L. & T. Co. *v.* Central R. Co., 5 McCrary (U. S.) 421; 17 Fed. Rep. 758; Mellen *v.* Moline Iron Works, 131 U. S. 352; Bradly *v.* Williams, 3 Hughes (U. S.) 26.

In Libby *v.* Rosekrans, 55 Barb. (N. Y.) Daniels, J., at page 219, says: "But even if the order directing the receiver as to the manner in which he should proceed in giving notice of and making the sale were irregular or improvident, its correction should be sought by a motion before the court that made it. There is no authority that will sustain an independent action for that purpose, even though the plaintiff was not a party to the proceeding in which the order was made. . . . The court that made the order had jurisdiction over the parties and the subject matter, by means of the proceedings already taken before it, and even though its order then made should prove to be irregular or improvident, it could not for those reasons be questioned or assailed in a collateral proceeding." In Brande *v.* Bond, 63 Wis. 140, Cole, C. J., says at page 142: "Now, some objections are taken to the proceedings of the receiver. It is said he never qualified by giving the requisite bond, and did not make the sale pursuant to the order of court. But it is very clear that these objections cannot now be considered in this collateral suit. When the court confirmed the receiver's sale, it necessarily passed upon its regularity. It was the duty of the court then to ascertain whether the receiver had proceeded according to its order in making the sale or not. The order of confirmation was a direct adjudication of the regularity of the action of the receiver, and we cannot now go behind the sale made by him."

The validity of a sale of personal property under order of court, by a receiver cannot be impeached in an action of replevin brought in another

into the suit.[1] The order of confirmation by the court must be considered conclusive as to the title derived from the sale.

(3) *Application Must Show Necessity.*—The application for an order authorizing the sale of property by a receiver must be founded on satisfactory proof of the necessity of such sale.[2]

(4) *Should Designate Specific Property.*—The order of sale should designate the specific property which is to be sold.[3]

court by a party to the action in which the property was sold. Brande *v.* Bond, 63 Wis. 140.

A stockholder of a corporation who joined in an application by the receiver for an order to sell the assets cannot, in an action to foreclose a mortgage, attack the validity of an assignment of such mortgage made by the receiver. Battershall *v.* Davis, 31 Barb. (N. Y.) 323.

Fraud.—The rule that a sale by a receiver under order of court cannot be attacked collaterally is generally laid down without qualification, but is modified as in the text, because of the decision in Hackley *v.* Draper, 60 N. Y. 88, *affirming* 2 Hun (N. Y.) 253; 4 Thomp. & C. (N. Y.) 614, in which it was held that a separate action would lie to set aside a sale where the order was procured by the receiver through fraud, even though relief might be obtained by motion in the action in which the receiver was appointed. One of the assets in the hands of a receiver was a judgment against D for $69,578.36 D had made several offers to compromise by paying from $10,000 to $25,000. The receiver knew of these offers, and also that a third person had said if the judgment were sold at auction he would give $35,000 therefor. The receiver procured an order authorizing him to sell said judgment at public or private sale. The order was procured *ex parte* without notice to any of the parties interested or their attorneys, upon a petition stating in substance that D was insolvent. Under authority of this order the receiver sold the judgment at private sale for $25,000 to S, who paid that sum, and was afterward repaid it by D. The sale was made at the instigation and for the sole benefit of D. At the time of the sale D was worth more than the sum paid for the judgment. He died shortly after and his executors filed an inventory of his assets, appraised at $96,000. When they learned what had been done, the plaintiffs began an action to set the sale aside. *Held*, that the action would lie, even though relief could have been had by motion in the action in which the receiver was appointed. Miller, J., said: "The counsel for the defendant claims, that if the plaintiffs were entitled to any relief . . . their true remedy was to apply to the court, by motion, in the action in which the receiver was appointed. The special term had authority, no doubt, to hear a motion for the purpose indicated, and could have vacated the sale made by the receiver. . . . But I think an equitable action will lie to vacate an order of court, obtained for a fraudulent purpose, and a sale made in pursuance of the same. The rule is well settled that courts will set aside, as a nullity, a judgment, decree or award obtained by fraud." Hackley *v.* Draper, 60 N. Y. 88.

1. Libby *v.* Rosekrans, 55 Barb. (N. Y.) 202.

2. An application for authority was made by a receiver, stating that taxes were due on land, that a portion of said lands had been sold for taxes, that the receiver had paid several hundred dollars of his own funds to redeem said lands, and that the receiver had no funds in hand. The administrator of the person whose property was the subject of the receivership objected to the granting of the order. The order was made, and was reversed by the Supreme court. Lumpkin, J., said: "Our second objection to the order is that it is not founded upon sufficient proof. The receiver makes the application upon the bare statement of the complainant in the creditor's bill and who is the solicitor of the receiver in the prosecution of the suit. We hold that the evidence is too uncertain and unsatisfactory to warrant the order. Dixon . . . was present resisting the order, and the *onus* was upon the party applying to show, by competent testimony, the necessity for passing the order." Dixon *v.* Rutherford, 26 Ga. 149.

3. An order of sale authorized a re-

(5) *May Prescribe Manner and Terms.*—The court in making an order authorizing a sale by a receiver may provide in the order concerning the time, manner and terms of the sale.[1]

(6) *Appeals From.*—An order of sale is a final decree from which an appeal will lie.[2] An order confirming the sale is also appealable.[3]

c. EXECUTION OF THE ORDER—(1) *Receiver's Discretion.*—Receivers are not mere executive officers; and while they must strictly comply with the terms of the order authorizing the sale, are permitted to exercise a certain discretion.[4]

ceiver to sell a portion of the property in the city of Columbus for the purpose of paying taxes on land in other States. The Supreme court reversed the order because it did not designate the specific property which should be sold. Lumpkin, J., said: "It is too vague and general. It specifies no particular property which is to be sold . . . Under this indefinite authority the receiver might sacrifice the most valuable property in the city of Columbus to pay taxes upon other real estate in Arkansas and elsewhere . . . if property must be sold for this purpose let it be designated in the order." Dixon *v.* Rutherford, 26 Ga. 149.

1. The court may appoint experts to report upon the best way of making the sale. *In re* Newark Sav. Inst. (N. J. 1887), 9 Atl. Rep. 375. In Case *v.* Fish, 63 Wis. 475, the Supreme court intimated that an order of sale would be reversed which in their judgment clearly designated a disadvantageous mode of sale. See remarks of Taylor, J., at page 497.

When the order directs a receiver to sell, and to carry on the business until he can sell, it is his duty to sell as soon as it is practicable to do so. Hooper *v.* Winston, 24 Ill. 353.

2. First Nat. Bank *v.* Sheed, 121 U. S. 85; 30 Am. & Eng. R. Cas. 439; Hospes *v.* Northwestern Mfg., etc., Co., 41 Minn. 256; First Nat. Bank *v.* Barnum Wire Works, 58 Mich. 315; McNab *v.* Noonan. 28 Wis. 434.

In First National Bank *v.* Barnum Wire etc. Works, 58 Mich. 315; 55 Am. Rep. 660, where it was objected that an order of sale was not a final order from which an appeal would lie under the statute of Michigan, Campbell, J., said: "No rule is better settled than that private rights are not subject to uncontrolled discretion, and any proceeding, whatever may be its name, whereby they are seriously affected or divested wrongfully must necessarily be open to review in some form. . . . It would be impossible to hold that by appointing a receiver any court could authorize him to violate private rights or to commit frauds without control . . . it would be absurd to hold that there could be no redress, merely because what would in other cases be an independent bill must here be a petition. The form of the remedy does not destroy its substance. . . . The order of sale provided for an entire disposal of the trust fund, and all of the claims of creditors and others may be affected by it. It is the chief end of the trust dealings."

3. On an appeal from the order confirming the sale, only the regularity of the sale and the adequacy of the price obtained can be considered. If a party is aggrieved by the terms of the order of sale his remedy is by appeal from that order. He cannot allow the sale to take place in accordance with its provisions, and then, in opposing the confirmation of the sale, urge objections to the order itself. Hospes *v.* Northwestern Mfg., etc., Co., 41 Minn. 256.

4. In Knott *v.* Morris Canal, etc., Co., 4 N. J. Eq. 423, Chancellor Haines said: "In the disposition of the trust property, the receivers have a discretion for the due exercise of which they are responsible to the court, and in the exercise of which they are subject to its control. . . . They are not, like executive officers, bound to sell for the highest price, without regard to the purchaser or the disposition he may make of the property; the object is not merely to obtain the greatest amount of rent, but also to secure the proper use and due repair of the canal, . . . and the continuance and increase of

(2) *Receiver Cannot Purchase.*—A receiver will not be permitted to bid nor purchase at his own sale. Any purchase he may make will be held or the benefit of the parties interested, is voidable at their election, and may be set aside by the court. The rule is independent of any question of actual fraud.[1] Nor should he

business upon it, that as far as practicable the reversionary interests of the creditors and stockholders may be promoted."

Where a receiver exercised his discretion as to selling in whole or in parcels, Zabriskie, Chancellor said: "In this case the discretion intrusted to the receiver has been in good faith exercised by him, and the sale ought not to be set aside because the court might differ from him in opinion as to which was in this particular case, the best mode of selling." National Bank *v.* Sprague, 20 N. J. Eq. 59. But the court will set aside the sale where it is clearly of opinion the mode was not the one calculated to produce the best results. Case *v.* Fish, 63 Wis. 475.

1. Alven *v.* Bond, 3 Ir. Eq. 365; F. & K. 196; Anderson *v.* Anderson, 9 Ir. Eq. 23; Eyre *v.* M'Donnell, 15 Ir. Ch., N. S. 534; Jewett *v.* Miller, 10 N. Y. 402; 65 Am. Dec. 751; Carr *v.* Houser, 46 Ga. 477; Titherington *v.* Hodge, 81 Ky. 286.

In Jewett *v.* Miller, 10 N. Y. 402; 65 Am. Dec. 751, Jewett, J., said: "It is hardly possible to state the rule of equity too broadly or too strongly. It will not permit a trustee to subject himself to the temptation which arises out of the conflict between the interest of a purchaser and the duty of a trustee . . . The rule is entirely independent of the question whether, in point of fact, fraud has intervened. It is to avoid the necessity of any such inquiry, in which justice might be balked, that the rule takes so general a form."

In Alven *v.* Bond, 3 Ir. Eq. 365; F. & K. 196, where a portion of the premises sold under the decree had been purchased for the receiver by another, the court set the sale aside after confirmation, upon discovery of the facts. In this case O'Loghlen, M. R., said: "I find it to be the general rule of this court, founded on principles of public policy, that trustees, solicitors, or agents for the assignees, and all persons filling any confidential office in relation to the property to be sold, shall not, without special leave of the court, and probably the assent of all parties interested, purchase the property with which they are by their office connected. I make no new decision if I apply that principle to a receiver."

Security.—The receiver cannot take as security property in his charge. Thompson *v.* Holliday, 15 Oregon 34, was a suit to foreclose a chattel mortgage on certain shares of stock. The mortgage was executed to the plaintiff while receiver, and while he, as such, held the stock for money advanced to the defendant. It was admitted that the plaintiff had made the loan to the defendant. *Held*, that plaintiff could recover his money by action, but that his mortgage was void.

When a receiver purchased at an undervaluation an annuity charged on land subject to his receivership, and which it was his duty to collect, the personal representatives of the vendor were held entitled to rescind the sale. Eyre *v.* M'Donnell, 15 Ir. Ch., N. S. 534.

By consent of all parties interested an order was entered closing an estate, except the sum of sixteen hundred dollars, which was directed to remain in the receiver's hands to pay a claim the amount of which was contested, and providing that the receiver should retain, as additional compensation, the residue after paying the claim. It was held that the receiver could not appeal from the allowance of the claim by the court. McAllister, J., said in this case: "A receiver is an officer of the court, and has been figuratively styled the hands of the court. With that figure in mind this case appears very much like a mild rebellion of the hands against the head. . . . We cannot but regard that part of the order as injudicious. It placed the receiver in a position where his interest was in direct conflict with his duty." Stanton *v.* Andrews, 18 Ill. App. 552.

Agent.—The receiver will not be allowed to purchase at his own sale as the agent for another. Where a receiver at his own sale bid the property off as the agent of his brother, and not

be interested in any claim against the subject-matter of the receivership.[1]

(3) *Confirmation and Control by Court.*—The court has entire control and supervision over sales by its receivers, and may confirm or reject them at its discretion. Purchasers will be presumed to know that they purchase subject to the court's disapproval of the sale.[2]

d. PURCHASER'S TITLE—(1) *Receiver's Power to Make Deed.*—The receiver has power to make a deed of property sold by him under order of court.[3] It is irregular to execute the deed until

for himself, the sale was held voidable at the election of any party in interest, and was set aside. Carr *v.* Houser, 46 Ga. 77.

Judicial Sale.—The rule applies even where the sale is a judicial sale, under a decree against the receiver and paramount to his title. W mortgaged certain premises to M, who assigned the mortgage to B, who afterward assigned it to N, as collateral security. After this last assignment W sold the premises to C, taking a purchase-money mortgage. W then assigned this mortgage to B as collateral for a loan. A receiver was subsequently appointed over the property of B. C, being unable to pay the purchase-money mortgage, made a quitclaim deed of the premises to the receiver. The receiver then had a right to redeem the mortgage assigned to N, and also the general equity of redemption under the deed from C. Thus situated, upon a foreclosure sale by N, the receiver bought the property. The sale was held voidable. Jewett *v.* Miller, 10 N. Y. 402; 65 Am. Dec. 751.

Exception.—In Stannus *v.* French, 13 Ir. Eq. 161, a receiver was permitted to become tenant of lands in his charge, when he obtained the consent of all parties to the litigation, and such course seemed to the court to be beneficial to the estate.

1. Thompson *v.* Holliday, 15 Oregon 34; Eyre *v.* M'Donnell, 15 Ir. Ch. 534.

2. At a receiver's sale, bank stock of the par value of $27,000 was bid off for $107. It was known to the purchaser, but not to the receiver, that in an action brought by stockholders it had been adjudged that the director's of the bank, because of misconduct, were liable for the market value of the stock at a time specified, and also for an assessment of one hundred per cent. which had been paid by the stockholders. The receiver before the delivery of the stock learned these facts, and refused to deliver the stock to the purchaser. *Held*, that court would not compel the receiver to complete the sale. Andrews, J., said: "There was doubtless a complete executory contract in form for the transfer of the shares. But the contract while executory was subject to the supervisory power of the court. The court could, in the exercise of a just discretion, sanction or disapprove of it, and the purchaser must be deemed to have purchased subject to this implied condition." Attorney-Gen'l *v.* Continental L. Ins. Co., 94 N. Y. 199.

In Weeks *v.* Weeks, 106 N. Y. 626, the court vacated the order for a lease after the tenants had gone into possession. In this case compensation was allowed the lessees out of the fund.

Field, J., in Koontz *v.* Northern Bank, 16 Wall. (U. S.) 196, says, at page 202: If the court "was deceived by the report of the receiver or master, and the purchaser participated in creating the deception, it could, undoubtedly, at any time before the rights of innocent purchasers had intervened, have set the whole proceedings, including the deed, aside. But after the rights of such third parties had intervened, its authority in that respect could only be exercised consistently with protection to those rights.

A receiver had been appointed on judgment creditors' bills amounting to about a thousand dollars. An assignment was executed to him, and he advertised the property for sale. Upon an affidavit by the defendant that the property in the receiver's hands was worth $60,000, the court made an order staying the sale. Wardell *v.* Leavenworth, 3 Edw. Ch. (N. Y.) 244.

3. Koontz *v.* Northern Bank, 16 Wall. (U. S.) 196; Russell *v.* Texas, etc., Co., 68 Tex. 646; Watkins *v.* Min-

after confirmation of the sale by the court, and if confirmation were refused, the deed would be inoperative;[1] but confirmation of the sale removes all objection.[2]

(2) *Rule Caveat Emptor Applies.*—Only such title and interest passes on a sale by the receiver as was possessed by the party whose interest is being sold. The rule *caveat emptor* applies, and it is for the purchaser to ascertain what that interest is.[3]

nesota Thresher Mfg. Co., 41 Minn. 150; Atchison *v.* Davidson, 2 Pin. (Wis.) 48.

Field, J., in Koontz *v.* Northern Bank, 16 Wall. (U. S.) 196, says, at page 202: "A purchaser under a deed from a receiver is not bound to examine all the proceedings in the case in which the receiver is appointed. It is sufficient for him to see that there is a suit in equity, or was one, in which the court appointed a receiver of property; that a sale was made under such authority; that the sale was confirmed by the court, and that the deed accurately recites the property or interest thus sold. If the title to the property was vested in the receiver by order of the court, it would in that case pass to the purchaser. He is not bound to inquire whether any errors intervened in the action of the court, or irregularities were committed by the receiver in the sale, any more than a purchaser under execution upon a judgment is bound to look into the errors and irregularities of a court on the trial of the case or of the officer in enforcing its process. If the receiver in the one case or the sheriff in the other omit to perform his whole duty, by which the parties are injured, or commit any fraud upon the court, and the rights of third parties have intervened so as to prevent the court from setting the proceedings aside, the injured parties must seek their remedy personally against those officers or on their official bonds."

Title in Receiver Not Necessary.—In Russell *v.* Texas, etc., R. Co., 68 Tex. 646, Stayton, J., at page 651, says: "We apprehend that no assignment is necessary to entitle the court appointing a receiver to pass title through a sale made by him under its orders. It is not a question whether the receiver has title, but whether the court has power to pass the title of the person or corporation whose estate is placed in the hands of a receiver. . . . Sales, whether made on seizure under execution issued after judgment, or on seizure before final judgment on decretal orders which a court has power to make, are held to pass title to the property sold, not because the ministerial officer has title, but because the law casts upon him when acting under its authority, the power to make a sale which will bind the owner as fully as would his own act."

Negotiable Paper.—In Atchison *v.* Davidson, 2 Pin. (Wis.) 48, receivers had transferred a negotiable note, part of the assets, to a creditor in payment of a claim, it was held that, in the absence of proof of the extent of the receiver's authority under the appointment, the presumption was that the receivers had power to make the transfer, and that the legal title to the note passed to the plaintiff who could recover on it.

1. Koontz *v.* Northern Bank, 16 Wall. (U. S.) 196; Simmons *v.* Wood, 45 How. Pr. (N. Y.) 268. Any transfer made before such confirmation is unauthorized, and any payment made is at the purchaser's risk. Simmons *v.* Wood, 45 How. Pr. (N. Y.) 268.

Corporate Seal.—Assignments and transfers by receivers of corporations are properly executed by them in their own names, without the use of the name of the corporation, or the corporate seal. Hoyt *v.* Thompson, 5 N. Y. 320, reversing 3 Sandf. (N. Y.) 416.

2. Field, J., in Koontz *v.* Northern Bank, 16 Wall. (U. S.) 196, says, at page 201: "There was undoubtedly an irregularity committed by the receiver in executing his conveyance before the sale was confirmed by the court, and until then the purchase was not binding upon that officer. But his conveyance was not on that account void; it was only voidable. If the deed had been executed after confirmation it would have taken effect by relation as of the day of the sale. If the confirmation had been denied, the deed, resting upon the sale, would have become inoperative. But the confirmation having been made, all objection to the time at which the deed was executed is removed."

3. Barron *v.* Mullin, 21 Minn. 374; Foster *v.* Barnes, 81 Pa. St. 377; Man-

(3) *Liens Not Divested.*—A sale by a receiver does not affect prior existing liens.[1] The property passes to the purchaser subject to all legal incumbrances, and he may therefore contest the validity of all such liens, and the amount thereof.[2]

ning *v.* Monagham, 23 N. Y. 544; Hackensack Water Co. *v.* DeKay, 36 N. J. Eq. 548; 1 Am. & Eng. Corp. Cas. 670.

The rule applies to the condition of the property as well as to its title, and in an action for the purchase money it is no defense in the absence of fraud or misrepresentation that the property was in defective condition. Barron *v.* Mullin, 21 Minn. 374; Newberry *v.* Trowbridge, 13 Mich. 263.

Where the purchaser acquiesced in and consented to the ratification of the sale, the fact that another piece of real estate was included in the sale but omitted in the deed, is not a defense to an action for the purchase money. Barron *v.* Mullin, 21 Minn. 374.

If the equity of redemption in mortgaged property is sold prior to the appointment of a receiver. and he fails to redeem it within the time provided by statute he has no title which can be the subject of sale. Fitch *v.* Wetherbee, 110 Ill. 475.

1. Barron *v.* Mullin, 21 Minn. 374; Lorch *v.* Aultman, 75 Ind. 162; Snow *v.* Winslow, 54 Iowa 200; Manning *v.* Monagham, 23 N. Y. 544; Lowrey *v.* Smith, 9 Hun (N. Y.) 514; Hackensack Water Co. *v.* De Kay, 36 N. J. Eq. 548; 1 Am. & Eng. Corp. Cas. 670; Fitch *v.* Wetherbee, 110 Ill. 475.

The general rule is that stated in the text, but it is modified in many States by statutes prescribing the effect of judicial sales on liens. Thus, in New Jersey, it is provided that the court may, under certain circumstances order the receiver to sell free from incumbrances. Revision of the Stats. of N. J., p. 192, § 84.

Where one has an established lien, and is not a party to the action in which the receiver's sale is made, his lien is not divested, the purchaser takes subject thereto, and it may be enforced as if no sale had been made. Snow *v.* Winslow, 54 Iowa 200, was an action to establish a merchant's lien against a railroad for supplies furnished for construction. The plaintiff secured his lien before the appointment of the receiver. The receiver was authorized to issue certificates, which should be a first lien. The road was sold to satisfy the certificates. In a contest between the purchaser and the plaintiff it was held that the purchaser took subject to the mechanic's lien.

The lien must have been an established subsisting lien, and prior to the lien of the party upon whose application the sale is made, otherwise it will be discharged. This rule applies even to taxes, in the absence of statute providing otherwise. Where it was provided by statute that taxes assessed on the capital stock of a railroad should be a lien, and the road was sold in foreclosure proceedings, under a mortgage, the lien of which was prior to the taxes in time, it was held that the purchasers took free from the lien for taxes. Cooper *v.* Corbin, 105 Ill. 224; 13 Am. & Eng. R. Cas. 394.

Mortgage.—The lien of a mortgage given by a firm to one who was not a party to the subsequent action in which a receiver was appointed, was not divested by the receiver's sale. Lorch *v.* Aultman, 75 Ind. 162.

Dower.—A wife's dower interest is not divested by a receiver's sale of her husband's real estate. Lowrey *v.* Smith, 9 Hun (N. Y.) 514.

State vs. Federal Courts.—A receiver's sale does not bar liens established by judgments in State courts, where the petitions of the judgment creditors to intervene in a federal court in the action in which the receiver was appointed were denied without prejudice, although the judgments were obtained during the pendency of the suit, while the receiver was in possession and without making him a party. Blair *v.* Walker, 26 Fed. Rep. 73.

Collateral — Where a corporation, before going into the hands of receivers assigned certain leases to a bank as security, and afterwards the receivers under order of court, sold all the property of the corporation free and clear of incumbrances, it was held that the assignment of the leases was a mere authority to collect and appropriate the rents due thereon, and that the rents which accrued after the sale belonged to the purchaser. Corrigan *v.* Trenton Delaware Falls Co., 7 N. J. Eq. 489.

2. The purchaser may question the

(4) *Claims Arising Out of or During Receivership.*—The court may order that the property shall be subject to debts and liabilities incurred by the receiver in its management. The sale in such case is conditional in its nature, and the purchaser takes it *cum onere.*[1] In the absence of such provision, however, the

amount and legality of the claim, though the terms of sale are expressly "subject to all legal liens and incumbrances." Hackensack Water Co. *v.* DeKay, 36 N. J. Eq 548; 1 Am. & Eng. Corp. Cas. 670. But a purchaser of a railroad at a sale under decree of foreclosure, which recites that the sale shall be made subject to liens established or to be established (on references before had or then pending, to a master, with right to bondholders to appear and oppose) cannot dispute the validity of the liens thus established. Suann *v.* Wright, 110 U. S. 590; 17 Am. & Eng. R. Cas. 345. See also Kneeland *v.* American L. & T. Co., 136 U. S. 89; 43 Am. & Eng. R. Cas. 519.

1. Farmers' L. & T. Co. *v.* Central R. Co., 5 McCrary (U. S.) 421; Farmers' L. & T. Co. *v.* Central R. Co., 2 McCrary (U. S.) 181; Davis *v.* Duncan, 19 Fed. Rep. 477; 17 Am. & Eng. R. Cas. 295; Sloan *v.* Central Iowa R. Co., 62 Iowa 728; 11 Am. & Eng. R. Cas. 145; Ryan *v.* Hays, 62 Tex. 43; Brown *v.* Wabash R. Co., 96 Ill. 297; 1 Am. & Eng. R. Cas. 626; Schmid *v.* New York, etc., R. Co., 32 Hun (N. Y.) 335.

Jurisdiction Retained.—The court has power to retain jurisdiction of the original cause in which the receiver was appointed so as to enforce such claims against the property. In Farmers' L. & T. Co. *v.* Iowa Central R. Co., 7 Fed. Rep. 758, the decree provided, "That the lawful debts contracted by the receiver during the litigation, and the costs and expenses of such litigation do constitute and are hereby made a first and paramount lien upon all said property . . . to all other liens and to the title acquired by the purchaser . . . and for the purpose of enforcing payment thereof if need be, this court will and does retain jurisdiction of said cause for the purpose of enforcing said payment and the lien herein provided for, without other action or independent proceeding." Two employés of the receiver who had pending claims for injuries caused by alleged negligence of the receiver, filed a petition of intervention in the original foreclosure proceeding, asking that their judgments be made liens on the railway. The purchasers insisted that since the original decree of foreclosure made no provision for these claims, that it was not within the power of the court to embody the above quoted order in the decree confirming the sale. *Held*, that the objection was not good, and there was a decree for the complainants.

Sale Conditional.—In Sloan *v.* Central Iowa R. Co., 62 Iowa 728; 11 Am. & Eng. R. Cas. 145, the court by Seevers, J., said: "We have determined that the receiver, or rather the property in his charge, was liable for the payment of the plaintiff's claim. The appellant, therefore, received the property charged with this liability. If it had been made a condition in the order that appellant, before the property was transferred or conveyed to it, should execute a written obligation binding himself to pay this claim, and it had done so, its liability we think would not be doubted . . . What was done in legal effect amounts to the same thing . . . The court in substance, said to the appellant: 'We will discharge the receiver, and place the road, and all property and rights connected therewith, in your possession, and vest you with the legal title thereto, provided you will assume and pay all liabilities incurred during the time the road has been operated by the receiver.' The appellant accepted the road on the conditions annexed. . . . It is true the appellant was not a party to the action of foreclosure, but it became a party to the order when it accepted the property."

Purchaser Bound by Order.—A purchaser of property under such order will not be allowed to dispute the validity of the order. Sloan *v.* Central Iowa R. Co., 62 Iowa 728. The liability follows the property into the hands of subsequent purchasers. Schmid *v.* New York, etc., R. Co., 32 Hun (N. Y.) 335.

purchaser takes free from claims and debts arising out of the receivership.[1]

e. PURCHASERS AT SALE.—A party bidding at a receiver's sale makes himself a party to the proceedings and subject to the jurisdiction of the court for all orders necessary to compel the perfecting of the purchase, and with a right to be heard on all questions arising affecting his bid.[2]

1. Davis *v.* Duncan, 19 Fed. Rep. 477; 17 Am. & Eng. R. Cas. 295; Chesapeake, etc., R. Co. *v.* Griest, 85 Ky. 619; 30 Am. & Eng. R. Cas. 149; Hicks *v.* International, etc., R. Co., 62 Tex. 38; Ryan *v.* Hays, 62 Tex. 42; Bell *v.* Chicago, etc., R. Co., 34 La. Ann. 785; Metz *v.* Buffalo, etc., R. Co., 58 N. Y. 61; White *v.* Keokuk, etc., R. Co., 52 Iowa 97. But see, for a modification of the rule, based upon the ground that claimants may follow the *corpus* of the property where the earnings of the receivership have been diverted to the enhancement of the property, to the extent of such diversion, Mobile, etc., R. Co. *v.* Davis, 62 Miss. 271; 17 Am. & Eng R. Cas. 308; 26 Am. & Eng. R. Cas. 425; Burnham *v.* Bowen, 111 U. S. 782.

The purchaser is not liable for damages resulting from negligence in the operation of a railroad between the time of sale and the confirmation of the sale. In Metz *v.* Buffalo, etc., R. Co., 58 N. Y. 61, the railroad's franchises and property were sold by the receiver on Dec. 7, the sale was confirmed Jan. 22d, following. On Dec. 24 a passenger was killed through negligence of the railroad's employés. *Held*, that the purchaser was not liable.

The receiver is not the agent of the company owning the railroad, and the fact that the old company subsequently repurchased the road does not charge it in their hands with the receiver's liabilities. Hicks *v.* International, etc., R. Co., 62 Tex. 38.

Neither is the receiver agent of the mortgagee in foreclosure proceedings, and if the mortgagees purchase the road they take it free from such claims. White *v.* Keokuk, etc., R. Co., 52 Iowa 97 In this case the railroad was purchased by a committee representing the bondholders, who reorganized, and the committee conveyed to the reorganized company. While the road was being operated by the receiver W sustained injuries for which he recovered judgment against the receiver. But before the recovery the sale of the road took place. He then brought action against the reorganized company, but it was held it was not liable.

The pendency of an action against the company or the receiver is not sufficient to charge the purchaser with liability therefor. Burlington, etc., R. Co. *v.* Verry, 48 Iowa 458. In this case it was held that the statute (Iowa Code, § 1309), providing that "any judgment recovered against any railroad company in this State for any injury to persons or property shall be a lien within the county where recovered on the road or other property of such company, and shall be prior and superior to the lien of any mortgage or trust deed which may be hereafter executed, except liens for taxes" does not embrace claims for such injuries received while the railroad was in the hands of the company, but for which judgment was not recovered until after sale in foreclosure proceedings, though the actions were pending at the time of the sale; aud the purchaser takes it free from such claims. These questions arise almost exclusively in connection with railway receiverships. For full treatment see RECEIVERS OF RAILROADS.

2. **May Oppose Confirmation.**—The purchaser may oppose the confirmation of the receiver's report, and if he does not oppose it will be deemed to have adopted it. In Barron *v.* Mullin, 21 Minn. 374, after confirmation of the sale, the purchaser refused to complete the transaction, insisting that on the parcel of land offered for sale and sold by the receiver, and bought by him, there was a piece other than the parcel described, and that such other piece was not included in the deed tendered by the receiver. The court, by Gilfillan, C. J., said: "This might have been a good defense . . . had it not been for the confirmation of the report

4. **Receiver's Contracts**—*a.* IN GENERAL.—The primary object of a receivership is the preservation of the property pending litigation, and the receiver has not power, as incident to his general authority, to make contracts. The court may authorize him to exercise such power, but without such authorization contracts made by him are not binding, and the court may ratify or disaffirm them at discretion.[1]

of sale. The report specifies, as sold to defendant, only lots 2, 3, 4 and 5. The defendant might have opposed, and, if he claimed that it was incorrect, he ought to have opposed, the confirmation of the report. As he acquiesced in it, he is deemed to have adopted it, and he is bound by the order of court affirming it."

Order Affecting.—Where the order of sale provided that "in making payment . . . the purchaser or purchasers shall be allowed to pay said surplus in the bonds and coupons to which the same may be applicable, as hereinbefore provided, each such coupon and bond being received by the master for such sum as the holder thereof is entitled to receive under the distribution herein provided, and according to the priority herein adjudged," it was held that purchasers had a right of appeal from the report of the master upon the claims of intervening creditors. Kneeland *v.* American L. & T. Co., 136 U. S. 89; 43 Am. & Eng. R. Cas. 519.

Damages.—A receiver who attempts to sell a greater interest in chattels than he can legally pass is liable personally for damages which may be sustained thereby by any person having an interest in such chattels. Manning *v.* Monaghan, 23 N Y. 544, reversing 2 Bosw. (N. Y.) 459. The purchaser in such case takes subject to any adverse interest, and therefore the receiver is only liable where the party interested sustains actual damage. Manning *v.* Monaghan, 23 N. Y. 544.

Where a purchaser refused to complete the purchase because of defective title, and the receiver waives and consents that the sale shall be void, the purchaser is entitled to recover from the receiver his legal expenses incurred in examining the title and in resisting a proceeding brought to perfect the purchase. Drake *v.* Goodridge, 6 Blatchf. (U. S) 151.

1. Attorney-Gen'l *v.* Vigor, 11 Ves. 563; Cowdrey *v.* Galveston, etc., R. Co., 93 U. S. 352; Denniston *v.* Chicago, etc., R. Co., 4 Biss. (U. S.) 414; Vilas *v.* Page, 106 N. Y. 450; Ryan *v.* Rand, 20 Abb. N. Cas. (N. Y.) 313; State *v.* Edgefield, etc., R. Co., 6 Lea (Tenn.) 353; Hand *v.* Savannah, etc., R. Co., 17 S. Car. 217; 12 Am. & Eng. R. Cas. 488, 495; Lehigh Coal, etc., Co. *v.* Central R. Co , 35 N. J. Eq. 426; 9 Am. & Eng. R. Cas. 479; Kerr *v.* Little, 39 N. J. Eq. 83; Tripp *v.* Boardman, 49 Iowa 410.

Van Fleet, V. C., said in Lehigh Coal, etc., Co. *v.* Central R. Co., 35 N. J. Eq. 426; 9 Am. & Eng. R. Cas. 479: "Assuming that the orders issued to the petitioners are entitled to be treated as contracts, the important question is, Do they bind the trust? The principle which must govern the court in deciding this question seems to me, from the very nature of the case, to be quite obvious and simple, and it is this: When a railroad corporation passes into the custody of the law, for the purpose of having its road operated and its property administered by the chancellor, for the benefit of the public and for the protection of its creditors and stockholders, neither its franchises nor its property can be legally charged with any burden or obligation without the order of the chancellor. The chancellor is in possession of this railroad. The receiver is the chancellor's officer; he acts simply in a fiduciary capacity, and is at all times subject to the orders of the chancellor. The chancellor may at any time, for whatever may seem to him sufficient cause, remove the receiver, and not a dollar expended in operating the road can be allowed to the receiver, in his accounting with the trust, except by the order of the chancellor. All outlays made in behalf of the trust must either be authorized in advance, or subsequently ratified by the chancellor. Whatever is not so authorized or ratified, cannot be charged against the trust. This presents the whole argument in a single

b. COURT MAY MODIFY OR ANNUL.—All contracts made by the receiver are subject to the control of the court, and it may modify or disregard them.[1] Where the contract has been made

sentence. It is thus demonstrated, as it seems to me, that nothing the receiver can possibly do, by contract or expenditure, can be made effectual against the trust without the sanction of the chancellor."

In Cowdrey *v.* Railroad Co., 1 Woods (U. S) 336, Justice Bradley of the U. S. Supreme Court, said: "It may be laid down as a general proposition that all outlays made by the receiver in good faith, in the ordinary course . . . are fairly within the line of discretion which is necessarily allowed to a receiver intrusted with the management and operation of a railroad. . . . His duties, and the discretion with which he is invested, are very different from those of a passive receiver. . . . In extraordinary cases, involving a large outlay of money, the receiver should always apply to the court in advance, and obtain its authority for the purchase or improvement proposed." In commenting on the above, Van Fleet, V. C., in Lehigh Coal, etc., Co. *v.* Central R. Co., 35 N J. Eq. 426, 9 Am. & Eng. R. Cas. 479, said: "This rule, it will be observed, simply prescribes what expenditures, out of the funds in his hands as receiver the court will recognize as legitimate and proper when the receiver comes to account for the administration of his trust, but nothing here said gives the slightest support to the notion that the receiver may, in virtue of the power of his office, make a contract which will bind the trust, or which the court will be bound to recognize without regard to its necessity or propriety. A receiver may, undoubtedly, appropriate moneys in his hands belonging to the trust to such purposes connected with the trust as he may think proper, always taking the risk that the court will finally approve his action, but he has no authority to bind the trust by contract without the authority of the court. Until his contracts are approved or ratified by the court, the court is at liberty to deal with them as to it shall appear just, and may either modify them or disregard them entirely.

The receiver has not authority to contract debts chargeable upon the property. The court must authorize such expenditures before they will be binding. In its discretion expenses incurred by a receiver, when clearly necessary and for the benefit of the property, may be allowed, although not previously authorized by the court, but their validity depends upon the subsequent allowance by the court and not upon the receiver's contract. Vilas *v.* Page, 106 N. Y. 451; Raht *v.* Attrill, 106 N. Y. 434; 60 Am. Rep. 456; Rogers *v.* Wendell, 54 Hun (N. Y.) 546; Wyckoff *v.* Scofield, 103 N. Y. 630.

In Kerr *v.* Little, 39 N. J. Eq. 83, Runyon, C., said: "The petitioners, in accepting these orders, acted with their eyes wide open. . . . They were dealing with an officer possessing very limited powers, and who was constantly subject to the orders of the power which created him. . . . They must also be assumed to have known that the receiver could make no contract effectual against the trust, which was not first authorized or subsequently ratified by the chancellor."

A receiver of a railroad has not the power, without an order of the court, to grant another railroad the privilege of crossing the line of his company. Howlett *v.* N. Y. W. S. & B. R. Co., 28 Hun (N. Y.) 55. Nor to grant a pass which shall be binding on his successors. Martin *v.* New York, etc., R. Co., 36 N. J. Eq. 109; 12 Am. & Eng. R. Cas. 448.

A receiver has no power, without special authority from the court, to contract for municipal aid to complete a railroad. Smith *v.* McCullough, 104 U. S. 25; 3 Am. & Eng. R. Cas. 159.

1. Kerr *v.* Little, 39 N. J. Eq 83; Weeks *v.* Weeks, 106 N. Y. 626; Knott *v.* Morris Canal, etc., Co., 4 N. J. Eq. 423; and see the immediately preceding note.

In Weeks *v.* Weeks, 106 N. Y. 626, the court, by an *ex parte* order, directed the receiver to lease a property for three years, and after the termination of the litigation modified the first order so as to authorize a leasing of but one year, and declared the lease invalid except for that period. But the court allowed the lessees indemnity out of the fund.

Where two railroads were in the

under sanction of the court the parties have a right to notice and to a hearing on any motion to modify the contract.[1]

c. RECEIVER'S PERSONAL LIABILITY.—The receiver is personally liable for contracts made by him without specific authority.[2] He must pay the bill himself and assume the risk of having the amount allowed in his account. He may, however, relieve himself from this liability by an express agreement with the party with whom he contracts, that such party shall look only to the estate over which the receiver is appointed.[3]

hands of receivers appointed by the same court, the court modified a contract made by the companies concerning terminal facilities and the use of each other's road. *In re* New Jersey, etc., R. Cos., 29 N. J. Eq. 67.

1. Mooney *v.* British, etc., L. Ins. Co., 9 Abb. Pr. N. S. (N. Y.) 103.

2 Ryan *v.* Rand, 20 Abb. N. Cas. (N. Y.) 313; Rogers *v.* Wendell, 54 Hun (N. Y.) 540; Foland *v.* Dayton, 40 Hun (N. Y.) 563; New *v.* Nicoll, 73 N. Y. 127; People *v.* Universal L. Ins. Co., 30 Hun (N. Y.) 142.

The receiver is individually liable because he has no responsible principal behind him, against whom the creditor may enforce his demand. He does not represent the receivership when he acts outside the scope of his authority. In Ryan *v.* Rand, 20 Abb. N. Cas. (N. Y.) 313, the court by McAdam, C. J., said: "The defendant must pay the plaintiff's bill and charge it against the estate he represents, and if found correct it will no doubt be allowed. It will not do for him to say that he has no estate to charge the account to, for then the policy of the rule holding him individually liable in the first instance has stronger reasons for its support. The receiver, as a rule, cannot involve the estate in expense without the sanction of the court. There was no authority from the court making the plaintiff's demand a charge upon the estate, and the defendant has no power to make it a charge thereon except by payment, then charging it in his accounts and having them sanctioned by the court in the usual way."

In Rogers *v.* Wendell, 54 Hun (N. Y.) 540, an action was brought against the executors of a deceased receiver to recover for services rendered in the management of the receivership. The court, by Martin, J., said: "It is no answer to the plaintiff's claim to say that it is just and proper, and the court will allow it and order it paid. It may have been perfectly proper, so far as the plaintiff is concerned, and still improper as against the estate. The receiver may have been guilty of some act which would render the allowance of his claim against the estate improper. In such event the plaintiff's claim would be disallowed. The plaintiff's rights under his contract should be dependent upon no such uncertain remedy for their enforcement. . . . But it is said that the receiver ought not to be held personally liable upon a contract made for the benefit of the estate he represents. Why not? If this action was of doubtful propriety, or if the estate was of doubtful sufficiency, why should not the receiver be liable, if, acting under the circumstances, he obtains the services and property of another. . . . If held to be individually liable, no improper harm can fall upon the receiver or his estate. If the action of the receiver in making this contract and incurring this expense was proper and authorized, the demand, when paid, can properly be charged in his account and will be allowed by the court."

3. Rogers *v.* Wendell, 54 Hun (N. Y.) 540; New *v.* Nicoll, 73 N. Y. 131; Davis *v.* Stover, 16 Abb. Pr., N. S. (N. Y.) 225; Livingston *v.* Pettigrew, 7 Lans. (N. Y.) 405. Such agreement may be shown by the language used when the contract was made, or by circumstances showing that such was its effect. Rogers *v.* Wendell, 54 Hun (N. Y.) 541. But a mere intention to look to the estate is not enough to relieve the receiver from personal liability. Rogers *v.* Wendell, 54 Hun (N. Y.) 541; *Ex parte* Williams, 17 S. Car. 396; 12 Am. & Eng. R. Cas. 425. Where a receiver assigns claims and covenants that the assigned claims are due and unpaid, he is not personally liable on the covenant. Livingston *v.* Pettigrew, 7 Lans. (N. Y.) 405.

d. WHEN COURT GIVES DISCRETIONARY AUTHORITY.—Courts are slow to authorize a receiver to exercise discretion in the making of contracts, and will only do so in cases of necessity. But when such discretion has been given and has been exercised in good faith, the court will not annul or disregard them at pleasure, even if they seem to it to have been injudicious, but will proceed upon equitable principles, having regard to the peculiar nature of the receiver's power and duty in such cases.[1]

5. Receiver's Certificates.—See RECEIVERS OF RAILROADS.

Where a receiver is authorized to make an expenditure, and has no funds, he may by express agreement make the expenditure a charge on the trust estate, or he may advance the money and will have a lien therefor, which he may transfer. New *v.* Nicoll, 73 N. Y. 131; Rogers *v.* Wendell, 54 Hun (N. Y.) 540.

1. Vanderbilt *v.* Central R. Co., 43 N. J. Eq. 669; 35 Am. & Eng. R. Cas. 18. In this case Magie, J., said: "I cannot find any countenance for the notion that the contracts of a receiver, made under either the implied or express authority conferred, may be revoked or annulled at the pleasure of the chancellor. Doubtless the chancellor has power to retain in his hands the administration of such a trust, and to personally direct and order each contract into which the receiver should enter. But it would obviously be impracticable to adopt such a course in running a railroad. To select and employ the necessary subordinates; to contract for and purchase materials and supplies, and to anticipate in these respects the future needs of one of the gigantic corporations by express orders in each case, would require the whole time of the chancellor. . . . It must have been contemplated that in the performance of these multifarious duties some degree of discretion might be accorded to the receiver. Whether a power to exercise such discretion would not be assumed to exist in every case, without a special order, need not be considered, for it is clear that the chancellor may accord such discretionary power by a general order such as was made in this cause. When a receiver has thus acquired discretionary powers to operate an insolvent railroad, his position is peculiar, and the contracts he makes for that purpose are *sui generis* . . . The first question to be determined is whether, if the alleged contracts exist, they are of a character to entitle the party applying to the relief asked. This determination is not to be reached upon the theory that the chancellor can disregard or annul such contracts at pleasure, but upon equitable principles applied to the management and winding up of an insolvent estate of this peculiar character."

Completed Contract.—When the contract has been completely performed and accepted by the receiver, payment will be made therefor, in the absence of fraud, even though the chancellor deems it to have been an injudicious contract. On this point Magie, J, in Vanderbilt *v.* Central R. Co., 43 N. J. Eq. 669; 35 Am. & Eng. R. Cas. 18, said: "If the contract has been completely performed, and its performance accepted by the receiver, and the claim is merely for compensation, relief of that nature would seem necessarily to be awarded, unless the applicant should appear to have dealt fraudulently or collusively with the receiver, to the detriment of the trust. Even if, in the judgment of the chancellor, the contract was injudicious or improvident and unreasonable, unless the contractor should appear to have contracted with notice of the improper character of the contract, no just reason could be given for debarring him from the agreed-on compensation, which the receiver might, for his negligence or misconduct, be required to repay to the fund."

Unperformed Contract.—One who has in good faith entered on the performance of a contract made by the receiver, but which the court annuls as improvident, will be reimbursed his actual expenses therein out of the fund. In Vanderbilt *v.* Central R. Co., 43 N. J. Eq. 669; 35 Am. & Eng. R. Cas. 18, Magie, J., said: "But if the contract had not been performed, and the applicant seeks a direction for its performance or damages for its

VI. **Relation to Court.**—The relation of a receiver to the court appointing him is one of agency; he is merely its ministerial officer, called to act as an indifferent person between the parties to the suit, to take possession for the court *pendente lite*, and preserve the property or fund in litigation for the benefit of all the parties, when it does not seem to the court equitable that either party should have possession or control of it.[1] The

non-performance, what course is to be taken if the contract be found to be improvident and unreasonable, although it does not appear that the contractor had notice that it was of that character? In such case, to direct the performance of the contract, or to award damages for its non-performance, would injure and despoil the trust for the mere benefit of the contractor. The course of equity, under such circumstances, seems plain. The contractor with a receiver must be assumed to know that, if he seeks to enforce his contract, it must come under the scrutiny of a court of equity, and if it there appears to be injurious to the trust managed by that court, it would be impossible for that court to carry it out. He cannot complain, therefore, if the court decline to direct such a contract to be performed, or, if it has been repudiated by the receiver, to award damages, in the ordinary sense of the term, for its non-performance. But if the contractor has, in good faith, entered into a contract with a receiver clothed with discretionary powers, and before the unreasonableness or improvidence of such contract had been brought to his notice, or judicially determined, has made preparations for its performance, and has therein expended money or contracted obligations which, if the contract goes unperformed, he cannot, with reasonable diligence, be reimbursed or protected against, then it would be obviously inequitable to turn him away to submit to such loss, or to leave him to such redress as he might be entitled to against the receiver. If he has acted in good faith, then, although he may not be entitled to enforce his contract because the receiver has acted improvidently, yet he ought not to be allowed to suffer actual loss, but should be made whole, and, since the receiver merely represents the fund, he should be made whole out of the fund.

Receiver Personally Liable.—If the conduct of the receiver require it, the court may compel him personally to make good to the fund losses arising to it from the carrying out of his improvident contracts, or for compensation allowed contracting parties who entered on their performance. Vanderbilt *v.* Little, 43 N. J. Eq. 669; 35 Am. & Eng. R. Cas. 18.

Pooling Contract.—Where a pooling contract was in force at the time the receiver was appointed, nothing was provided concerning it in the orders of the court, and the receiver continued it in force. *Held*, that he could not afterwards set up its invalidity, but must account to the other contracting roads for money received under it. Matthews, J., said in this case, Central Trust Co. *v.* Ohio Cent. R. Co., 23 Fed. Rep. 306, 23 Am. & Eng. R. Cas. 666: "The question now presented to me is not whether an unperformed and executory contract shall be enforced, nor whether damages shall be recovered against a party who refuses to operate under it. It is whether one party, who has received all the expected benefits to be derived from it, shall account for the fruits of its performance, which, by its terms, belong to another, and which, contrary to its terms, it retains. The contract, whether legal or not, was not binding on the complainant or receiver; and if objected to in season, proper instruction would have been given in reference to its recognition and adoption. Failing to take proper steps to that end, the receiver was necessarily left at liberty to exercise his own judgment and discretion in reference to it. . . . Good faith requires that the proceeds arising from its operation, and which by its terms belong to the petitioner, should be paid over to him, without regard to the questions now made as to the original validity of the contract."

1. *In re* Colvin, 3 Md. Ch. 300; Ellicott *v.* Warford, 4 Md. 80; Hooper *v.*

receiver has been aptly termed the "arm of the court," also "the hand of the court," by which it seizes the subject-matter in controversy and preserves it for the benefit of whoever shall ultimately become entitled thereto.[1]

1. Supervision by the Court.—As a receiver derives his official existence from the court whose creation he is, so at every step he is subject to the control and supervision of such court in his management of the property or fund placed in his charge. His powers, which are derived from the order of his appointment, the same court may enlarge or restrict;[2] it may exact security for the faithful performance of his duties, and pass upon the sufficiency thereof;[3] it fixes his compensation, increasing or diminishing the same from time to time, as, in its discretion, the circumstances or difficulty attending the administration of the trust require;[4] it may call upon him to account at such times, in such manner, and to such persons as it may direct;[5] and, finally, for sufficient cause, it may remove the receiver and appoint a successor in his place; or, when the object for which the receivership was created has been attained, it may terminate the receivership and discharge the receiver.[6]

2. Bond Required.—Although a receiver is an officer of the court and subject to its direction and control, he is nevertheless required by the court to give bond with approved sureties for the faithful execution of his trust. Accordingly the general rule is as follows:

a. GENERAL RULE AS TO SECURITY.—Before entering upon his duties, and particularly before taking possession of the receivership fund or property, the court will require a receiver appointed by it to enter into a bond or personal recognizance, with sufficient security, either to the clerk of the court or to the State, usually conditioned to faithfully perform the duties incident to the trust, and to obey such orders affecting the trust estate as the appointing court may from time to time make.[7]

Winston, 24 Ill. 353; Matter of Burke, 1 Ball & B. 74; Fairfield *v.* Weston, 2 Sim. & S. 98; Bryan *v.* McCormick, 1 Cox 422; Field *v.* Jones, 11 Ga. 413; Broad *v.* Wickham, 1 Sm. Ch. Prac. 500; Angel *v.* Smith, 9 Ves. 335; Curtis *v.* Leavitt, 1 Abb. Pr. (N. Y.) 274; 10 How. Pr. (N. Y.) 481; Chautauqua Co. Bank *v.* White, 6 Barb. (N. Y.) 584; Booth *v.* Clark, 17 How. (U. S.) 322.

1. U. S. *v.* Murphy, 44 Fed. Rep. 39; 45 Am. & Eng. R. Cas. 102; Runyon *v.* Farmers', etc., Bank, 4 N. J. Eq. 480; Van Rensselaer *v.* Emery, 9 How. Pr. (N. Y.) 135; Williamson *v.* Wilson, 1 Bland (Md.) 418; Ellicott *v.* Warford, 4 Md. 80.

2. Booth *v.* Clark, 17 How. (U. S.) 322; *In re* Colvin, 3 Md. Ch. 300; Williamson *v.* Wilson, 1 Bland Ch. (Md.) 418.

3. See *infra*, this title, *Bond Required.*

4. See *infra*, this title, *Compensation Allowed.*

5. See *infra*, this title, *Accounting Exacted.*

6. See *infra*, this title, *Removal or Discharge.*

7. Carper *v.* Hawkins, 8 W. Va. 304; Banks *v.* Potter, 21 How. Pr. (N. Y.)

469; Johnson *v.* Martin, 1 Thomp. & C. (N. Y.) 504; *In re* Eagle Iron Works, 8 Paige (N. Y.) 385; Williamson *v.* Wilson, 1 Bland (Md.) 422; Tomlinson *v.* Ward, 2 Conn. 396; Mead *v.* Lord Orrery, 3 Atk. 237; Colmore *v.* North, 27 L. T. N. S. 405; Manners *v.* Furze, 11 Beav. 30; Tylee *v.* Tylee, 17 Beav. 583.

Number of Sureties.—Two or more sureties are usually required, though the court may dispense with two and take one. Johnson *v.* Martin, 1 Thomp. & C. (N. Y.) 504; *In re* Mechanics' F. Ins. Co., 5 Abb. Pr. (N. Y.) 446; Mead *v.* Lord Orrery, 3 Atk. 237; Seton on Decr. 1007; *In re* Ward, 31 Beav. 1.

Who May Become Surety.—Any one over twenty-one years of age, of sound mind and not a married woman may become a surety. Smith on Rec. 16.

The court, before accepting a surety, shall see that he is a substantial person. Beardmore *v.* Phillips, 4 M. & S. 173; Smith *v.* Scandrett, W. Bl. 444; and in *England* he is required to be a freeholder. With us, the question of sufficiency rests largely in the discretion of the court, which should satisfy itself of the responsibility and solvency of the security offered. Edw. on Rec. 94; Smith on Rec. 17. In *England*, sureties must be residents. Cockburn *v.* Raphael, 2 Sim. & S. 453; but with us the Federal courts will receive as sureties on the bond of a receiver, parties outside of the district in which the court has jurisdiction, unless special reason be shown for the contrary. Taylor *v.* Life Assoc. 3 Fed. Rep. 467.

In this case a public officer of the State of Missouri was authorized, in his official capacity, to wind up an insolvent corporation located in Missouri and doing business in Tennessee and other States. He was appointed receiver of the corporation by the proper Missouri court, with instructions to collect the assets through all the States and hold them for distribution, subject to instructions of the court. The United States circuit court for the western district of Tennessee appointed such officer receiver of all assets of the company to be found within the State of Tennessee, on condition that he should pay the funds into the registry of the court, and allowed him to give a bond, with residents of Missouri as sureties. In rendering the opinion of the court, Hammond, D. J., said: "Being desirous, upon principles of comity, if for no other reason, to give as much effect as possible to the proceedings in Missouri, the home of the corporation, without injury to any of the rights, real or supposed, of the Tennessee creditors, it at first appeared to me that it would answer the ends of justice to refuse a receiver, dissolve the attachment, and permit Relfe to go on with his collections; but to restrain him from taking the funds beyond the jurisdiction of the court until this controversy was settled, and to require him to pay his collections into the registry of this court, as a further security against their removal. This was not satisfactory to the plaintiffs, and inasmuch as they insisted that the laws of Missouri could not operate in Tennessee, nor the decrees of its courts, nor the assignment in a case like this, it seemed necessary to strengthen Relfe's title by appointing him receiver here, and it was so ordered. He was required to pay the funds into this court, and enjoined from making any other disposition of them. He submitted to this course and accepted the conditions, presumably with the consent and advice of the court in Missouri; but, whether that be so or not, the power to prevent any injury by his removing the assets was considered ample, and I had no doubt the proceedings could progress amicably between the two courts, and much unnecessary expense be thereby saved. He has tendered the required bond, with sureties residing in Missouri, of ample means for the purposes of security. This petition for a rehearing is a very earnest protest against that decree, and against a bond given only by non-residents. The objections are (1) that Relfe is an officer of a foreign State, subject to its laws; (2) that he is the receiver of a foreign court, subject to its control; (3) that he is a party to the suit, and not indifferent or impartial; (4) that he is a non-resident, and resides at a distance, and (5) that his sureties, at least, should reside here.

"As a general rule, the appointment of a receiver and the proper person to be appointed, are matters within the discretion of the court; not arbitrary, it is true, but to be governed by sound considerations of judicial judgment, each case to be determined according

to its own circumstances. High on Receivers, § 65; Kerr on Receivers (Bisph. ed.), § 577. Private preferences must yield to public considerations; and no man can claim it for himself or his particular friend, especially in a case like this, where so many absent parties, not known to the record, and who are, and doubtless will remain, quite ignorant of these proceedings, are interested in the subject-matter of this controversy. *In re* Empire City Bank, 10 How. Pr. (N. Y.) 498; Edwards on Receivers 260.

"Most of these objections would have great force, if, in the relations we bear to the State of Missouri, it is to be treated as a foreign State, and its citizens entitled in our courts to such considerations only as are given to foreigners. It must be conceded that in this matter of insolvent laws, and the administration of assets situated in different States, there has grown up a selfishness which comes very near to that which absolutely foreign States show to each other. But, after all, principles of courtesy and comity do prevail, and the insolvent laws of one State may be permitted to operate in another State for the promotion of justice, when neither the latter State nor its citizens will suffer any inconvenience or injury thereby, and the title of a foreign receiver will be recognized where it can be done without detriment to the citizens of the State granting the recognition. High on Receivers, § 47.

"I have no doubt that this court is so far a court of the State of Tennessee that it is its duty to afford all the protection to the plaintiffs in this case which a State court would or should afford to its own citizens. But it is also true that because of a fear—whether well or ill founded, it is not material to inquire—that State tribunals would give more consideration to the interests of the citizens of the State than would always be justified in controversies between their own and citizens of other States, the Federal courts have been invested with concurrent jurisdiction over such controversies. This seems to imply that in this court, at least, the citizens of other States should not be considered so much as foreigners, and their non-residence here should not weigh so much against them in the enforcement of rules and regulations of practice governing the discretion of the court in appointing receivers and taking bonds. Relfe is subject to this court; can be removed or punished for contempt; and, in this day of railroads and telegraphs, his residence, a day's journey from the State, where his duties are confined to foreclosing mortgages by legal proceedings or sales under powers of trust, cannot be a serious objection. High on Receivers, § 69.

"He is required to account semi-monthly, and no opportunity is afforded for any violation of the injunction. It is no more onerous for these citizens of Tennessee to be compelled, if necessary, to pursue Relfe for a breach of his duties in the courts of Missouri, than it would be to compel the citizens of Missouri, or any of the thirty other States, to pursue a citizen of Tennessee for any breach of his duties as receiver, if one should be appointed residing in that State. And this applies as well to the sureties on the bond."

And see *Ex parte* Milwaukee, etc., R. Co., 5 Wall. (U. S.) 188, where the Supreme Court held that the fact of the non-residence of the sureties within the district was not sufficient reason for rejecting a bond not otherwise objectionable.

Amount of Bond. — The bond is usually in double the amount of the annual rental or yearly value of the real estate to be collected. Seton on Decr. 1007. Where debts or outstanding estate are to be got in, security is given for the full, or something beyond the full amount which is ordered or expected to be received. With a view to reducing the amount of the bond the receiver may be restricted from getting in mortgage debts. 1 Fisher on Mort. 405; and with the same view, part of the estate may be ordered to be paid into court for safe custody and security required for the rest. Poole *v.* Wood, Seton on Decr. 1007; *Ex parte* Clayton, 1 Russ. 476. See *In re* Eagle, 2 Ph. 201.

It is not regular to take as security for a receiver the assignment of a mortgage belonging to him. Mead *v.* Lord Orrery, 3 Atk. 237; but where one of three executors, appointed receiver in another matter, in conjunction with his coexecutors assigned a mortgage belonging to their testator as security for the receivership, it was held to be a valid assignment, and that it must stand as security for whatever amount might

b. DISPENSING WITH SECURITY. — The court, in a proper case, may dispense with the giving of sureties,[1] and when the order is to that effect, the appointment is complete by the filing of the receiver's own bond, which, however, is indispensable, as the court will not, even with the consent of the parties, sanction the appointment unless the receiver's own bond is filed.[2]

c. SECURITY A PREREQUISITE TO RECEIVER'S CONTROL OF PROPERTY.[3]

be due from the receiver, although the assignment was strongly condemned. Mead *v.* Lord Orrery, 3 Atk. 237. Nor is it regular to take the bond of an incorporated guaranty association. Manners *v.* Furze, 11 Beav. 30; though a transfer of government stock has been accepted as security. Betaugh *v.* Cameron, Smith on Rec. 17.

Validity of Bond.—Where an act provides for the appointment of a receiver and the approval of his bond by the court, the bond cannot be approved by the clerk of the court, and the receiver must be appointed and the bond approved by the court in term time and not by the judge in vacation. Newman *v.* Hammond, 46 Ind. 119.

But a bond given in pursuance of the directions of the court becomes one given in pursuance of law, and hence a bond given in pursuance of an order or decree by a receiver to the clerk of the court, conditioned for the faithful performance of the receiver's duty, does not fall within the prohibition of a statute forbidding a sheriff or other officer to take any bond, obligation or security by color of his office, except such as are provided by law. Titus *v.* Fairchild, 49 N. Y. Super. Ct. 217; Gerould *v.* Wilson, 81 N. Y. 578.

Nor is such a bond a mere personal obligation of the clerk because it is not taken to him officially as clerk, where it is shown on its face that there was no obligation to the clerk individually, but that it was given in pursuance of the orders of the court and for the performance of the duties to which the clerk was appointed by the court. Titus *v.* Fairchild, 49 N. Y. Super. Ct. 218.

Bond on Appeal.—Receivers appealing in good faith from the judgment of the State courts should not be required to give *supersedeas* bonds. Central Trust Co. *v.* St. Louis, etc., R. Co., 41 Fed. Rep. 551.

1. Banks *v.* Potter, 21 How. Pr. (N. Y.) 471; Dilling *v.* Foster, 21 S. Car. 339; Ridout *v.* Plymouth, Dick. 68; Carlisle *v.* Lord Berkeley, Ambl. 599; Hibbert *v.* Hibbert, 3 Meriv. 681. And see Wilson *v.* Wilson, 11 Jur. 793.

As, where the parties, on their own authority, nominate a receiver and then apply for liberty for him to act without security. Manners *v.* Furze, 11 Beav. 30. But if a reference has been made to a master to appoint a receiver, the court will not, with the consent even of the parties, dispense with the usual security. Manners *v.* Furze, 11 Beav. 30; and a receiver will not be appointed without sureties, though not objected to, if persons not competent to consent are interested. Tylee *v.* Tylee, 17 Beav. 583. Security may also be dispensed with where a receiver is appointed without salary. Gardner *v.* Blane, 1 Hare 381; and was not required of the mortgagee of West India estates appointed receiver in England. Davis *v.* Barrett, 13 L. J. N. S. Ch. 304.

But the Irish court of chancery requires, of the person appointed receiver, adequate security, even though the persons in interest agree that he may be appointed merely on his own recognizance. Bailie *v.* Bailie, 1 Ir. Eq. 413.

2. Banks *v.* Potter, 21 How. Pr. (N. Y.) 471; Conolly *v.* Codd, H. & J. 624.

3. See *supra*, this title, page 132.

In Johnson *v.* Martin, 1 Thomp. & C. (N. Y.) 504, Justice Smith said: "The appointment of a receiver is perfected by the filing of the order for his appointment with the report of the referee, and the security required by such order and report. In this case the order of the county judge required the receiver to execute a bond, with sureties. No title passed, and no authority as receiver was conferred or

d. ADDITIONAL SECURITY ON EXTENSION OF RECEIVERSHIP.—If the security becomes inadequate in consequence of the discovery of additional property of the debtor, or of a new acquisition of property by the receiver, the proper course is to require him to give further security. The court that appointed him will, upon the application of any party interested, compel him to do so, and if he should not, will remove him and appoint another receiver.[1]

e. SECURITY BECOMING INSUFFICIENT.—In the event of the security of a receiver becoming insufficient, the court may make a rule upon him to show cause why he should not give additional sureties, and, upon his failure to do so, may remove him and appoint another in his place.[2]

existed till the receiver named in the order complied with the order for his appointment." Thompson on Provisional Remedies 477; Banks *v.* Potter, 21 How. Pr. (N. Y.) 469; Conger *v.* Sands, 19 How. Pr. (N. Y.) 8; Voorhees *v.* Seymore, 26 Barb. (N. Y.) 569.

And where the order required the receiver to execute a bond, with sureties, it was held that at least two sureties were required, and an obligation under seal, and that the execution and filing of an instrument in the form of a bond, but not sealed, and signed by only one surety, did not authorize the receiver to act. Johnson *v.* Martin, 1 Thomp. & C. (N. Y.) 504.

Failure of Receiver to Give Bond No Defense to an Action.—The fact that the receiver has not given bond is no defense to a suit by him to recover property of the corporation, where the decree appointing such receiver did not require him to give bond. Wilson *v.* Welch (Mass. 1892), 31 N. E. Rep. 712; 38 Am. & Eng. Corp. Cas. 5.

1. Banks *v.* Potter, 21 How. Pr. (N. Y.) 474; Cagger *v.* Howard, 1 Barb. Ch. (N. Y.) 370; Wise *v.* Ashe, 1 Ir. Eq. 210; Downshire *v.* Tyrrell, Hayes 354; Beach on Rec., § 175; Edw. on Rec., § 109; Smith on Rec., § 192.

If in such case the receiver be removed, and seeks the costs incident to his original appointment, he must make a special case for them. Wise *v.* Ashe, 1 Ir. Eq. 210.

2. If, upon direction of the court, he fails to pay over the assets in his hands to his successor, suit may be brought against him and his sureties on his bond as receiver. Shakelford *v.* Shakelford, 32 Gratt. (Va.) 510. The court in this case made an alternative order that, unless the first receiver, within sixty days, paid over the funds in his hands to his successors, a suit should be brought against him and his sureties therefor by a commissioner named in the order, who was required to give bond for the faithful performance of his duties. And it must plainly appear that the court below erred before the appellate court will reverse its action. For security becoming insufficient by vacating receiver's bond as to one surety, see *Discharge of Sureties, infra*, this section, and Callaghan *v.* Callaghan, 8 Ir. Eq. 572; O'Keeffe *v.* Armstrong, 2 Ir. Ch. 115. Upon discharge of one surety during receivership, receiver must enter into fresh recognizance with new sureties. Vaughan *v.* Vaughan, Dick. 90; Blois *v.* Betts, Dick. 336; and also where a surety becomes bankrupt Dan. Ch. Prac. 1603, and Kerr on Rec. (Bisp. ed.) 273.

Where one of the sureties dies or goes abroad and the receiver is unable to procure another, it is not the practice to charge the receiver with the expense of his discharge or the appointment of a new receiver. Lane *v.* Townsend, 2 Ir. Ch. 120.

But where one of the sureties of a receiver dies leaving real property bound by his recognizance, his decease is no ground for requiring the receiver to procure a new surety. Where, however, the deceased surety has not left any property available for the purpose of satisfying the recognizance, the court will require a new surety to be appointed. Averall *v.* Wade, F. & K. 341.

f. NATURE OF SURETIES' LIABILITY.—Sureties are held to the strict obligation of their bond and will not be released therefrom on their own application unless it be for the benefit of the parties in the cause, or the estate,[1] or unless underhand practice be proved and the person secured shown to be connected with such practice.[2]

g. WHEN LIABILITY OF SURETIES BECOMES ABSOLUTE.—The bond or recognizance becomes absolute upon the failure of the receiver duly to perform his duties and account to the court.[3] However, it is held that the receiver and his sureties are not liable to an action on the bond until he has failed to obey some particular order of the court in relation to the effects placed in his hands, and his default has been ascertained. The regular course, according to well-settled practice, is to proceed against the receiver in the first instance by rule or order to render his account, and if he fail in the proper discharge of his duty within the scope of his bond, then to obtain leave of court to sue upon the bond.[4]

When a surety becomes bankrupt, the receiver is usually required to enter into fresh recognizance with two more sureties. The order is made on summons. Dan. Ch. Pr. 1603; Kerr on Rec. (Bispham's ed.) 273.

1. Griffith *v.* Griffith, 2 Ves. 400.

2. Hamilton *v.* Brewster, 2 Moll. 407. The liability of a surety grows out of his undertaking as surety on the bond, and can be ascertained and enforced only by suit on the bond in a common-law court, where full opportunity for making defense and the constitutional right of trial by jury can be had. Thurman *v.* Morgan, 79 Va. 372; but a *Mississippi* statute authorizing the court to allow proceedings by *scire facias* against the sureties, has been held constitutional. Bank of Mississippi *v.* Duncan, 52 Miss. 740.

Where a surety knowingly gets into his hands part of the trust fund, the court has sufficient jurisdiction over him by reason of his suretyship on the receiver's bond and his intermeddling conduct, to make an order upon him to act *in personam* for the preservation of the fund, and peremptorily require him to pay it into court. Seidenbach *v.* Denklespell, 11 Lea (Tenn.) 299.

3. *Ex parte* Maunsell, 9 Ir. Eq. 283.

4. State *v.* Gibson, 21 Ark. 140; Bank of Washington *v.* Creditors, 86 N. Car. 323; Atkinson *v.* Smith, 89 N. Car. 74.

It may be that in some cases the surety might, by order of court and upon reasonable notice, be brought into the action in which the receiver had been appointed and proceeded against therein. But this practice is not to be encouraged, if, indeed, it can be sustained in any case. Atkinson *v.* Smith, 89 N. Car. 74.

If, however, the receiver dies, it becomes impossible to pursue the ordinary course against him, and the remedy is against the sureties on their bond. Weems *v.* Lathrop, 42 Tex. 207; French *v.* Dauchy, 57 Hun (N. Y.) 100; Ludgater *v.* Channell, 3 M. & G. 175; *reversing* 15 Sim. 479.

The petition in this last case set forth the facts of the death of the receiver and a balance due from him to the estate, and prayed that suit might be commenced upon the recognizance into which he had entered, against his representatives, real and personal, and his sureties, or that his personal representative be compelled to forthwith pass the accounts of his receipts and payments in respect to the estate. Lord Truro, upon an appeal from the vice-chancellor's decision dismissing the petition, granted leave to bring suit against the sureties, and observed that: "It is of the utmost importance that the functions of receivers, who are the officers of this court, should be duly discharged. The respondents in the present case are the sureties, and the representatives of the receiver; and the recognizance

in question was entered into in pursuance of a general order of the court. Now, the obligation of a receiver is to account once a year, and to pay his balances into court; but here this duty was entirely omitted, thus involving a forfeiture of the recognizance, and consequently constituting a debt due by the receiver. Upon the death of the receiver, the parties interested in the fund come to the court and state that redress may be had in one of two ways, either against the representatives of the receiver, or against his sureties. They present their claim in a double aspect, and call on the court to grant them relief as against one or other of the respondents to the petition; and it is obvious that if either of the respondents had been omitted, the other would have objected, and with some reason, to his absence. But the administratrix says she is not accountable in this form of proceeding; and the sureties, on their part, allege that there is a positive rule of practice that the surety cannot be made to account until the receiver has been called upon; and, further, that the mode of proceeding in such a case is by bill against the personal representative. I can, however, find no authority for the rule which it is thus sought to establish. . . . The books of practice show that where there are not the means of pursuing the ordinary course against the receiver, the surety may be had recourse to; and the first part of the prayer of the petition is for leave to sue the sureties. Not, therefore, now deciding whether the surety shall pay, or whether the administratrix may or may not be called on to account in this form of proceeding, I think that the first part of the prayer of the petition must be granted, and it is unnecessary for me to advert further to the alternative relief sought."

Evidence of Breach.—In an action by the commonwealth against a surety upon the official bond of a receiver of an insolvent insurance company, an order made in the cause in which the receiver was appointed, fixing the amount due from him and directing its payment, is competent evidence both of a breach of the bond and of the amount for which the surety is liable. In such an action, the omission of the receiver to pay to himself, as receiver, money which he had borrowed of the company before his appointment, is a breach of his bond for which he and his sureties are liable; and the fact that the receiver rendered valuable services for which he was entitled to compensation, the amount of which had not been determined, is not competent evidence to reduce the amount of the surety's liability. Com. *v.* Gould, 118 Mass. 300.

Surety Not Liable for Default Prior to Execution of Bond.—The surety is not liable for any default or misconduct of the receiver, prior to the execution of the bond, where the undertaking was that the receiver should "*henceforth*" faithfully discharge his duties. Thomson *v.* MacGregor, 81 N. Y. 592; Bissell v. Saxton, 66 N. Y. 60; Scofield *v.* Churchill, 72 N. Y. 567; Rochester *v.* Randall, 105 Mass. 295; 8 Am. Rep. 519; Vivian *v.* Otis, 24 Wis. 518; 1 Am. Rep. 199; Myers *v.* U. S., 1 McLean (U. S.) 493; Farrar *v.* U. S., 5 Pet. (U. S.) 389; U. S. *v.* Boyd, 15 Pet. (U. S.) 187; U. S. *v.* Giles, 9 Cranch (U. S.) 212; nor is he concluded by an accounting as to the amount due by the receiver and an order fixing the amount, made in the cause in which the receiver was appointed, when not a party to such accounting and not heard therein. Thomson *v.* MacGregor, 81 N. Y. 592.

A receiver appointed in place of one removed may, as a party in interest, sue on the bond given by the removed receiver when authorized by the court. Thomson *v.* McGregor, 45 N. Y. Super. Ct. 204; and though the suit is brought without an order of court authorizing it, first obtained, the error is cured by a subsequent order approving the receiver's action and instructing him to proceed with its prosecution, such subsequent order being alleged in an amended petition. Weems *v.* Lathrop, 42 Tex. 212.

In a suit on a receiver's bond, it need not be shown that there are funds in the receiver's hands, if he has been ordered to pay and has been adjudged in contempt for not paying, where the bond is conditioned not only to faithfully discharge the duties of the trust, but also to pay and apply what he had or should receive, as he may from time to time be directed by the court. Titus *v.* Fairchild, 49 N. Y. Super. Ct. 220; relying upon the case, as to executor's bond, of Scofield *v.* Churchill, 72 N. Y. 565; and also citing generally, Gerould *v.* Wilson, 81 N. Y. 578.

h. EXTENT OF SURETY'S LIABILITY.—The surety's liability is to be ascertained by the terms of his bond,[1] and extends to the amount thereof[2] for whatever sum of money, whether principal, interest,[3] or costs, the receiver has become answerable, including the costs of his removal and the appointment of a successor.[4] But a surety who has paid the full balance due by his receiver, may protect himself by an injunction from having a judgment enforced against his recognizance for anything more.[5]

i. DISCHARGE OF SURETIES.—Sureties of a receiver will not be discharged upon their own request;[6] nor will the discontin-

1. Thomson *v.* MacGregor, 81 N. Y. 592; Ross *v.* Williams, 11 Heisk. (Tenn.) 410.

2. Kerr on Rec. (Bisp. ed.) 274; Gluck & Becker on Rec. 367; High on Rec., § 131; Beach on Rec., § 188. The liability would probably be limited by the penalty of the bond. State *v.* Blakemore, 7 Heisk. (Tenn.) 657.

3. Dawson *v.* Raynes, 2 Russ. 466.

But the liability for interest rests largely in the discretion of the court, upon a consideration of all the facts and circumstances. *In re* Herrick's Minors, 3 Ir. Ch. N. S. 183. And where the receiver had been a bankrupt, with the knowledge of all the parties, for a considerable time, during which no steps were taken to compel the passage of his accounts, the surety on his bond is excused from paying interest upon the amount for which he was found to be in default. Dawson *v.* Raynes, 2 Russ. 466.

4. Maunsell *v.* Egan, 8 Ir. Eq. 372; *aff'd* 9 Ir. Eq. 283.

5. *In re* Herrick's Minors, 3 Ir. Ch. N. S. 183.

As to the right of a surety upon a receiver's bond to appeal from an order for the payment of the amount of the bond, made in the cause in which the receiver was appointed, see *In re* Guardian Sav. Inst., 78 N. Y. 408. In this case Q. was appointed receiver of an insolvent savings bank, executed his bond with O'Donohue as surety, and entered upon his duties, but, by leave of court, resigned. An order of special term was made settling his accounts, and authorizing O'Donohue to appeal on stipulating to be bound by the decision thereunder. O'Donohue appealed to the general term, giving the stipulation, which was accepted by the opposite party, and the appeal was heard without objection to the right of O'Donohue to appeal. The order was affirmed with a direction that O'Donohue pay to the new receiver the amount of the bond. It was held that O'Donohue was entitled to appeal to the court of appeals.

6. Griffith *v.* Griffith, 2 Ves. 400; Kerr on Rec. (Bisp. ed.) 272; High on Rec. (2d ed.), § 127; Gluck & Becker on Rec. 363.

A surety was, however, discharged on his own application where he had become such in violation of articles of partnership. Swain *v.* Smith, Seton on Decr. (4th ed.) 1021.

Payment by the surety to a solicitor prosecuting the proceedings is insufficient. Proceedings were commenced in the common-law side of the court against the surety of a receiver, to compel the payment of the balance ordered to be paid to the plaintiff. The surety paid the amount to the solicitor prosecuting the proceedings, and then applied to have his recognizance vacated. The petition was served on the plaintiff, who did not appear. The court refused to make the order, but directed the plaintiff to be served with a notice that the order would be made on a given day unless the plaintiff showed cause to the contrary. The plaintiff not then appearing the order was then made. Mann *v.* Stennett, 8 Beav. 189; 9 Jur. 98.

Where a receiver is required by the court, at the instance of a party to the case, to execute a new bond, though in the same penalty and conditioned as the old bond, the new bond will not operate to discharge the surety on the old bond from liability for future defaults of the receiver, unless there be circumstances to show that the second bond was intended as a substitute for, rather than as supplemental to, the first. Stewart *v.* Johnston, 87 Ga. 97.

How Surety May Obtain Discharge.—Where one of the sureties of a receiver seeks to be discharged, a consent, verified by affidavit and signed by the

uance of a suit discharge a receiver therein.[1] Where an application was made to discharge a receiver on the ground of misconduct, and the sureties joined in the application, Lord Hardwicke held that no regard was to be had to the application unless it was for the benefit of the estate, or unless there were special circumstances in the case;[2] as where underhand practice or fraud can be proved and the person secured shown to be connected with such fraud or practice.[3] And if a surety, during the continuance of a receivership, procures his discharge, the receiver must enter into a fresh recognizance with new sureties.[4]

j. REIMBURSEMENT OF SURETY—REFUNDING OF RECEIVERSHIP FUNDS BY SURETY.—A surety who has paid anything on account of the receiver is entitled to be reimbursed out of any balance of money in court reported to be due to the receiver;[5] but when a surety, in order to indemnify himself for his liability on the receiver's bond, obtains from the receiver part of the funds belonging to the estate and in his keeping, knowing them to be such, the court has sufficient jurisdiction, by reason of his suretyship and of his intermeddling with the funds, to act by an

receiver and remaining surety, must be lodged with the registrar, stating that they consent that the surety shall be discharged without prejudice to their liability as to past and future acts of the receiver, and a declaration that they will not rely on the vacating of the recognizance as to one of the parties in any proceeding against them on the recognizance. O'Keeffe *v.* Armstrong, 2 Ir. Ch. 115; Callaghan *v.* Callaghan, 8 Ir. Eq. 572.

1. Where a receiver has been appointed by a court of chancery in a case pending and has frequent charge of the property in litigation, a compromise and dismissal of the bill do not discharge the receiver from accountability to the court. State *v.* Gibson, 21 Ark. 140; but it will entitle him to apply for his discharge and to have his account passed, so that he may pay over the balance, if any, in his hands, and exonerate himself and his sureties from further liability, unless the interests of the defendants require that he should continue in the receivership to protect their rights. Whiteside *v.* Prendergast, 2 Barb. Ch. (N. Y.) 471.

2. Griffith *v.* Griffith, 2 Ves. 400.

3. Hamilton *v.* Brewster, 2 Moll. 407.

4. Vaughan *v.* Vaughan, Dick. 90; Blois *v.* Betts, Dick. 336.

5. Glossop *v.* Harrison, 3 Ves. & B. 134. In this case a motion was made by the surety of a receiver who had been discharged by order of the court, to restrain the receiver from taking out of court the balance due him until he should satisfy payments made by the surety on his account. In delivering the opinion of the court, Lord Eldon said: "Where the surety for a receiver in this court is called upon to pay, as the receiver is an officer of the court, and the surety is so in a sense, if there is anything due in account between them, justice requires that upon the application of the surety he shall be indemnified for what he has paid for the receiver out of the balance due him. If that has not been decided, as I think it has, it must be decided upon principle, as it is clearly capable of being maintained upon equitable grounds. The court, therefore, cannot part with the fund until an opportunity is given of determining the claim of the surety; the amount of which, when ascertained, must be paid to him; and the residue only must be paid to the receiver."

Upon the same principle, the share of a receiver in property which was being administered by the court, was held liable to make good to the surety the amount paid by him for the receiver, although it was not included in a mortgage which the receiver had given the surety as an indemnity. Brandon *v.* Brandon, 5 Jur. N. S. 256; 28 L. J. Ch. 147.

order *in personam* in the cause in which the receiver was appointed, directing the surety to pay such money into court.[1]

k. CONTRIBUTION AGAINST CO-SURETY.—A surety who pays a debt of his receiver has the same rights against his co-sureties that he has against the principal, and will be permitted to put the recognizance in suit as against the co-surety.[2]

l. SURETY'S COURSE ON BEING SUED.—Where an action is brought against the surety upon the recognizance, the proper course for him to pursue is to apply to the court, by motion or summons, with notice to the parties interested in the suit, to stay the proceedings on the recognizance, offering at the same time to pay the amount due from the receiver, but not exceeding the penalty of the recognizance, into court.[3]

3. **Compensation Allowed**—*a.* GENERAL RULE AS TO ALLOWANCE OF COMPENSATION.—A receiver, unless it is otherwise ordered,[4] as where he consents to act without a salary,[5] will be allowed a salary, or have some other allowance made to him for his care and pains in the execution of his duties;[6] and the right of a receiver to his compensation is not impaired by the fact that the actual work of managing the property intrusted to him is performed by others.[7]

1. Seidenbach *v.* Denklespeil, 11 Lea (Tenn.) 297; High on Receivers (2d ed.), § 133; Beach on Receivers, § 190.

2. Woods *v.* Creaghe, 2 Hog. 51. If one surety has been forced to pay the whole amount of a judgment on the receiver's bond, and the sureties are liable, he is entitled to contribution from his joint obligors, although the judgment may have been irregular or void. Ross *v.* Williams, 11 Heisk. (Tenn.) 411.

3. Kerr on Receivers (Bisph. ed.) 276; Walker *v.* Wild, 1 Madd. 528.

If the receiver's account has not been taken, the application should also pray inquiry as to what is due from the receiver. The court may, it would seem, upon an application of this kind, indulge a surety by allowing him to pay the balance in installments. The costs of the application, and of the proceedings in consequence of it, must be paid by the surety. Walker *v.* Wild, 1 Madd. 528.

4. As where the order appointing a receiver is set aside. Verplanck *v.* Mercantile Ins. Co., 2 Paige (N. Y.) 438. And see *infra*, this title, *Liability for Receiver's Compensation.*

5. See Wilson *v.* Greenwood, 1 Swanst. 483; Blakeney *v.* Dufaur, 15 Beav. 44; Sargant *v.* Read, 1 Ch. Div. 600; Hoffman *v.* Duncan, 18 Jur. 69; Powys *v.* Blagrave, 18 Jur. 462; Berry *v.* Jones, 11 Heisk. (Tenn.) 207; Brien *v.* Harriman, 1 Tenn. Ch. 467; Todd *v.* Miller, 2 Tenn. Ch. 107.

6. 2 Dan. Ch. Pract. (5th ed.) *1745; Kerr on Receivers (Bispham's ed.), 236; Fitzgerald *v.* Fitzgerald, 5 Ir. Eq. 525; Malcolm *v.* O'Callaghan, 3 Myl. & C. 52; *In re* Gomersall, L. R., 20 Eq. 291; Adams *v.* Woods, 15 Cal. 206; Heman *v.* Britton, 88 Mo. 549; Devendorf *v.* Dickinson, 21 How. Pr. (N. Y.) 215; Martin *v.* Martin, 14 Oregon 165.

An order ought not to be made directing a receiver to pay over the entire fund, without authorizing him to deduct his commissions, or in some way providing for their payment. Galster *v.* Syracuse Sav. Bank, 29 Hun (N. Y.) 594; Weston *v.* Watts, 45 Hun (N. Y.) 223; per Bartlett, J. It has been held, however, that where the receiver of an insolvent corporation has no assets in his hands, it is not error to discharge him upon the application of those at whose instance he was appointed, without making the payment of his compensation and charges a condition precedent to the discharge. Joslyn *v.* Athens Coach, etc., Co., 43 Minn. 534; 32 Am. & Eng. Corp. Cas. 530.

7. High on Receivers (3d ed.), § 788; Price *v.* White, Bailey Eq. (S.

b. AMOUNT OR RATE OF COMPENSATION—(1) *Where Regulated by Statute.*—In some jurisdictions the rate of compensation allowed to receivers is fixed by statute.

This, for instance, is the case in *New York*,[1] *South Caro-*

Car.) 240. In this case farms or plantations in the receiver's custody were managed by overseers appointed and employed by himself, he being responsible for their management.

But if, under the order of the court, he has permitted the business to be principally conducted by the parties in interest, who have transacted the business as before the receivership, making purchases and sales and receiving and disbursing moneys, the receiver will not be allowed commissions upon their receipts and disbursements. *In re* Woven Tape Skirt Co., 85 N. Y. 506.

1. 2 N. Y. R. S. 470, § 76; N. Y. Laws of 1842, ch. 3, § 2, as amended by N. Y. Laws of 1879, ch. 442; N. Y. Laws of 1883, ch. 378, § 2, as amended by N. Y. Laws of 1886, ch. 275, § 2; N. Y. Laws of 1886, ch. 310, § 6; Code of Civ. Proc., § 3320, as amended by N. Y. Laws of 1892, ch. 465. And *compare* the following cases: *In re* Bank of Niagara, 6 Paige (N. Y.) 213; Van Buren *v.* Chenango Co. Mut. Ins. Co., 12 Barb. (N. Y.) 671, *cited* in *In re* Hulbert, 10 Abb. N. Cas. (N. Y.) 289; Gardiner *v.* Tyler, 2 Abb. App. Dec. (N. Y.) 247; 4 Abb. Pr. N. S. (N. Y.) 263; Hynes *v.* McDermott, 14 Daly (N. Y.) 104; *In re* Security L. Ins., etc., Co., 31 Hun (N. Y.) 36; *In re* Commonwealth F. Ins. Co., 32 Hun (N. Y.) 78; People *v.* Mutual Ben. Associates, 39 Hun (N. Y.) 49; Hanover Ins. Co. *v.* Germania Ins. Co., 46 Hun (N. Y.) 308; Clapp *v.* Clapp, 49 Hun (N. Y.) 195; *In re* Woven Tape Skirt Co., 85 N. Y. 506; Attorney Gen'l *v.* North America L. Ins. Co., 89 N. Y. 94; 26 Hun (N. Y.) 294; Attorney Gen'l *v.* Guardian L. Ins. Co., 93 N. Y. 631; People *v.* McCall, 94 N. Y. 587; *aff'g* 65 How. Pr. (N. Y.) 442; U. S. Trust Co. *v.* New York, etc., R. Co., 101 N. Y. 478; 25 Am. & Eng. R. Cas. 601.

Receivers of Moneyed Institutions.—Receivers of moneyed institutions are entitled to the same commissions as executors and administrators, but such compensation is in no case to exceed $10,000 per annum. N. Y. Laws of 1842, ch. 3, § 2, as amended by N. Y. Laws of 1879, ch. 442. The fees allowed executors and administrators are as follows: For receiving and paying out sums of $1,000 or less, five per cent.; for sums exceeding $1,000 and less than $10,000, two and a half per cent.; for sums above $10,000, one per cent.; also a just and reasonable allowance for actual and necessary expenses. 2 N. Y. R. S. 93, § 58, as amended by N. Y. Laws of 1849, ch. 160; and N. Y. Laws of 1863, ch. 362, § 8, and partly repealed by N. Y. Laws of 1880, ch. 245, § 1. *Compare* Howes *v.* Davis, 4 Abb. Pr. (N. Y.) 71, and see Code of Civ. Proc., § 2736.

Receivers of Dissolved Corporations Generally.—Such receivers shall, in addition to their actual disbursements, be entitled to such commission as the court shall allow, not exceeding the sum allowed by law to executors or administrators. 2 N. Y. R. S. 470, § 76.

Receivers of Corporations Dissolved by the Legislature.—Receivers who sell property of a corporation that has been dissolved by act of the legislature, are entitled to two per cent. of the whole amount received from the sale. N. Y. Laws of 1886, ch. 310, § 6.

Receivers of Insolvent Corporations.—Every receiver of a corporation shall receive as compensation for his services five per cent. for the first $100,000 received and paid out, and two and a half per cent. on all sums received and paid out in excess of the said $100,000; but no receiver shall be entitled to more than $12,000 a year, nor for any period less than a year to more than at the rate of $12,000 per annum. When more than one receiver shall be appointed, the compensation is to be divided between them. N. Y. Laws of 1883, ch. 278, § 2, as amended by N. Y. Laws of 1886, ch. 275, § 2. The above enactment relates only to receivers of insolvent corporations. U. S. Trust Co. *v.* New York, etc., R. Co., 101 N. Y. 485.

All Other Receivers.—In cases not otherwise specially provided for by statute, a receiver is entitled, in addition to his lawful expenses, to such a commission, not exceeding five per cent. upon sums received and disbursed by him, as the court or judge appointing him may allow. Any receiver

lina[1] and *Tennessee*.[2] In such States the statutory commission must be allowed, notwithstanding it may appear to be more than a reasonable compensation for the services rendered.[3] The statutes usually allow a certain percentage for receiving and disbursing the trust fund, and it has been held that one-half the commission is for receiving and the other half for disbursing the same.[4]

required by law to give bond may include as a part of his lawful expenses such reasonable sum, not exceeding one per cent. per annum upon the amount of such bond paid his sureties thereon, as such court or judge allows. Code of Civ. Proc., § 3320, as amended by N. Y. Laws of 1892, ch. 465. The discretion of the court or judge, which is thus authorized to govern in all cases not fixed by statute, is not limited by the rule allowing compensation to executors and administrators. See *infra*, this title, *Fixed by Analogy to Compensation of Fiduciaries*.

1. Price *v.* White, 1 Bailey Eq. (S. Car.) 240; Massey *v.* Massey, 1 Cheves Eq. (S. Car.) 159.

2. Stretch *v.* Gowdey, 3 Tenn. Ch. 565. But see Woodward *v.* Williams, 11 Humph. (Tenn.) 325.

3. Price *v.* White, 1 Bailey Eq. (S. Car.) 240. In this case the court by Johnson, J., said: "The rate of commissions allowed by law to a receiver, is necessarily arbitrary. In some instances, the commissions may prove to be more, and in others they will be less, than an adequate remuneration; but even this is better than the uncertainty of suffering the rate of compensation to depend upon the discretion of the master. When, therefore, a receiver discharges the duty assigned to him, he is entitled to the usual commissions, although they may appear to be more than a reasonable compensation for the services rendered. It is said, however, that . . . the receiver in this case did nothing; and his own examination, in which he states that he would not take charge of one of the plantations, because the others were withheld, is relied on to prove it. But the fact is not disputed, that they were all managed by overseers appointed and employed by him, and that the crops were sold by factors of his own selection, and under his direction. It was not expected that he would perform these services in person, and it does not follow that the interests of those concerned were not promoted by this arrangement; and, at any rate, he incurred the responsibility incident to these sub-agencies, and, therefore, he is entitled to his commissions. If anything has been lost by his neglect, or the mismanagement of his agents, that would be the foundation of a demand upon him to make it good."

4. High on Receivers (3d ed.), § 785; Beach on Receivers, § 766; Howes *v.* Davis, 4 Abb. Pr. (N. Y.) 71. *Compare In re* Bank of Niagara, 6 Paige (N. Y.) 213; *In re* Kellogg, 7 Paige (N. Y.) 268; Hosack *v.* Rogers, 9 Paige (N. Y.) 468; *In re* Roberts, 3 Johns. Ch. (N. Y.) 43; Betts *v.* Betts, 4 Abb. N. Cas. (N. Y.) 442; Morgan's Estate, 15 Abb. N. Cas. (N. Y.) 201; 1 How. Pr. (N. Y.) 184; Rowland *v.* Morgan, 3 Dem. (N. Y.) 292; Ward *v.* Ford, 4 Redf. (N. Y.) 34; *In re* Roosevelt, 5 Redf. (N. Y.) 623.

Where, by the State laws, the compensation of a receiver is fixed at a certain percentage on his receipts and disbursements, the surrender, under order of the court, of premium notes of an insolvent insurance company upon condition that the makers pay such assessments as shall be sufficient to pay all the creditors of the company, is, so far as it affects the receiver's claim to commissions, to be regarded as so much money received and paid over; and he is entitled to commissions thereon. In such a case, however, the commissions will be allowed only on the actual value of the notes, and not upon such as were not collectible. Van Buren *v.* Chenango Co. Mut. Ins. Co., 12 Barb. (N. Y.) 671.

The receiver of an insolvent corporation having tendered his resignation after levying an assessment upon the members, it was held that he could not be allowed commissions upon the assessments, there being no evidence of their value, or that they had any value, and such assessments not being "sums received," within the meaning of the statute, until they were actually paid in. People *v.* Mutual Ben. Associates, 39 Hun (N. Y.) 49.

(2) *Where Not Regulated by Statute.*—In the absence of statute, the compensation of receivers is determined by the courts in various ways. Sometimes they adopt the rule by which commissions are allowed to fiduciaries, and sometimes they fix the amount within their own discretion. The power of the court to fix the receiver's compensation arises from the relation of the receiver to the court appointing him, he being its officer, under its control and direction, and deriving his authority to act from that source alone.[1] In some States it is provided by statute that the compensation of receivers shall be left to the discretion of the courts.[2]

(a) **Fixed by Analogy to Compensation of Fiduciaries.**—In some States the courts have established the rule of allowing receivers the same compensation as that given to executors, administrators, guardians, and other fiduciaries. This is the rule in *Alabama*,[3] in *Maryland*,[4] and in *New Jersey*.[5] The same rule has been laid down in *New York* also, in cases where the compensation is not regulated by statute.[6]

Rests.—The courts have, in cases where receivers are allowed a commission or percentage upon the funds received, sometimes permitted them to make annual rests, and to charge their commissions upon the amounts thus ascertained. Under such circumstances, however, a receiver will not be allowed to make a new rest every time he makes a deposit in the bank, or to begin with full commissions from the date of such rest. Bennett *v.* Chapin, 3 Sandf. (N. Y.) 673.

Where property is transferred in specie, the commission will be computed upon the value of the property, and if the parties cannot agree upon the value of the effects, a referee will be appointed to ascertain it. Bennett *v.* Chapin, 3 Sandf. (N. Y.) 673; *In re* DePeyster, 4 Sandf. Ch. (N. Y.) 511.

1. Day *v.* Croft, 2 Beav. 488; Magee *v.* Cowperthwaite, 10 Ala. 966; Gardiner *v.* Tyler, 3 Keyes (N. Y.) 505; 2 Abb. App. Dec. 247; Baldwin *v.* Eazler, 34 N. Y. Super. Ct. 275; Martin *v.* Martin, 14 Oregon 165, Stretch *v.* Gowdey, 3 Tenn. Ch. 565.

2. For instance, in *Rhode Island*, by Gen Sts., ch. 140, § 46, a "reasonable" compensation is allowed. In *Virginia* (Code of 1887, § 3411) a receiver is to receive, as a compensation for his services, such percentage of the amount received, and invested or paid out by him, as the court may direct, for receiving, investing or paying out the same.

3. In *Alabama* the rate of compensation allowed to guardians is held to fix an appropriate, though not an imperative rule, in the case of receivers. Magee v. Cowperthwaite, 10 Ala. 966.

4. In *Maryland* the commission allowed to trustees on sales made under decrees and orders of court, furnishes the proper standard of compensation for receivers, with discretion to increase it in case of extraordinary trouble or difficulty, or to reduce it in case of negligence. Abbott *v.* Baltimore, etc., Steam Packet Co., 4 Md. Ch. 314; Tome *v.* King, 64 Md. 180.

5. In *New Jersey* receivers are dealt with as trustees under a will, or as executors having real and personal estate in charge. Holcombe *v.* Holcombe, 13 N. J. Eq. 417.

6. For the statutory provisions in *New York*, see *supra*, this title, *Where Regulated by Statute.*

When the case does not fall within the statutes, compensation will be awarded to receivers at the same rate as to executors and administrators. Howes *v.* Davis, 4 Abb. Pr. (N. Y.) 71; Bennett *v.* Chapin, 3 Sandf. (N. Y.) 673; Muller *v.* Pondir, 6 Lans. (N. Y.) 481. *Compare In re* Kellogg, 7 Paige (N. Y.) 265. But this is only true, it seems, in the absence of proof as to the amount of labor performed by a receiver; Muller *v.* Pondir, 6 Lans. (N. Y.) 472; otherwise the rule is not binding, and the court by whom a receiver is appointed has the right

(b) **Fixed Within the Discretion of the Court**—(aa) DOCTRINE IN ENGLAND.—In *England* there is no settled rule, save in one case which is fixed by statute,[1] for determining the amount of compensation to be allowed receivers for their services. Usually the question is left to be determined by the masters in chancery, who are governed by the degree of difficulty or labor involved in the case, increasing the compensation where there is any special difficulty, and diminishing it if there is any extraordinary facility in the collection.[2]

to determine the rate of his compensation, which may be fixed with reference to the circumstances of the case. Gardiner *v.* Tyler, 3 Keyes (N. Y.) 505; 2 Abb. App. Dec. 247; Baldwin *v.* Eazler, 34 N. Y. Super. Ct. 274.

In instances where the rule prevailing in the case of executors and administrators is applied to receivers, one-half the compensation is given for receiving and one-half for paying out moneys. Howes *v.* Davis, 4 Abb. Pr. (N. Y.) 71. The receiver is entitled also, in addition to percentages on money received and paid, to commissions on the value of all the assets (for example, book accounts and other things in action) taken out of his hands and delivered to the parties by an order settling the suit. Bennett *v.* Chapin, 3 Sandf. (N. Y.) 675.

1. 44 & 45 Vict. ch. 41, § 24, subsection 6, provides that a receiver appointed by a mortgagee shall be entitled to retain, out of any money received by him, for his remuneration and in satisfaction of all costs, charges and expenses which he incurs as receiver, a commission at such rate, not exceeding five per centum on the gross amount of all money received, as is specified in his order of appointment; and that if no rate be specified, then at the rate of five per centum on that gross amount, or at such rate as the court think fit to allow on an application made by him for that purpose.

2. Day *v.* Croft, 2 Beav. 491; 4 Jur. 429; 9 L. J. N. S. Ch. 287; Malcolm *v.* O'Callaghan, 3 Myl. & C. 52; 1 Jur. 838. In the former case Lord Langdale, M. R., said: "Various representations having been made at the bar, as to the principle and the practice adopted in the offices of the different masters in respect of receivers' allowances, I thought it right, before disposing of the case, to inquire of the masters what were the principles upon which they acted, and the practice adopted on this point in their several offices. The masters have each of them been good enough to furnish me with a certificate; and I find that there is no general rule which universally prevails as to the allowance to a receiver. Where the receipts consist of rents of freehold and leasehold estates, 5*l.* per cent. upon the amount received is most frequently allowed. If there be any special difficulty in collecting the rents, on account of the sums being extremely small or of the payments being very frequent, as weekly payments, then the allowance is increased. On the other hand, if there should be very great facility in receiving the rents, then less than 5*l.* per cent. is allowed. One of the masters has certified to me a case, where, after consideration, he allowed only 4*l.* per cent. for the receipts of rents and profits of freehold and leasehold estates. Another master has certified to me a case in which the sum paid to the receiver amounted to 300*l.* a year for the first year; the receiver was afterwards allowed 150*l.* only for a succession of years; which was afterwards reduced to 50*l.* a year, for the receipt of the same rents. It cannot, therefore, be considered as a universal or general rule, that 5*l.* per cent. should be allowed, even upon the receipts of rents and profits. It may be increased if there be any extraordinary difficulty, or diminished if there be any extraordinary facility in the collection. With respect to other receipts, each master considers himself bound to have regard to the degree of facility or difficulty there may be in receiving them. They have sometimes allowed 2¼*l.* per cent.; but for gross sums of money, this has been very much reduced, and 1¼*l.* per cent. has been allowed upon many occasions. It appears, therefore, that the masters, as they ought, consider upon each occasion what is fit or proper to be allowed, having regard to the degree of difficulty or facility experienced by the receiver." In the case in which these observations were made, an objection was taken to an allowance which had been made to the

Occasionally a salary has been allowed.[1] But where the amount of the property is small, and the duties are not onerous, compensation may be denied by the court altogether.[2]

(bb) DOCTRINE IN UNITED STATES.—In those States where the compensation of receivers is not regulated by statute, the courts have, as in *England*, not settled upon any inflexible rate. Such a rate would, from the nature of the case, be impracticable. The compensation is, therefore, usually determined according to the circumstances of the particular case,[3] and may be a gross sum,[4]

receiver of 5*l.* per cent. on certain large sums of money which had been paid to him for redemption of annuities, for interest upon mortgages and annuities, and it appearing that the particular circumstances and the particular nature of the items had not been brought to the attention of the master, Lord Langdale thought there was sufficient in the case to warrant an order to review the report. 2 Dan. Ch. Pract. (5th ed.) *1746; Kerr on Receivers (Bispham's ed.) 239; High on Receivers (3d ed.), § 782; Beach on Receivers, § 760.

The practice of the master's officers, as above stated, is generally followed in the chambers of judges in making the allowance or fixing the salary of a receiver. 2 Dan. Ch. Pract. (5th ed.) *1746; Beach on Receivers, § 760, *citing* Seton on Decrees, 425, 1006; Potts *v.* Leighton, 15 Ves. 276; *In re* Montgomery, 1 Moll. 419; Bristowe *v.* Needham, 2 Ph. 190; Courand *v.* Hanmer, 9 Beav. 3; *In re* Ormsby, 1 Ball & B. 189.

The rule stated in the text above is followed substantially in the Irish practice also. See *In re* Montgomery, 1 Moll. 419; *In re* Ormsby, 1 Ball & B. 189.

1. Carlisle *v.* Lord Berkley, Ambl. 599; Neave *v.* Douglas, 26 L. J. Ch. 756.

2. Marr *v.* Littlewood, 2 M. & C. 458.

If a trustee or a party in interest, as for example, a partner, offer himself as receiver, he may be required to serve without compensation. See *infra*, this title, *Where a Receiver is a Party in Interest*. Pilkington *v.* Baker, 24 W. R. 234; Sykes *v.* Hastings, 11 Ves. 363; Sutton *v.* Jones, 15 Ves. 584. But see Newport *v.* Bury, 23 Beav. 30, in which case a testator having appointed as trustee and executor a person who had for many years been the paid receiver and manager of his estate, the court appointed him receiver and allowed him a salary.

3. High on Receivers (3d ed.), § 783; Cowdrey *v.* Railroad Co., 1 Woods (U. S.) 331; Abbott *v.* Baltimore, etc., Steam Packet Co., 4 Md. Ch. 310; Grant *v.* Bryant, 101 Mass. 570; Jones *v.* Keen, 115 Mass. 181.

A receiver appointed by the court in a partnership suit, shortly after his appointment, sold the business to a firm to which the partnership was indebted, and agreed to run the business for the new firm at a salary of $200 a month. Such firm furnished his bond and paid his traveling expenses, and all he had to do as receiver was to collect the debts of the old firm when traveling for the new firm. *Held*, that an allowance of $50 a month was sufficient for such services, and the allowance by the court of $2,400 for eight months was excessive. Martin *v.* Martin, 14 Oregon 165.

4. *Compare* Central Trust Co. *v.* Wabash, etc., R. Co., 32 Fed. Rep. 187; Grant *v.* Bryant, 101 Mass. 570; Jones *v.* Keen, 115 Mass. 181; Lichtenstein *v.* Dial, 68 Miss. 54; Greeley *v.* Provident Sav. Bank (Mo. 1891), 15 S. W. Rep. 429; U. S. *v.* Church of Jesus Christ (Utah 1889), 21 Pac. Rep. 516.

The receivers of a railway company received and paid out during their trust about $60,000,000. At the time of their appointment the mileage was about 3,600 miles, and the property consisted of thirty or forty different roads, all heavily mortgaged. There was about $4,000,000 of floating and pressing debts resting upon the company, and its credit was gone. On their personal guaranty the receivers obtained money to satisfy most of the pressing claims, the aggregate sum thus advanced amounting to $22,000,000. Considering their successful administration for two years and a half, and its felicitous outcome, *held* that $70,000 for each of the receivers was a just and fair compensation for the services actually rendered. Central Trust

a salary,[1] or a percentage.[2] The courts of several States, how-

Co. *v.* Wabash, etc., R. Co., 32 Fed. Rep. 187.

Ten thousand dollars is an adequate compensation for the services rendered by the receiver of the Late Corporation of the Church of Jesus Christ of Latter Day Saints, in view of the facts that the property which he collected and handled, amounting to $725,000, consisted in part of real estate, which required but little trouble in caring for, and of personal property which he acquired without litigation, and collected and otherwise disposed of without difficulty, and that his active duties covered only about one year. U. S. *v.* Church of Jesus Christ (Utah, 1889), 21 Pac. Rep. 516.

The receiver of an insolvent bank had collected $979,249. On his final settlement the parties in interest were ordered to show cause why the receiver and his counsel should not be allowed for their services a commission equal to that allowed by statute to executors. One creditor having objected, the court heard testimony as to the value of the services, and made an allowance of $18,000 to the receiver, and $15,000 to his counsel. *Held*, that the allowance should not be disturbed. Greeley *v.* Provident Sav. Bank (Mo., 1891), 15 S. W. Rep, 429.

Three liquidators of an insolvent bank, whose commissions are fixed by law, cannot also charge a salary. And when they have already the help of two experts they cannot employ clerks, unless they first show the necessity from the intricacy of the accounts, or other cause, and obtain leave of court. *In re* Louisiana Sav. Bank, etc., Co., 40 La. Ann 514.

1. *Compare* Cowdrey *v.* Railroad Co., 1 Woods (U. S.) 331; Thompson *v.* Willamette, etc., Mfg. Co., 15 Oregon 604. In the latter case the plaintiff was appointed a receiver in an action in which the court allowed him, and he was paid, $500 per month. Among the property transferred to the receiver was three-fifths of the stock of a corporation of which he was afterwards elected president. A resolution previously passed fixed the salary of the president at $250 per month. *Held*, that the corporation was not indebted to the plaintiff as an individual, the services which he rendered the corporation having been performed as receiver and compensated for in the allowance made by the court.

2. *Compare* Abbott *v.* Baltimore, etc., Steam Packet Co., 4 Md. Ch. 310; Lichtenstein *v.* Dial, 68 Miss. 54.

Where, a few days before the filing of a bill by a member of a firm, asking for the dissolution thereof, and the appointment of a receiver, the firm assigned to a creditor certain of their book accounts, and the receiver afterwards appointed collected these assigned accounts, as well as all other claims due the firm, the auditor to whom the receiver's account was referred, properly treated the entire amount in the hands of the receiver as the property of the firm, and allowed the receiver a commission on the accounts so collected. Kerlin *v.* Ewen (Pa. 1892), 24 Atl. Rep. 127.

A receiver appointed to take charge of a jewelry business, received $11,000 worth of stock, made an inventory in which he employed some assistance, secured an order of sale, and made some efforts to sell, when, the partners having settled their differences, he, by order of court, sold the stock to one of them, made his final report, and was discharged. Three reputable members of the bar testified that three and a half per cent., or four per cent., on the value of the property, as allowed in cases of administration, would be a proper compensation, and the court allowed four per cent. *Held*, that the compensation was reasonable, and the fact that a competent person could have been employed at a less amount, by private contract, did not affect the question. Lichtenstein *v.* Dial, 68 Miss. 54. In this case the court by Woods, C. J., said: "A careful examination of the authorities referred to by counsel for appellant fails to satisfy us that the compensation of a receiver should be fixed at that sum for which a person possessed of competent qualifications could have been employed by private contract to perform the services rendered in a given case. A receiver is an officer of the court from which he holds his appointment. He is selected by the court in the exercise of its sound judicial discretion, regard being had to the nature of the services required in each case, the competency of the person to be appointed, and the responsibilities he

ever, have laid down certain general principles as applicable to the subject. Thus in *Iowa* receivers are entitled to a sum which is a reasonable compensation, according to the degree of business capacity, integrity and responsibility required in the case.[1] In *Massachusetts* the rule adopted is that the compensation is not to be regulated upon the basis of a fixed commission upon the amount of money passing through the receiver's hands, but is to be such an amount as would be reasonable for the services required of, and rendered by, a person of ordinary ability, and

must assume. He is to discharge his duties under the direction of the court appointing him, and may be summarily dealt with for disobedience to, or neglect of, any orders given him by the court touching the custody, management and control of the estate. Being an officer of the court elected in the manner just indicated, and with reference to the services to be performed, and looking to his competency and his responsibilities, we wholly repudiate the theory of appointment which looks to the selection of any person, by private contract, or at public auction, who will undertake the office for the smallest compensation. The office of receiver not being conferrable on any such principle, it would seem to follow that the compensation of the officer could not be determined on such principle, likewise. The compensation, like the appointment, is determined by the court in the exercise of its judicial discretion, and not by the result of bidding, even by persons every way competent to discharge the duties of the office. In allowing the compensation in this State, no inflexible rule, indeed, no written rule, of legislative requirement, is imposed upon the court. The compensation must be reasonable compensation, in view of the facts of each case, and in view of the duties and responsibilities of the receiver. By what means, or in what manner, the court will arrive at its determination as to what sum is reasonable, no positive rule is to be found, and the court should have the largest liberty of inquiry and ascertainment before ultimately deciding. In receiverships of that character in which the officer is at once receiver and manager of a business, a gross sum may be allowed as specific compensation for services, and with propriety, as we think. In other cases, in which the receiver's duties are confined to the receipt and disbursement of money, the court might wisely refer to the rule and rate of a given percentage in analogous cases, when such percentage is regulated by law, and might properly adopt such rule and rate, if, in its discretion, the same would amount to reasonable compensation. The reasonableness of the compensation is matter exclusively for the determination of the court. The manner and means of exercising that discretion in endeavoring to ascertain what is reasonable must be left largely to such court, also."

1. French *v.* Gifford, 31 Iowa 428. In this case the court by Miller, J., said: "While we concede that the receiver should receive a compensation corresponding to the high degree of business capacity, integrity, and responsibility required in cases of this character, and which was secured in the person of the receiver in this case, yet we feel it our duty to allow only such sum as will be such reasonable compensation. There can be no reasonable grounds to doubt that the receiver in this case, or some other person possessing equal qualifications, could have been employed by private contract to perform the services rendered in this case for half the amount allowed by the referee. This, it seems to us, is the fair and reasonable test by which the amount of compensation to be allowed should be determined. While it may be true that an individual of the required qualifications, if engaged in a lucrative private business, could not be induced to abandon such business for a temporary appointment of this character without extraordinary compensation, yet one of wealth and leisure may readily be found (as in this case) who would undertake the trust for a reasonable and ordinary compensation. We would not be warranted in allowing extraordinary compensation unless in a case of imperative necessity."

competent for such duties and services.[1] And in *Rhode Island* the amount is to be fixed by considering the responsibility assumed, the skill and labor expended, and the rate of pay usually allowed for similar work, and is not to be determined by a percentage on collections.[2] In cases where the allowance to receivers is left to the discretion of the court, the question is discretionary only in the sense that there are no fixed rules to determine the proper allowance, and it is not discretionary in the sense that the courts are at liberty to give more than a fair and reasonable compensation.[3] The allowance of compensation to a receiver cannot be resisted on the ground that the court had no power to appoint the receiver, that objection being a collateral attack on the order appointing him.[4]

c. ADDITIONAL COMPENSATION—(1) *The General Doctrine*—The regular compensation made to a receiver for his services is considered sufficient to compensate him for all the labor which he performs in connection with the receivership, and hence, as a rule, no additional allowance will be made.[5]

1. Grant *v.* Bryant, 101 Mass. 570; Jones *v.* Keen, 115 Mass. 181.

2. Special Bank Comrs. *v.* Franklin Sav. Inst., 11 R. I. 57.

3. Central Trust Co. *v.* Wabash, etc., R. Co., 32 Fed. Rep. 188. In this case the court by Brewer, J., said: "The question of allowances is a judicial one, and while, as it is said, the matter is left to the discretion of the court, it is discretionary only in the sense that there are no fixed rules to determine the proper allowance, and is not discretionary in the sense that the courts are at liberty to give anything more than a fair and reasonable compensation. We desire to see the officers and agents of the court well paid, in order that men of character and ability may be willing to accept the burdens and responsibilities of these trusts; but at the same time we may not forget that the property to be charged with these allowances is not ours, that there are many thousands scattered all over the land who are the owners, whose property by the strong hand of the law has been taken out of their custody, and who look to us to see that no unjust or excessive burden is cast upon them. We may not exercise the generosity of owners, but are closely limited to the justice of judges."

4. Greeley *v.* Provident Sav. Bank, 103 Mo. 212. *Compare* State Journal Co. *v.* Com., 43 Kan. 93. In the former case it was also held that upon the allowance of compensation to a receiver and his counsel on final settlement, there is no error in not requiring at the hands of the receiver and his counsel an itemized account of their services. Greeley *v.* Provident Sav. Bank, 103 Mo. 212.

Where a receiver has been appointed in an action to foreclose a chattel mortgage, and there exists any irregularity in such appointment, if, on the application of defendant to set aside the appointment, the court orders the receiver to be discharged, if the defendant will execute a bond to pay the judgment and costs of the case, and the defendant voluntarily executes the bond and has restored from the receiver all of the property in controversy, such defendant cannot contest the legal costs of the receiver for any irregularity in his appointment. State Journal Co. *v.* Commonwealth Co., 43 Kan. 93.

5. Beach on Rec., § 769; *In re* Ormsby, 1 Ball & B. 189; Malcolm *v.* O'Callaghan, 3 Myl. & C. 52; Vanderheyden *v.* Vanderheyden, 2 Paige (N. Y.) 287; 21 Am. Dec. 86; *In re* Bank of Niagara, 6 Paige (N. Y.) 216; Hynes *v.* McDermott, 3 N. Y. St. Rep. 585.

Thus where the receiver of a minor's estate attended to a survey of the realty, the court refused any extra allowance for his exertions, on the ground that the act was entirely voluntary on his part, and the expenses attending it were paid out of the minor's estate. *In re* Ormsby, 1 Ball & B. 189.

So also a receiver will not be allowed

(2) *Where Receiver Incurs Extraordinary Trouble or Expense.*—Nevertheless a receiver may be granted allowances beyond his regular compensation for any extraordinary trouble or expense he may have been put to in the performance of his duties,[1] or in prosecuting or defending any legal proceedings brought by or against him.[2]

extra compensation for services and expenses incurred by him in making journeys to a foreign country for the purpose of prosecuting legal proceedings to recover money due the estate, when such journeys have not been expressly authorized by the court, even though authorized and approved by many of the parties interested in the estate. In passing upon the question of compensation in such a case, the court will not consider any agreements made by the parties in interest with the receiver, with regard to his undertaking such journeys, or his compensation therefor. Malcolm *v.* O'Callaghan, 3 Myl. & C. 152; 1 Jur. 838.

Hence, moreover, the allowance of a *per diem* compensation to a receiver for particular services is improper. *In re* Bank of Niagara, 6 Paige (N. Y.) 216. In this case the court, by Walworth, Ch., said: "The commissions upon the moneys received and paid out are in lieu of all personal services of the receiver, executor, or guardian, except such taxable law charges as are allowed to attorneys and solicitors by the fee bill, if he acts in that capacity." See also Vanderheyden *v.* Vanderheyden, 2 Paige (N. Y.) 287; 21 Am. Dec. 86.

Interest on Balances in Receiver's Hands.—A receiver, although he passes his accounts and pays his balances regularly, is not entitled to make interest for his own benefit out of the moneys which come into his hands in his character as receiver, during the intervals between the times of passing his accounts. Kerr on Rec. (Bispham's ed.) 246; Shaw *v.* Rhodes, 2 Russ. 539. See Earl of Lonsdale *v.* Church, 3 Bro. C. C. 41.

A receiver of a distillery is not entitled to compensation for collections and disbursements of the government tax on whisky in bond belonging to third persons, which tax, as was customary among distillers and warehousemen, be collected from the owners on withdrawal of the whisky from bond; though customary, such collections are merely for the accommodation of the owners, and no part of the duties of a receiver. White *v.* Allen (Ky. 1889), 11 S. W. Rep. 364.

1. 2 Dan. Ch. Pract. (5th ed.) *1747; Farmers' L. & T. Co. *v.* Central R. Co., 2 McCrary (U. S.) 318; 8 Fed. Rep. 60; Adams *v.* Haskell, 6 Cal. 475; Williamson *v.* Wilson, 1 Bland (Md.) 433.

In case the duties of a receiver prove to be more arduous than he or the court expected, or in case he performs duties in addition to those ordinarily required of a receiver in either case, provided he has faithfully administered his trust without intentional error or fraud, he is entitled to compensation in addition to that fixed by the order under which he was appointed. Farmers' L. & T. Co. *v.* Central R. Co., 2 McCrary (U. S.) 318; 8 Fed. Rep. 60.

On foreclosure proceedings it appeared that the trustees and receivers contracted originally to render their services for the sum of $1,500, and that they were paid such sum up to the beginning of the litigation; that since the litigation commenced, they had been paid by allowances by the court to them as receivers, and by appropriation by themselves as trustees, at the rate of $4,500 per year. The services rendered were not exclusive of their business, and did not take all or nearly all of their time, and there was no great responsibility requiring extraordinary compensation. *Held*, that they had been amply compensated, and that an extra allowance was improper. Easton *v.* Houston, etc., R. R. Co., 40 Fed. Rep. 189.

2. Bristowe *v.* Needham, 2 Ph. 190; Potts *v.* Leighton, 15 Ves. 276; Courand *v.* Hanmer, 9 Beav. 3; Stuart *v.* Boulware, 133 U. S. 78. *Compare* Internal Imp. Fund *v.* Greenough, 105 U. S. 527; Holcombe *v.* Holcombe, 13 N. J. Eq. 413.

A receiver acting as his own counsel is not entitled to make any extra charge for such services. See *infra*, this title, *Where Receiver Acts in Several Capacities.*

(3) *Where Receiver Acts in Several Capacities.*—Where a receiver acts in two capacities, he is allowed compensation for services in one capacity alone, while in the other the compensation is merely nominal or wholly disallowed.[1] The question has arisen in cases where a receiver has rendered legal services for which he seeks compensation, and in such instances the courts have, as a rule, refused it.[2]

Counsel Fees.—Where the employment of counsel is proper and necessary, receivers will usually be allowed credit on their accounts for amounts expended for counsel fees. Cowdrey *v.* Railroad Company, 1 Woods (U. S.) 338; Howes *v.* Davis, 4 Abb. Pr. (N. Y.) 71; Bennett *v.* Chapin, 3 Sandf. (N. Y.) 673; U. S. *v.* Church of Jesus Christ (Utah, 1889), 21 Pac. Rep. 516. *Compare In re* Colvin, 4 Md. Ch. 126. Thus in Cowdrey *v.* Railroad Company, 1 Woods (U. S) 338, a receiver was allowed his counsel and witness fees, and his expenses in defending himself against a motion for his removal. But where the employment of counsel by the receiver has not been authorized by the court, or appears to have been improper or unnecessary, counsel fees will not be allowed. *In re* Union Bank, 37 N. J. Eq 420; 4 Am. & Eng. Corp. Cas. 159; Utica Ins. Co. *v.* Lynch, 2 Barb. Ch. (N. Y.) 573; Corey *v.* Long, 43 How. Pr. (N. Y.) 506; O'Mahoney *v.* Belmont, 37 N. Y. Super. Ct. 223. *Compare* Adams *v.* Woods, 8 Cal. 306; Attorney Gen'l *v.* Continental L. Ins. Co., 62 How. Pr. (N. Y.) 130. Thus it was held in Utica Ins. Co. *v.* Lynch, 2 Barb. Ch. (N. Y.) 573, that a receiver is not entitled to an allowance out of the fund in his hands for counsel fees which he has paid on an unsuccessful defense to a suit brought against him by the owner of such fund; nor for the expenses of an unsuccessful appeal brought by him from the decree in such suit. And in an Irish case, *In re* Montgomery, 1 Moll. 419, where a receiver had instituted proceedings which, being wrong in form, he abandoned and afterwards took other proper proceedings, which were successful for the estate, the court refused to allow him the costs of the abandoned proceedings, although the master reported that the receiver had acted *bona fide*, and ought to be allowed the costs.

1. Beach on Rec., §§ 768, 770; Battaile *v.* Fisher, 36 Miss. 321; Holcombe *v.* Holcombe, 13 N. J. Eq. 417; *In re* Bank of Niagara, 6 Paige (N. Y.) 213; Martin *v.* Martin, 14 Oregon 165; Arthur *v.* Master in Equity, 1 Harp. Eq. (S. Car.) 47. *Compare* State *v.* Butler, 15 Lea (Tenn.) 113.

Thus a master in chancery acting as receiver is entitled only to the compensation of a receiver. Arthur *v.* Master in Equity, 1 Harp. Eq. (S. Car.) 47.

2. Battaile *v.* Fisher, 36 Miss. 321; *In re* Bank of Niagara, 6 Paige (N. Y.) 213.

In the latter case the court by Walworth, Ch., said: "The receiver was not entitled to charge for extra counsel fees to himself, in addition to the legal taxable costs in suits prosecuted or defended by him as attorney or solicitor, nor was he entitled to any allowance in the character of counsel for himself or his co-receiver in relation to any other matter. The employment of counsel and the payment of a proper allowance for such services, when necessary, requires the exercise of a sound discretion on the part of the receivers or the trustee of the fund out of which such services are to be paid. It would, therefore, be as unsafe to allow a receiver or other trustee to contract with and pay himself for such extra services as it would be to allow him to become the purchaser of the trust property which it is his duty to sell to the best advantage for benefit of the estate. If he employs third persons as counsel, and where he has no interest in employing and paying them for services which are not absolutely necessary, there is comparatively little danger that the estate intrusted to his care will be charged with counsel fees which might safely have been dispensed with." And in State *v.* Butler, 15 Lea (Tenn.) 118, the court by Freeman, J., after quoting the above, added: "The particular case before us is one in which these words have peculiar force, as it presented a fruitful source of temptation to contests of every kind which it would not be proper to impose upon

d. WHERE RECEIVER IS A PARTY IN INTEREST.—Compensation is, as a rule, denied where the receiver is interested in the fund or property; as, for example, where a partner or mortgagee has been appointed receiver.[1]

e. WHERE RECEIVER IS GUILTY OF MISCONDUCT.—Where a receiver has been guilty of negligence or misconduct in the management of property committed to him, the court may reduce his compensation, and may, in addition, impose a penalty in the shape of a further reduction on account of his mismanagement.[2]

f. WHERE ONE RECEIVER SUCCEEDS ANOTHER.—A second receiver who is appointed to succeed a former one, and who

the receiver. The temptation to earn fees as counsel was liable to warp his judgment, and is more than human nature ought to be required to meet in the execution of so important a trust." But in Farmers' L. & T., etc., Co. *v.* Central R. Co., 2 McCrary (U. S.) 318; 8 Fed. Rep. 64; where the receiver had attended in person to some of the legal business of the company, he was allowed therefor the regular fee paid to counsel.

In Battaile *v.* Fisher, 36 Miss. 321, which was a suit in chancery, to enforce a lien on an intestate's property in the hands of his administrator, the property was placed in the hands of a receiver, who had previously been counsel for the administrator in defending the suit. It was held that the receiver was not entitled, in a statement of his account by a commissioner of the court, to a credit for counsel fees, such an expenditure not being properly a subject of allowance in the settlement of the accounts of the receiver, but that his charge for services might be allowed him by the court of probate.

In State *v.* Butler, 15 Lea (Tenn.) 118, the receiver of an extinct municipal corporation, who had been appointed in pursuance of an act of the legislature, by which he received a fixed compensation, had rendered legal services in the execution of his duties. A subsequent act of the legislature allowed additional compensation for these services. Said the court by Freeman, J.: "It is argued that this is a retrospective law, and creditors of the extinct corporation have the right to resist it, as impairing or impinging on their vested rights. We see no force in this objection. It is but an allowance made by the legislature by way of compensation to an officer appointed under its authority for services rendered in securing, protecting and accumulating the fund. As we have said, such compensation might have been allowed if paid to other attorneys employed, and the result would have been the same to the creditors. The only objection to it is based on the impolicy of allowing a party occupying the position of a trustee to employ himself. The legislature clearly had the right to remove this objection in this case, and has done so, and we do not think any one else can complain."

1. See 2 Dan. Ch. Pract. (5th ed.) *1732; Wilson *v.* Greenwood, 1 Swanst. 483; Langstaffe *v.* Fenwick, 10 Ves. 405; Scott *v.* Brest, 2 T. R. 238; Blakeney *v.* Dufaur, 15 Beav. 40; Sargant *v.* Read, 1 Ch. Div. 600; Steel *v.* Holladay, 19 Oregon 517; Brien *v.* Harriman, 1 Tenn. Ch. 467; Todd *v.* Miller, 2 Tenn. Ch. 107; Berry *v.* Jones, 11 Heisk. (Tenn.) 206. But see Ranney *v.* Peyser, 83 N. Y. 1.

Thus a surviving partner who is appointed receiver, is not, in the absence of express stipulation to that effect, entitled to compensation, since his duties as receiver in such case are not more than his duties as surviving partner would have been. Berry *v.* Jones, 11 Heisk. (Tenn.) 206.

When the parties to a litigation ask the appointment of a person as receiver who is an interested party, and represent that his appointment would save the salary of the receiver then in office, and the court makes the appointment, and he serves as such receiver until removed, without making any claim for compensation, his application, made after removal, to be allowed a salary for the time he served, is properly refused. Steel *v.* Holladay, 19 Oregon 517.

2. Beach on Rec., § 758, *citing* Harrison *v.* Boydell, 6 Sim. 211; Rex *v.*

receives the funds which were in the hands of the other, is not entitled to any commission thereon, when such commission has already been paid to the former receiver.[1] But the death of a co-receiver does not defeat the claim of the survivor to compensation for his services rendered after the death of his colleague.[2]

g. WHERE MONEY IS PAID DIRECTLY INTO COURT.—A receiver has not, by virtue of his appointment, such a vested right to the collection of moneys payable to the estate as will entitle him to prevent persons indebted to the estate from paying the money directly into court, thereby saving to the estate a large commission or poundage to which the receiver would be entitled if the money passed through his hands.[3]

h. TIME WHEN COMPENSATION IS PAID.— In *England* the allowance to a receiver is, in general, not fixed until the passing of the first account, when the receiver will be allowed either the percentage upon his receipts or a gross sum by way of salary.[4] But in *America* a receiver is not obliged to wait until the termination of his receivership, but may be paid at stated intervals during the continuance thereof.[5]

i. LIABILITY FOR RECEIVER'S COMPENSATION.—When a receiver is properly appointed, the allowance for his compensation is a charge upon the property or funds that pass through

Lidwell, 1 D. & W. 26; *In re* Commonwealth L. Ins. Co., 32 Hun (N. Y.) 78.

1. Attorney Gen'l *v.* Continental L. Ins. Co., 32 Hun (N. Y.) 223. In this case the following language was used by the court: "When the present receiver was appointed to succeed [the former one who had died], the fund upon which a full commission was allowed to the present receiver had been paid and it was in his official hands at the time of his decease. It necessarily passed directly to the present receiver on his appointment. It should not again be subjected, therefore, to a similar burden from the mere fact that the present receiver has acquired it by virtue of his office. It must be said that that is not such a receiving of the fund as the law contemplates to make it chargeable with commissions. It is the service or duty of collecting or gathering together of the fund which subjects it to a charge for commissions, and not for succeeding to its possession after it has been thus gathered together. It must be said, further, that the law contemplates but one commission, which is the entire compensation provided for collecting. Inasmuch, therefore, as the court had possession of this fund, and it was, as already suggested, *in custodia legis*, the present receiver is entitled to be compensated only as to the fund which had been collected or received by the late receiver, for paying it out." But see Williamson *v.* Wilson, 1 Bland (Md.) 439.

2. Burroughs *v.* Bunnell, 70 Md. 18.

3. In such a case Lord Langdale made an order, on the petition of some of the parties interested, that a debtor who was willing to pay the amount of his debt at once to the accountant-general might be at liberty to do so. Haigh *v.* Grattan, 1 Beav. 201; Weale *v.* Ireland, 5 Jur. 405. As to the practice in lunacy, see *Ex parte* Clayton, 1 Russ. 476; *Ex parte* Cranmer, 1 Russ. 477, note.

4. 2 Dan. Ch. Pract. (5th ed.), *1745.

5. Special Bank Com'rs *v.* Franklin Sav. Inst., 11 R. I. 557. In this case the court, by Durfee, C. J., said: "We also think it is not improper to allow the receiver compensation from time to time before the close of his receivership. The duties are sometimes very onerous and may be protracted for years. They may interrupt, either wholly or in part, other avocations from which an income is derived. It would be unreasonable to expect the receiver to wait until the end of his service before receiving any compensation."

his hands.[1] And if no question is made as to the legality or propriety of the appointment of a receiver, he is entitled, where he has closed up the business in pursuance of his appointment, to have his compensation paid from the funds under his control.[2] But if the plaintiff sues for property for which he has no lawful claim, and, upon his application, a receiver is appointed, or, in general, if for any reason the order of the appointment is improperly made and is accordingly set aside, it seems unfair to charge the property with the receiver's fees, and, according to the better opinion, the plaintiff himself will be required to pay them.[3] However, the contrary view has been taken, viz: that

1. Beach on Rec., § 771; High on Rec. (3d ed.), § 796; Courand *v.* Hanmer, 9 Beav. 3; *Ex parte* Izard, 23 Ch. Div. 75; Beckwith *v.* Carroll, 56 Ala. 12; Seligman *v.* Saussy, 60 Ga. 20; Radford *v.* Folsom, 55 Iowa 276; Jaffray *v.* Raab, 72 Iowa 335; Hutchinson *v.* Hampton, 1 Mont. 39; Hopfensack *v.* Hopfensack, 61 How. Pr. (N. Y.) 498; Hayes *v.* Ferguson, 15 Lea (Tenn.) 1; 54 Am. Rep. 398.

In one case it was held that a receiver's compensation might be either allowed out of the property in his hands, or taxed as costs in the cause. Hutchinson *v.* Hampton, 1 Mont. 39. In this case it was held, also, that the receiver of property in controversy in an action cannot recover judgment for his services against all the parties by a motion in the original suit.

Where a receiver was appointed for an insolvent partnership at the suit of an attaching creditor, who alleged fraudulent conveyances by the firm, it was held that, although the suit failed as to the setting aside of the conveyances, the compensation of the receiver should be paid entirely out of the fund, the court alleging as reasons that the receivership was proper under the circumstances, that the appointment had been made with the consent of the parties, and that the management of the estate by the receiver was not attended with any additional expense. Jaffray *v.* Raab, 72 Iowa 335.

A was appointed a receiver of a railroad; first, under a suit instituted by the stockholders; and, second, under a suit brought by the bondholders of a railroad company in a State court. The bondholders' suit was subsequently removed to the Federal court, where certain questions connected with the compensation of the receiver were referred to a special master, who found a balance due from the receiver, which he was ordered to pay. Upon appeal this order was affirmed by the United States Supreme Court. Thereupon, the stockholders' suit, which had been stricken from the docket of the State court, was reinstated, and the question of the compensation of the receiver referred by the State court to a master, who found a large amount due to the receiver for compensation and necessary expenditures. The bondholders took no part, however, in these proceedings in the State court. *Held*, under the circumstances of this case, that, where the receiver had paid into the Federal court the amount decreed as due from him in the bondholders' suit, he could not, upon petition to the Federal court, have such amount appropriated in part payment of what had been found due to him in the stockholders' suit by the State court. *In re* Hinckley, 3 Fed. Rep. 556.

In *England* a receiver and manager of a business, who desires to advance money of his own for the purposes of the business, may, before doing so, apply to the court for its authority, and the court will, as a general rule, allow him interest at five per cent. on the amount which it authorized him to advance and will give him a charge on the debtor's assets for the advance and interest; but if the receiver advances money without such previous authority, although he is entitled to indemnity out of the assets, he cannot obtain a personal order against the trustee for payment. *Ex parte* Izard, 23 Ch. Div. 75.

2. Radford *v.* Folsom, 55 Iowa 276. Consequently he cannot be compelled to accept therefor a judgment against the party securing his appointment. See same case.

3. Weston *v.* Watts, 45 Hun (N. Y.) 419; *citing* French *v.* Gifford, 31 Iowa 228; Verplanck *v.* Mercantile Ins.

Co., 2 Paige (N. Y.) 438. *Compare* Moyers *v.* Coiner, 22 Fla. 422; Radford *v.* Folsom, 55 Iowa 287; O'Mahoney *v.* Belmont, 37 N. Y. Super. Ct. Rep. 223; Willis *v.* Sharp (Supreme Ct.), 12 N. Y. Supp. 120; Mem. of S. C., 58 Hun (N. Y.) 608.

In Weston *v.* Watts, 45 Hun (N. Y.) 219, the court, by Daniels, J., said: "The appellant was appointed receiver at the instance and on the application of the plaintiffs in the action, and under such appointment he obtained possession of the property now in controversy. After his appointment an appeal was taken by the defendant from the order making it, and after the hearing of the appeal the order appointing the appellant was reversed, and he was directed, as he has been by the order from which he has now appealed, to transfer and deliver the property and effects in his hands to the defendant. He was further ordered to file an account of his proceedings before a referee appointed to take and state the same, and his fees and compensation as receiver were directed to be paid by the plaintiffs in the action. From these facts it becomes evident that the appointment of the appellant as receiver was upon an application adverse to the defendant, and without the authority of the law. And having been made in that manner, there seems to be no legal ground upon which the receiver can be directed to withhold so much of the property from the defendant as may be required to pay his commissions and expenses, but those expenses should be paid, as they have been directed to be, by the plaintiffs who obtained the appointment. So far as the defendant is concerned, the appointment was an unauthorized one, not made for his benefit in any manner, but through which property was taken from his possession by the receiver and withheld from him without any legal authority justifying the proceeding. It was an invasion of his rights, for which there is no law requiring him or his property to pay the expense; but, on the contrary, so far as the law provides for the payment of legal expenses, they are to be defrayed by the unsuccessful party in the litigation. To take a person's property from him by an unauthorized proceeding and place it in the hands of a receiver, and then subject him to the expenses of the proceeding, would be very transparently unjust, even if the courts had the power to do that. Cases are not uncommon where the result would be ruinous to the injured individual. All the property a person may have in trade may, upon an unauthorized application, be taken from him and placed in the hands of a receiver, and after vindicating his right to be relieved from the proceeding, if he should be obliged to bear the expenses of it and compensate the receiver for his commissions and disbursements, or, in default of doing so, his property should be appropriated to securing that end, he might, under the forms of law, be financially ruined; for that there seems to be, and probably will not be, any authority vested in the courts, for their duty is to right the wrong when its existence may be made to appear and protect the injured party against its consequences; and that can be no otherwise done than by restoring to him the property of which he may have been divested by the unauthorized interference of the court. As little as that he certainly is entitled to, and the receiver who has acted under the appointment obtained upon the application of the adverse party must look to that party for his fees and compensation. If the court could impose upon the defendant, or the property ordered to be restored to him, the obligation first to pay the receiver, it might with the like reason apply the same principle to every case where one man may be deprived of his property through legal proceedings wrongfully instituted against him by another person. If such a principle is applicable at all it must be a general one, charging the property with the fees of officers where it may have been replevied or taken under an attachment; and the same rule would restrain the discharge of a person in custody under an order of arrest until the fees of the officer should be paid. Such cases would be equally meritorious, in the claims presented as the present case, which in principle cannot be distinguished from these others. It is sufficiently injurious for a person to have his property taken from him, or his person subjected to arrest, without right; and upon no legal principle can the wrong be aggravated in such a manner as to order him to pay the expenses of the proceeding." And in the same case, Bartlett, J., used this language: "In the case at bar, however, the payment of all proper commissions and expenses to which the receiver may be en-

the receiver being an officer of the court, his compensation does not depend upon the result of the litigation, but will be paid out of the property in dispute, no matter to which of the parties to the action the possession of such property may be adjudged.[1] If the appointment of a receiver is made for the benefit of all the

titled is provided for by charging them against the plaintiffs, who procured his appointment under circumstances which the court has held to have been insufficient to warrant a receivership, and who, so far as appears, are of sufficient pecuniary responsibility to pay the receiver's charges. Indeed, even if the unsuccessful party were unable to pay the receiver, it may well be doubted whether any authority exists to enforce payment of his commissions out of any portion of the property or fund belonging to the party who has succeeded in vacating the receivership. It would be a pretty severe rule, even if constitutional, which should compel a litigant to pay the expense of having his own property illegally taken out of his custody for awhile. There might be cases where a receiver was erroneously appointed, but not under such circumstances as to make the appointment absolutely void, which would warrant an order that his disbursements be paid out of the fund, as, for example, where the property consisted of a herd of cattle for which the receiver had to buy fodder. In such a case it would be fair and just to charge the successful party with the cost of feeding, for he would have had to incur it if the animals had remained in his own custody. But commissions and all disbursements, except such as would have been necessary if the custody of the property had remained unchanged, seem to me to stand on a different footing."

In French *v.* Gifford, 31 Iowa 428, the court by Miller, J., said : "It is insisted by plaintiff's counsel that the compensation of the receiver should be paid out of the fund of which he had the custody and charge, and that he should be permitted to retain the same therefrom. Numerous cases have been cited to show that such is the uniform practice. Upon an examination of these cases it, will be found that in every case there was no question made as to the legality or propriety of the appointment of the receiver; that in each case the receiver closed up the business and settled his accounts in pursuance of his appointment. The receivership in each case was for the benefit of those interested in the fund, and he was paid therefrom, which is only another method of apportioning the costs upon those entitled to the fund. . . . We think it would be an unjust and inequitable rule if in all cases the receiver should be entitled to his compensation from the fund in his hands, without reference to the legality of his appointment. Under the operation of such a rule, innocent persons might be made to suffer great loss." In this case the receiver's compensation was apportioned one-third being charged upon the fund, and the other two-thirds upon the plaintiff.

1. Hopfensack *v.* Hopfensack, 61 How. Pr. (N. Y.) 508. *Compare* Hembree *v.* Dawson, 18 Oregon 474.

Thus in Hopfensack *v.* Hopfensack, 61 How. Pr. (N. Y.) 508, the court by Van Hoesen, J., said: "I think there is no question as to the right of the court to award to the receiver compensation out of the fund which he holds, even though the title to that fund be found to have been from the first, and to be now in the defendants. The receiver's compensation cannot be made to depend upon the result of the litigation. He is the officer of the court who takes property, the right to which is involved in dispute, and by order of the court holds it for the benefit of the party who shall ultimately be found to be entitled to it. It may sometimes happen, as it probably happened in this case, that by the unfounded claim of a plaintiff the rightful owner of property is deprived temporarily of the possession of it, and that when he gets it back, it is incumbered with the charges of the officer to whom the court has given the care of it, *pendente lite*. But great as may be the misfortune to the owner, he must bear the loss unless he can obtain redress from the party on whose application the wrong has been accomplished. The court is not to blame, nor is the receiver who obeys its order. The property in the hands of the receiver is the fund from which his fees must be paid."

parties, his expenses should be shared by all equally.[1] By agreement between the parties one of them alone may become responsible for the receiver's fees.[2] And if the fund in court is insufficient to afford an adequate compensation, the parties at whose instance the receiver was appointed may be required to provide the means of payment.[3]

j. APPEAL IN QUESTIONS OF COMPENSATION.—An appeal may be taken from an order granting or refusing compensation to a receiver.[4] But since the allowance to be made a receiver is mainly within the discretion of the court appointing him, which has a fuller knowledge of the facts controlling the amount, the appellate court will not disturb the action of the lower court unless the discretion vested in that tribunal has been abused.[5]

1. Johnson *v.* Garrett, 23 Minn. 565. This case holds, also, that where no reason appears in the facts to justify charging the whole of the receiver's compensation to one of the parties, it is error so to charge it.

2. Kelsey *v.* Sargent, 2 N. Y. St. Rep. 669; mem. of same case, 40 Hun (N. Y.) 633. In this case the appointment of a receiver for an insolvent corporation was vacated, after he had entered regularly upon the discharge of his duties. The parties stipulated that he should be protected, and agreed that upon his removal, his commissions should be fixed by a reference. One of the parties, in consideration of certain promises contained in the agreement, agreed to pay the commission. It was held that he was personally liable therefor, and could not object to the amount of the commissions, when they were fixed. It was also held in this case that if a stipulation in the cause imposes a personal liability on some of the parties, it may be enforced in the same action, an independent proceeding not being necessary.

3. Tome *v.* King, 64 Md. 166.

4. Magee v. Cowperthwaite, 10 Ala. 966; Herndon v. Hurter, 19 Fla. 406. *Compare* Adams v. Woods, 8 Cal. 306.

Where the court, by agreement of the paties, had made an allowance of compensation to a receiver, but no appeal was taken from the order of allowance, and, more than six months after the order was made, one of the parties moved the court to set aside and vacate the order, which motion the court overruled, it was held that, while the allowance was excessive, yet the remedy for the one aggrieved thereby was by appeal from the order of allowance within the time prescribed by statute, and that no appeal to this court from the order overruling the motion to vacate could be entertained. Russell *v.* First Nat. Bank, 65 Iowa 242.

5. Stuart *v.* Boulware, 133 U. S. 78; Morgan *v.* Hardee, 71 Ga. 741; Wilkins *v.* Georgia Iron Works, 74 Ga. 532; Greeley *v.* Provident Sav. Bank (Mo. 1891), 15 S. W. Rep. 429; Karn *v.* Rorer Iron Co., 86 Va. 754. *Compare* a remark of Miller, J., in Hinckley *v.* Gilman, etc., R. Co., 100 U. S. 153.

In Morgan *v.* Hardee, 71 Ga. 741, the court by Jackson, C. J., said: "In regulating the compensation of the receiver or other officer of a court, this court, on review, will defer much to the court appointing such officer and supervising his conduct, and where not only a jury on facts, but the court below, on considering the verdict on a motion for a new trial, find the officer's conduct upright and the compensation just, this court will never interfere except in a very strong case."

Thus the appellate court will not interfere where the master reports a compensation for the receiver as fair and reasonable, and the same is sustained by the uncontradicted evidence of competent and experienced witnesses. Karn *v.* Rorer Iron Co., 86 Va. 754. *Compare* Lichtenstein *v.* Dial, 68 Miss. 54.

The counsel for the receiver offered in evidence in the lower court the various petitions, reports and orders in the cause. This evidence was objected to by the exceptor, and was excluded on his admitting that in passing on the allowance, the court was entitled to look at every paper, and the whole record of the case. *Held*, on appeal, that in the absence of such evidence, to which the trial court had full access,

4. Accounting Exacted—*a.* DUTY OF RECEIVER TO RENDER ACCOUNTS.—A receiver, being an officer of the court appointing him, is held to a strict accountability by that court in all matters pertaining to the receivership affairs.[1] One of the first and principal duties of a receiver after his appointment, is to make a complete inventory[2] of all the property and effects coming into his hands, and to keep in due form[3] a fair and accurate account of the same, as well as of all moneys received and expended, so that the court may properly consider all claims for compensation and disbursements out of the funds in his charge.[4]

b. WHEN ACCOUNTS MUST BE RENDERED.—The court from which a receiver derives his authority, and under the direction of which he acts, may, in its discretion, require him to account at any time.[5] It is the practice, however, of the courts to appoint a particular time, usually once a year, for filing accounts.[6] And

it would be impossible for the supreme court to determine, with any degree of accuracy, whether the compensation allowed was excessive. Greeley *v.* Provident Sav. Bank, 103 Mo. 212.

The plaintiffs, having a lien on certain personalty, brought suit to have an instrument held by the defendants and affecting the property, declared void, and procured the appointment of a receiver to manage and sell the property. *Held*, that, although the instrument was decreed to be a valid chattel mortgage, giving defendants a prior lien and securing debts far in excess of the proceeds arising from the sale of the property, an order allowing the receiver to retain out of such proceeds his commissions as expenses would not be interfered with as an abuse of the court's discretion. Hembree *v.* Dawson, 18 Oregon 474.

1. **Delay in Accounting.**—A delay on the part of a receiver in accounting may be justifiable, when he has received the consent of all parties interested, provided they are competent to consent; but it is otherwise if some are under disability, as in the case of minors. Dease *v.* O'Reilley, 2 C. & L. 441; 4 D. & W. 284; Hooper *v.* Winston, 24 Ill. 365.

Irregular or Void Appointment.—A receiver will be held to a strict accountability, notwithstanding the order appointing him be void. It is enough that he claims to act, and does act as such: he is receiver *de facto* for the time being, and cannot avail himself of an irregular or void appointment under which he has acted, procured by his own instrumentality, and thus escape an accounting for the moneys which come into his hands. O'Mahoney *v.* Belmont, 62 N. Y. 133.

Jurisdiction to Compel Accounting.—No other court than the appointing one has jurisdiction to require the receiver to account. Bills *v.* New Albany, etc., R. Co., 2 Biss. (U. S.) 390; Conkling *v.* Butler, 4 Biss. (U. S.) 22; Hinckley *v.* Gilman, etc., R. Co., 100 U. S. 153; Musgrove *v.* Nash, 3 Edw. Ch. (N. Y.) 172. But a receiver in a suit in a State court, which is afterwards removed to a U. S. court, may be called to account in the latter court. Hinckley *v.* Gilman, etc., R. Co., 100 U. S. 153.

2. Hooper *v.* Winston, 24 Ill. 365. It is the duty of the solicitor who procures the receiver's appointment, to direct him as to making out the inventory, and the method of keeping and rendering his periodical accounts, as far as may be necessary. *In re* Seaman, 2 Paige (N. Y.) 409.

3. Bertie *v.* Lord Abingdon, 8 Beav. 53; 2 Daniel's Ch. Prac. (5 Am. ed.) 1753; Kerr on Rec. (Bispham's ed.) 247.

4. Hooper *v.* Winston, 24 Ill. 365; Akers *v.* Veal, 66 Ga. 302; Adams *v.* Woods, 8 Cal. 306; Mabry *v.* Harrison, 44 Tex. 286.

5. DeWinton *v.* Mayor of Brecon, 28 Beav. 200. And he is not freed from the control of the court to compel a settlement, although an order has been made directing him to turn over property to some one else. Mabry *v.* Harrison, 44 Tex. 286.

6. Day *v.* Croft, 6 Eng. L. & Eq. 62; Lowe *v.* Lowe, 1 Tenn. Ch. 515.

it is the duty of the receiver to come in voluntarily and account to the court at the proper time; but failing in this, the court, upon application of a party in interest, or upon its own motion, will compel him to do so.[1]

c. AUTHORITY OF COURT FOR EXPENDITURES.—The discretion of a receiver in the matter of expenditures is very limited, and it may be laid down generally, that before making any outlay whereby the receivership fund will be seriously diminished, he must obtain the leave of the court which appointed him.[2] But this general rule will be relaxed to prevent hardship, where the receiver has in good faith incurred reasonable liabilities absolutely necessary for the preservation of the trust estate.[3]

d. WHAT EXPENDITURES WILL BE RATIFIED.—As a general rule, the court, on the final passage of a receiver's accounts, will not ratify any expenditure unless the same has been necessarily incurred for the benefit of the estate.[4] But where the receiver has made an outlay honestly, and the court is satisfied

In *New York* receivers of corporations are required by statute to account every six months. Laws of 1883, Ch. 378, § 4. And in People *v.* Knickerbocker L. Ins. Co., 31 Hun (N. Y.) 622, it was held that under this statute requiring receivers to file accounts with the General Term, the court is not called upon to pass on their correctness, or to determine whether or not they should be approved; that the statute contemplates nothing further than that they be filed in the court.

Re-examination.—In Farmers' L. & T. Co. *v.* Central R. Co., 1 McCrary (U. S.) 352, there had been three receivers, no one of whom had been discharged; one of them had made monthly presentations of his accounts, which had been referred to a master, and were passed upon by him and confirmed, with the exception of the last one. That one had been passed upon and confirmed, saving a few items, to which the receiver himself made exceptions. The two other receivers had never made any final accounting. Their last accounts were open and not passed upon. *Held*, that a final decree of the court that the receivers should appear before the master and pass their accounts, referred only to the two receivers who had not accounted; that after confirmation by the court, a re-examination will not be directed except for special reasons shown.

1. McBride *v.* Clarke, 1 Moll. 233; Adams *v.* Woods, 8 Cal. 306. And being an officer of the court he is not entitled to have a jury pass upon his accounts. Akers *v.* Veal, 66 Ga. 302.

2. The Attorney-Gen'l *v.* Vigor, 11 Ves. 563; Waters *v.* Taylor, 15 Ves. 25; Thornhill *v.* Thornhill, 14 Sim. 600; Hooper *v.* Winston, 24 Ill. 365; Adams *v.* Woods, 15 Cal. 206.

Receiver Under Special Statute.—Being the creature of the court, a receiver, unless appointed under a special statute, for a special purpose, has no powers except such as are conferred upon him by the order for his appointment and the course and practice of the court. Verplank *v.* Mercantile Ins. Co., 2 Paige (N. Y.) 452.

3. Blunt *v.* Clitherow, 6 Ves. 799; Tempest *v.* Ord, 2 Merv. 55; Brown *v.* Hazlehurst, 54 Md. 26; Hynes *v.* McDermott, 3 N. Y. St. Rep. 583. As to what are reasonable expenses see Wells *v.* Wales, 31 Eng. L. & Eq. 562; Watsell *v.* Leslie, 31 Eng. L. & Eq. 563. See also Flagg *v.* Manhattan R. Co., 20 Blatchf. (U. S.) 142; 10 Fed. Rep. 413; 4 Am. & Eng. R. Cas. 140.

4. Corey *v.* Long, 43 How. Pr. (N. Y.) 504. A receiver will not be allowed credit for advances to pay charges against his predecessor, if it appear that the latter was in arrears on account of the receivership fund. Battaile *v.* Fisher, 36 Miss. 321.

In re Union Bank, 37 N. J. Eq. 420; 4 Am. & Eng. Corp. Cas. 159, expenses incurred by a receiver for a daily newspaper for his office; for clerks whose services were not necessary; for attorneys employed by him to resist applications to the court which he ought

that, had application been made, it would have directed such outlay, it will be sanctioned as fully as though express authority therefor had been obtained.[1]

e. RAILROAD RECEIVERS.—A distinction is taken between the duties and discretion of a receiver of a railroad, and a mere passive receiver, and the Supreme Court of the United States has laid it down as a general rule in regard to the former "that all outlays made by the receiver in good faith, in the ordinary course, with a view to advance and promote the business of the road, and to render it profitable and successful, are fairly within the line of discretion which is necessarily allowed to a receiver intrusted with the management and operation of a railroad in his hands."[2]

not to have resisted, were all disallowed.

So in Langdon *v.* Vermont, etc., R. Co., 54 Vt. 593; 11 Am. & Eng. R. Cas. 688, the expenses of keeping up a reading room for the road's employees, were disallowed the receiver.

A receiver is not entitled to be reimbursed the expenses of journeys to, and residence in a foreign country, for the purpose of prosecuting proceedings for the recovery of property belonging to the estate, before the tribunals of that country unless he has the express authority of the court for such journeys. Malcolm *v.* O'Callaghan, 3 Myl. & C. 52.

Payments Made in Another Capacity.—*In re* Guardian Sav. Inst., 78 N. Y. 408. Quinlan was appointed receiver of an insolvent savings bank, and about the same time was appointed by Roche, one of several trustees, to dispose of property of his and use the proceeds thereof to pay such creditors of the insolvent bank as should assign their claims to him (Roche), and subrogate him to their rights as creditors against the institution to the extent of such payments, respectively. The office was accepted by Quinlan, and thus, as regards the creditors of the bank, became clothed with two characters. An order was made for a reference of the accounts of Quinlan as receiver, and upon this reference it appeared that he had received as proceeds of the trust estate created by Roche, and paid to certain creditors something over $47,000. *Held*, that the payments not being made out of the property of the bank, the receiver could not be credited therewith, and so far as he was concerned, the debts to which the money was applied were still outstanding.

Deputy Receiver.—Where a receiver appoints a deputy to discharge duties which are properly his own, and such as he himself could perform, the court, in passing upon his accounts, will not sanction the employment, and will therefore disallow the cost of same. Corey *v.* Long, 43 How. Pr. (N. Y.) 504.

1. As to allowance of costs of insurance, see Thompson *v.* Phenix Ins.Co., 136 U. S. 287; Brown v. Hazlehurst, 54 Md. 26. In the former case the court observed: "We have no doubt that, under some circumstances, a receiver would be derelict in duty if he did not cause property in his hands to be insured against fire."

As to allowance of costs of repairs and improvements, see Hynes *v.* McDermott, 3 N. Y. St. Rep. 583.

If the estates are distant, necessary expenses of agents will be allowed, ——— *v.* Lindsey, 15 Ves. 91; likewise of necessary clerks, watchmen and assistants. Howes *v.* Davis, 4 Abb. Pr. (N. Y.) 71; Corey *v.* Long, 12 Abb. Pr. N.S. (N. Y.) 427; Dickerson *v.* Van Tine, 1 Sandf. (N. Y.) 724; Taylor *v.* Sweet, 40 Mich. 736.

In Gluck and Becker on Rec. § 111, p. 484, the rule is stated as follows: "The justice and right of the matter must depend, to a great extent, upon the special circumstances of each case that may be presented. Due regard must always be had, not only to the nature and surroundings of the property in the custody of the receiver, but to the exigencies of the moment when he may have been required to take action involving the safety of the property in his charge."

2. Cowdrey *v.* Railroad Co., 1 Woods (U. S.) 331; *affirmed*, 11 Wall. (U. S.) 459; Burnham *v.* Bowen, 111

f. MINGLING OF FUNDS.—It is the duty of a receiver to keep the trust funds separate and distinct from his own, and a violation of this duty by mingling them, and using the trust funds, will make him chargeable with interest; and this whether he has derived a profit from them or not.[1]

g. WHEN CHARGEABLE WITH INTEREST.—It is well settled that a receiver renders himself liable for interest in two events: *First*, when he has collected interest, or could have done so by the exercise of that prudence and good management required of his office.[2] *Second*, when he has been guilty of some improper conduct or neglect, in which case interest is charged as a penalty for the breach of trust.[3]

U. S. 776; 17 Am. & Eng. R. Cas. 308; U. S. Trust Co. *v.* New York, etc., R. Co., 25 Fed. Rep. 797. And except in extraordinary cases the submission by the receiver of his accounts to the master at frequent intervals, whereby the latter may ascertain from time to time the character of the expenditures made, and disallow whatever may not meet his approval, will be regarded as a sufficient reference to the court for its ratification of the receiver's proceedings. Cowdrey *v.* Railroad Co., 1 Woods (U. S.) 331; *affirmed* 11 Wall. (U. S.) 459.

1. Hinckley *v.* Gilman, etc., R. Co., 100 U. S. 153; Utica Ins. Co. *v.* Lynch, 11 Paige (N. Y.) 520; *In re* Commonwealth F. Ins. Co., 32 Hun (N. Y.) 78. But see Radford *v.* Folsom, 55 Iowa 276, in which it was held that in the absence of proof that the receiver used any part of the trust fund deposited in bank with his own funds, or in any way derived profit from them, he cannot be charged with interest.

In Hinckley *v.* Gilman, etc., R. Co., 100 U. S. 153, *supra*, the receiver deposited money in a bank at Springfield to his account as receiver, most of which was drawn from there on his check, and deposited to his private account with a bank in Chicago; and when on his examination as a witness he was asked to give explanations of this matter, and to state what sums he had so deposited, declined to do so, it was held that he was properly charged with interest on it.

Hire of Property.—And he is chargeable with reasonable hire for receivership property used about his own business. Battaile *v.* Fisher, 36 Miss. 321.

2. Shaw *v.* Rhodes, 2 Russ. 539; Foster *v.* Foster, 2 Bro. C. C. 616; Earl of Lonsdale *v.* Church, 3 Bro. C. C. 41; Harman *v.* Foster, 1 Hog. 318; Adair Co. *v.* Ownby, 75 Mo. 282; Battaile *v.* Fisher, 36 Miss. 321.

A receiver cannot be charged, as a matter of course, interest on funds which remain in his hands. How *v.* Jones, 60 Iowa 70.

In Attorney-Gen'l *v.* North American L. Ins. Co., 89 N. Y. 94, the receiver, acting in perfect good faith, but without the authority of the court, loaned receivership funds, and charged himself with the sums received as interest; no losses occurred; and the estate was benefited by the loans. Finch, J., in delivering the opinion of the court, said: "The receiver appears to have acted in entire good faith, and without trace of any wrong intention. We have no reason to suspect him of any personal benefit in the transaction. No part of the fund has been lost. It is all safe and ready for distribution. No injury has resulted to the parties interested, but, on the contrary, it is quite probable that a larger interest has been obtained than would have resulted from the direction of the court. Although disapproving what has been done, we do not think the case is one for punishment, because entire good faith and honesty of intention are manifest, and the fund has been benefited and not harmed."

Shrinkage.—A receiver should not be charged for shrinkage in the stock turned over to him, when there is no bad faith or negligence on his part. Johnston *v.* Keener, 23 Ill. App. 220.

3. **Misappropriation.**—Where one of two receivers illegally appropriates the funds, and the other negligently permits it, they are jointly liable for the balance justly due upon stating their accounts, and chargeable with interest.

h. FOR COUNSEL FEES.—Courts of equity are, as a general rule, disinclined to allow a receiver, on the settlement of his accounts, fees paid for services of counsel, when the employment has not been previously sanctioned by the court.[1] However, if such expense has been incurred in the exercise of a sound discretion, and for the benefit of the trust estate, it will be allowed out of the receivership fund.[2] But a receiver, acting as his own

Com. *v.* Eagle F. Ins. Co., 14 Allen (Mass.) 344.

Failure to Invest.—In Hicks *v.* Hicks, 3 Atk. 274, where a receiver had been appointed during the minority of an infant who had no guardian, and was directed to place out the surplus of the rents and profits, when they should amount to a competent sum, with the approbation of the master, on government or other securities, but omitted to do so, Lord Hardwicke directed that he should pay interest at the rate of 4 per cent. on the surplus rents and profits, from the date of the decree till the infant came of age, although the infant, two days after he came of age, settled accounts with the receiver, who delivered up his vouchers, and gave him copies of all the accounts passed by the master.

Failure to Account at Proper Time.—When a receiver neglects to account at the appointed time, he must pay interest on the balance in his hands from the time he should have accounted or paid the money into court. ——— *v.* Jolland, 8 Ves. 72; Fletcher *v.* Dodd, 1 Ves. Jr. 85; Brownhead *v.* Smith, 1 Jur. 237. It will not, however, be exacted from time of receiving the money—but only from time it should have been paid into court. Potts *v.* Leighton, 15 Ves. 273. But a receiver of annual rents and profits will be liable for interest from time of receipt. Weems *v.* Lathrop, 42 Tex. 207. And he will not be permitted to make interest on the fund for his own benefit during the time intervening the receipt and accounting; and if the sum received be sufficiently large for investment, he should get an order to pay same into court. Shaw *v.* Rhodes, 2 Russ. 539. Although a receiver has accounted and to the satisfaction of all parties, yet he may be charged with interest on moneys improperly kept in his hands, and an inquiry for the purpose may be directed. Fletcher *v.* Dodd, 1 Ves. Jr. 85. And in some jurisdictions he will be compelled to make good any difference in the price of funds between the proper time for payment, and when payment was actually made. ——— *v.* Jolland, 8 Ves. 73.

1. Corey *v.* Long, 43 How. Pr. (N. Y.) 504; but see *In re* Colvin, 4 Md. Ch. 126; also Attorney-Gen'l *v.* North American L. Ins. Co., 91 N. Y. 59; 1 Am. & Eng. Corp. Cas. 577. Under N. Y. Laws 1883, ch. 378, § 4, requiring that, in respect to attorney and counsel fees contained in a receiver's report, nothing shall be paid by him until such charges have been approved by the court, and an order to that effect duly entered, it has been held that a reference will be made to determine whether the services have been rendered, and whether the charges are just and proper. People *v.* Knickerbocker L. Ins. Co., 31 Hun (N. Y.) 622.

2. Platt *v.* Archer, 13 Blatchf. (U. S.) 351; Cowdrey *v.* Railroad Co.; 1 Woods (U. S.) 331; *aff. sub. nom.* Galveston, etc., R. Co. *v.* Cowdrey, 11 Wall. (U. S.) 459; Howes *v.* Davis, 4 Abb. Pr. (N. Y.) 71; *In re* Colvin, 4 Md. Ch. 126; How *v.* Jones, 60 Iowa 70.

But the receiver will not be allowed his expenses in defending his appointment when such appointment was procured through fraud, and the order of appointment was reversed on appeal. O'Mahoney *v.* Belmont, 62 N. Y. 133.

And where the receiver made an unsuccessful defense to a suit brought against him by the owner of the receivership fund, and also made an unsuccessful appeal from the decree in such suit, it was held that he was not entitled to an allowance out of the fund for fees paid to counsel in such proceedings. Utica Ins. Co. *v.* Lynch, 2 Barb. Ch. (N. Y.) 573.

In Hand *v.* Savannah, etc., R. Co., 21 S. Car. 162, where a tract of land was held adversely to the receiver, and an attorney was employed by him to recover same under an engagement for a sum equal to one-half the value of

attorney, will not be allowed counsel fees retained by himself for such legal services.[1] Nor, as a rule, will such allowance be made, when the receiver employs the attorney of either party as his counsel in the receivership affairs.[2]

the recovery, and the suit was successful, and the land sold along with the other property, it was held that the attorney was entitled to compensation out of the proceeds of the sale.

Litigation as to Appointment of Receiver.—The estate cannot be charged with the cost of a litigation about the appointment of a receiver. The receiver, so long as he fills that office, will be allowed all the proper and reasonable fees paid to counsel for advice and assistance in the discharge of his duty, and in aiding him to preserve and defend the estate; beyond this he cannot go. If he chooses to carry on a litigation for his office, he must pay the cost out of his own pocket. He holds the office at the discretion of the court, and should a dispute arise as to the propriety of continuing him in it, or appointing some one in his stead, the controversy must be conducted by parties interested in the estate, and at their own expense. If the official conduct of the receiver be assailed, he may defend it, and if he does so successfully, the assailant will be made to pay costs, *but fees to counsel, even in that case, should not be thrown upon the estate. But where the action results in the removal of the receiver, it follows that he was wrong in resisting the application of the party who proceeded against him, and in such a case it would be manifestly improper to allow his counsel fees to be cast upon the estate. In re* Colvin, 4 Md. Ch. 126.

Overpayment of Attorney.—Where an attorney employed by a receiver petitions to the court for an allowance for his professional services, and names a certain sum, the court should not grant a larger sum than that named. Richter *v.* Schroeder, 119 Ill. 112.

In State *v.* Edgefield, etc., R. Co., 4 Baxt. (Tenn.) 92, the receiver, claiming authority under the State, employed counsel to oust the lessees of another receiver, in which suit he was successful, and subsequently on appellate proceedings, the property was sold; held, that such counsel were creditors of the estate, and that the receiver might pay for their services out of such funds coming into his hands in that capacity, and that the same would be allowed him upon the settlement of his accounts.

1. *In re* Bank of Niagara, 6 Paige (N. Y.) 213, the court said: "The receiver was not entitled to charge for extra counsel fees to himself, in addition to the legal taxable costs in suits prosecuted or defended by him as attorney or solicitor; nor was he entitled to any allowance in the character of counsel for himself or his co-receiver in relation to any other matter. The employment of counsel and the payment of a proper allowance for such services, when necessary, requires the exercise of a sound discretion on the part of the receivers or the trustee of the fund out of which such services are to be paid. It would therefore be as unsafe to allow a receiver or other trustee to contract with, and pay himself for such extra services as it would be to allow him to become the purchaser of the trust property which it is his duty to sell to the best advantage for the benefit of the estate. If he employs third persons as counsel, and when he has no interest in employing and paying them for services which are not absolutely necessary, there is comparatively little danger that the estate intrusted to his care will be charged with counsel fees, which might safely have been dispensed with. No allowance for extra counsel fees to himself can therefore be made to a receiver or other trustee upon the settlement of his accounts." See also Collier *v.* Munn, 41 N. Y. 141.

Receiver's Law Partner as Counsel.—Where a receiver engaged the professional services of his own law partner, and the orders for payment were made upon the motion of the latter, and upon petitions made and verified by him, without notice to any party interested, it was held that such orders could be collaterally assailed by any one sought to be affected by them, and that it was incumbent upon the receiver to show by other satisfactory evidence that such payments were warranted by the services rendered. *In re* Commonwealth F. Ins. Co., 32 Hun (N. Y.) 78.

2. Where counsel for plaintiff in a suit for the dissolution of a partner-

as associate counsel for the
he is not entitled to compen-
services rendered in the lat-
ity. Adams *v.* Woods, 8 Cal.

ts Not Adverse.—But where
ests are not adverse, or the
ssent to the employment, the
reasonable, will be allowed.
. New York Consolidated
o., 18 Abb. Pr. (N. Y.) 419;
McDermott, 3 N. Y. St. Rep.
nett *v.* Chapin, 3 Sandf. (N.

ule and the reasons therefor
en thus stated: "When the
is thus fully appointed, he
etain his own solicitor and
who ought not to be the same
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ause the solicitors of the sev-
ies are bound, in duty to their
o watch the proceedings of
ver, and to see that he faith-
charges his trust, and the un-
g to act as the solicitor or
for the receiver under such
ances would therefore fre-
cast upon the person thus as-
to act, inconsistent and con-
duties, both of which duties
t be properly discharged by
person." Edw. on Rec. 93.

ng Counsel Fees of Parties in Upon Receivership Fund.—A
has no authority to credit him-
attorney's fees paid to either
in their behalf. He must look
ursement to the parties them-
nd if, in the final settlement of
, there be sufficient funds in
onging to the parties for whom
aid, the court may allow him
eir respective shares, if the ad-
f fees have been proper and
le, or were made at the request
arty charged. The receiver,
e circumstances, will be subro-
the lien which an attorney
ave claimed upon his client's
Drake *v.* Thyng, 37 Ark. 229.
ckman *v.* Parkins, 5 Paige (N.
where the complainant made
on for an order requiring the
to pay out of the funds in his
terest on the judgment, for the
on of which the suit was
and also the complainant's
le counsel fees, which he had
d in the prosecution of the
court said in regard to the
im: "There is no foundation
r for the claim for payment of
the complainant's counsel fees out of the fund which belongs to the defendant or to his judgment creditors. . . . As between party and party the counsel for the complainant has in no case a right to be paid extra counsel fees out of a fund belonging to a defendant, except where the counsel has been employed to obtain or create such a fund for the joint benefit of both parties. When the interests of the parties are adverse nothing beyond the legal taxable costs can be allowed by one party as against the other." See also State *v.* Florida Cent. R. Co., 16 Fla. 705.

In Hubbard *v.* Camperdown Mills, 25 S. Car. 496, a minority of the stockholders and creditors brought an action against the corporation, charging the majority of the stockholders with gross misconduct and fraud, and praying for an injunction, appointment of receiver, and sale of property; and after application of proceeds to the debts of the company, a distribution of the residue amongst the stockholders according to their respective rights. The defendants acquiesced in the order for appointment of receiver and sale. There was no evidence of fraud. It was held that the fact of the agreement of the defendants to the appointment of a receiver and to a sale did not make the attorneys of the plaintiffs their attorneys, and that they were not entitled to counsel fees out of the fund realized by the sale; but that the nature of the allegations rendering employment of counsel by the defendants necessary, they and the receiver were entitled to counsel fees out of the fund.

Where an attorney was employed by an individual to conduct proceedings against an insolvent insurance company, whose assets had been placed in the hands of a receiver, and the referee reporting in regard to the attorney—"he has rendered very valuable services—*services, indeed, of a most meritorious character*, and occupying very considerable time, and involving much labor and investigation upon his part . . . and had for their purpose and effect the protection of the general fund and assets . . . and their concentration in such shape and under such control as should be for the benefit of all policy holders and others concerned in the same."

Westbrook, J., in delivering the opinion of the court, said: "There is no question, then, either as to the meri-

i. FOR COSTS.—A receiver should be allowed such costs, charges and expenses as are properly incurred in the discharge of his ordinary duties,[1] or in extraordinary services which have been

torious character of the services, or their value, and the only question is, has the court power to order the services paid? On this point I have no doubt, either on authority or principle, allowances under such circumstances have frequently been made by other judges, as well as by myself, in this State; that power has also been recognized in other States and in *England*. The court is the custodian and administrator of the estate. In the discharge of its duties it needs assistance, both to protect the trust and to enlighten its conscience as to its execution. There must therefore always be representative suits and proceedings, which, though in the name of individuals for their own benefit, are really for the benefit of hundreds of others as well. To hold that these persons who sustain all the labor and anxiety of the proceedings, which are as much for other's benefit as their own, should, in addition, bear all the expenses, would be unjust, and deter proceedings which ought to be taken, upon the grounds, first, that those who receive the benefit of labor ought to pay for it; and, second, that the protection of trusts requires representative proceedings, and that *when necessary and proper*, they should be encouraged and not discouraged; and, third, because the court, as the administrator of the trust, must have the power to compensate those who aid it in the discharge of their duty." Attorney-Gen'l *v.* Continental L. Ins. Co., 62 How. Pr. (N. Y.) 130.

But allowances to the attorney-general for services of special counsel, employed by him to aid in the settlement and adjustment of the affairs of insolvent corporations, in the hands of receivers, to be paid out of the fund, are not authorized. Attorney-Gen'l *v.* Continental L. Ins. Co., 88 N. Y. 571.

In Seligman *v.* Laussy, 60 Ga. 20, a creditor's bill was filed against certain debtors, and their assets passed into the custody of the court; afterwards, in bankrupt proceedings in the district court of the U. S., they were adjudged bankrupts, and upon the trustees in bankruptcy petitioning for the possession of such assets, an order was made directing the transfer from the receiver to them, saving so much as was required to pay for collecting and securing same up to the time of the order. *Held*, that in order to the payment of any claim out of the fund, it must be shown to fall properly within the exceptions named; and that the following were properly included therein, viz.: costs of filing the bill and of the collection of assets by the receiver; fees of counsel from the time the bill was filed until demand was made by the trustees for the assets; also services of the counsel employed by the receiver, and those rendered by himself, up to the time the surrender of the fund was ordered.

In Attorney-Gen'l *v.* Continental L. Ins. Co., 27 Hun (N. Y.) 195, certain of the creditors of the company, which was insolvent, had been allowed to intervene in the proceedings instituted by the receiver, and the privilege of having notice of, opposing and moving therein. *Held*, no allowance should be granted to the counsel of such creditors payable out of the fund: nor should their taxable costs be charged upon it.

So, where an attorney was retained by certain of the policy holders in an insolvent insurance company to resist certain improper claims made on behalf of the receiver, it was held that his services were performed for the benefit of those retaining him, and not for, or on behalf, or by the employment, of the receiver, and therefore created no indebtedness against him, for the payment of which the funds officially held by him could be lawfully appropriated. Attorney-Gen'l *v.* Continental L. Ins. Co., 31 Hun (N. Y.) 623.

And where counsel, in behalf of their clients, presented claims against the funds in the hands of a receiver of an insolvent insurance company, which were rejected, and the orders rejecting them reviewed and affirmed upon appeal, it was held, that as such services were of no value to the receivership funds, no allowance should be made therefor. People *v.* Security, etc., L. Ins. Co., 23 Hun (N. Y.) 596.

1. Kerr on Rec. (Bispham's ed.) 239; see Marsh *v.* Hussey, 4 Bosw. (N. Y.) 614, as to the rule under the New

Code of Procedure; also Attorn'l v. North American L. Ins. N. Y. 59; 43 Am. Rep. 648; 1 Eng. Corp. Cas. 577, where the n of allowance is exhaustively ed.

ular Appointment.—Where, in on to foreclose a chattel mort- receiver is appointed and there irregularity in such appoint- f, when the defendant applies to he appointment vacated, the orders the discharge of the re- provided the defendant will a sufficient bond for the judg- nd costs in the case, and the ant voluntarily does so, in pur- of such order, and has turned of the property in the posses- the receiver, such defendant is situation to contest the costs of ceiver. State Journal Co. v. onwealth Co., 43 Kan. 93.

al Receiver.—Under § 28, ch. Va. Acts, 1882 (Warth's Code, a judge of a circuit court ought appoint in vacation a special re- of real estate, or of the rents, or profits thereof, but if he do so, the court will allow such receiver to retain out of the his hands, an amount sufficient r all the costs and other legiti- xpenses incurred by him while in such capacity. Kerr v. Hill, Va. 576.

nction Between Costs of Litiga- d Costs of Administration.—In iis v. St. Louis Gas Light Co., App. 243, the issue was whether insel fees paid by a receiver art of the costs of administra- were taxable as costs in the on against the losing party. son, J., in delivering the opinion court, observed: "If we go so to hold that the amounts al- o the receiver's counsel for his s, and the other items here in n, are properly taxable as costs litigation, we establish a prin- hich would charge the plaintiffs he salaries and compensation to all the persons whom the r, during the long term of his stration, was obliged to employ ying on the extensive works had been placed in his custody r of the court. We can see no nce in principle between the nsation of the receiver's profes- adviser, and the compensation ook-keeper, his cashier, or the engineer employed by him to run the works."

Resisting Set off.—Where the receivers of an insolvent insurance company, acting in good faith, and for the benefit of the general creditors of the company, and probably under their directions, resisted a claim of set-off by a debtor of the company, they were permitted to retain their costs out of the funds in their hands, although they were clearly wrong in refusing to adjust the claim, and the claim was allowed by the court. Holbrook v. American Fire Ins. Co., 6 Paige (N. Y.) 220.

Judgment for Costs against Receiver.—Where a motion is made to compel a receiver to pay judgment for costs rendered against him, it is no ground for granting the same that the receiver has been in possession of funds within some recent period sufficient to pay the judgment; nor that he has paid other claims larger in amount: as in such a motion he is not before the court to render a general account of his trust to the creditors nor is he bound to render such an account to each particular creditor who brings him up on a like motion. Devendorf v. Dickinson, 21 How. Pr. (N. Y.) 275.

Receiver Continuing Suit Begun Prior to His Appointment.—In Camp v. Bank of Niagara, 2 Paige (N. Y.) 283, the bank commenced a suit before its insolvency, and, after their appointment, the receivers elected to proceed with it, and the plaintiffs were nonsuited. Upon the question of costs, the court said: "Although the suit against the petitioner was commenced under the direction of the officers of the bank, and was at issue before the appointment of the receivers, yet as the receivers elected to go on with that suit for the benefit of the fund, it is equitable that they should pay the whole previous costs, as well as those which occurred after they assumed the control of the suit. If the receivers did not think it for the interest of the creditors to run the risk of having the costs charged upon the fund, they should have abandoned the suit, and then the petitioner would only have been entitled to share ratably with the other creditors." See also Columbian Ins. Co. v. Stevens, 37 N. Y. 536; 35 How. Pr. (N. Y.) 101.

Wrong Form of Action.—But a receiver of a lunatic proceeding in a wrong form of action, which he was

sanctioned by the court.[1] And the costs of the receiver's appointment have priority over all other charges out of a fund realized by him.[2]

advised to abandon, and adopt another form of action, in which he succeeded for the lunatic, he was refused the costs of the abandoned proceedings, although the master reported that he had acted *bona fide*, and ought to be allowed the costs. *In re* Montgomery, 1 Moll. 419.

Where an adverse application was made against a receiver by a party to the cause, which was refused with costs, the applicant being wholly unable to pay the costs—held, that the receiver was entitled to be indemnified and have his costs, as between solicitor and client, out of the funds in his hands. Courand *v.* Hanmer, 9 Beav. 3.

Discharge of Receiver.—Receiver is allowed the costs of his application to be discharged. Richardson *v.* Ward, 6 Madd. 266.

But upon a petition to discharge a receiver and pay over the money into court, the receiver, though served, should not appear—and his costs will be disallowed. Herman *v.* Dunbar, 23 Beav. 312.

If a receiver is appointed under a mistake, he will not be charged with costs of removal. Hunter *v.* Pring, 8 Ir. Eq. 102.

And where a motion, made for the removal of the receiver, is afterward withdrawn, and he thereupon voluntarily surrenders his trust to the court, he will be allowed the costs incurred in resisting such motion, when it appears that he acted in good faith, and with integrity of purpose. Cowdrey *v.* Railroad Co., 1 Woods (U. S.) 331.

If a receiver, contrary to his duty, allow costs to accrue, he will be compelled to pay same out of his own pocket. Cook *v.* Sharman, 8 Ir.Eq. 515.

Under the English Chancery Practice, if a receiver made defense to an action without obtaining permission of the court, and was unsuccessful therein, his costs would be disallowed; though, if successful, they would be allowed him. Bristowe *v.* Needham, 2. Ph. 190. See also Swaby *v.* Dickon, 5 Sim. 629.

Where a bill is filed by a receiver of a partnership on behalf of a numerous body of creditors, under the advice of counsel, and without fault on the part of the receiver is dismissed because the allegations of fraud contained therein are unsupported by the evidence, the receiver will be allowed his costs out of any funds which have come, or may come, into his hands in such capacity. Tillinghast *v.* Champlin, 4 R. I. 173.

Reference of Accounts.—The court will not impose upon the receiver the costs of a reference to settle his accounts, where it is not claimed that his reports are made in bad faith for fraudulent purposes. Radford *v.* Folsom, 55 Iowa 276.

In Attorney-General *v.* Continental Life Ins. Co., 27 Hun (N. Y.) 524, Anderson having been removed from the receivership of an insolvent corporation, and another receiver appointed, made application for the payment of his commissions, and the court ordered the matter to be referred to a referee to report as to what would be a reasonable compensation. The report was favorable to Anderson, but it did not appear that any action had been taken thereon. Afterwards the referee obtained an order fixing his own compensation and directing the new receiver to pay him. *Held*, that the fees of the referee must be paid by Anderson upon taking up the report, to be recovered from his successor, or lost by himself, according as the referee's report was confirmed or rejected.

When the taxed bill of fees for services of the master has been paid by the receivers, the court may not, upon a final passing of the accounts, inquire into that item. *In re* Bank of Niagara, 6 Paige (N. Y.) 213.

Although a receiver ought never to present a petition, nor originate proceedings in his own name, but such application should be by parties in the cause, yet when he has incurred costs in the execution of his duty, which the parties long neglect to provide for, his petition will be allowed. Ireland *v.* Eade, 7 Beav. 55.

1. Kerr on Rec. (Bispham's ed.) 239.
2. High on Rec. (2d ed.), § 809, *citing* Read *v.* Corcoran, 1 Ir. Ch. 235.

The costs attending the application for the appointment of a receiver, may be directed by the court to be costs in the cause. Bowker *v.* Henry, 6 L. T.,

GATION DELAYING OR DELAYED BY ACCOUNTING.—
ere are rival claimants to a fund in the receiver's hands,
priate remedy for the receiver is to bring an action, in
of a bill of interpleader, to compel such rival claimants
ad, and settle their rights between themselves, and, in
ime, he may render an account of the receivership, and
ys in his hands into court, to abide the litigation upon
leader.[1] And, on the other hand, it would be unrea-
at the plaintiffs to the action in which a receiver is ap-
hould be delayed in the collection of their debts until
of the litigation over the receiver's accounts, which
upy a number of years.[2]

OUNTS OF DECEASED RECEIVER.—The court has no
n to order, in a summary way, the executor of a de-
eiver to bring in and pass his testator's accounts, and
lance to be found due out of the assets.[3] The proper
such a case is for the executor to petition the court to

opping *v.* Searson, 6 L. T.,
all *v.* Elkins, 9 W. R. 861;
be dealt with at the time
ation. Goodman *v.* Whit-
W. 593; Wood *v.* Hitch-
858; Wilson *v.* Wilson, 2
kinner's Co. *v.* Irish So-
& C. 169.

receiver is appointed by
on the application of the
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t the objection of the de-
costs and expenses as are
such erroneous appoint-
d be paid by the com-
caused them. Moyers *v.*
la. 422.

ver, in the first instance,
ts incident to completing
and they are allowed him
his first account. Hunter
r. Eq. 102.

t of New Receiver.—Where
unable to procure new
not the practice to charge
costs of the appointment
eiver. Lane *v.* Townsend,
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re a receiver, who had
inal account, and paid in
ascertained against him,
d served for 30 years, was
e was not required to pay
the appointment of a new
Cox *v.* McNamara, 11 Ir.

Receivership Extended.—Where a receiver is extended over additional lands, he must perfect additional security, or be removed from the receivership altogether. If in such case the receiver be removed, and seeks the costs incident to his original appointment, he must make a special case for them. Wise *v.* Ashe, 1 Ir. Eq. 210.

The practice is thus stated: "The receiver brings in his bill of costs upon passing his first account. The bill is then taxed, and the amount included in his disbursements. On passing his first account, the receiver's costs of completing the appointment are taxed and allowed." Kerr on Rec. (Bispham's ed.) 250.

1. Winfield *v.* Bacon, 24 Barb. (N. Y.) 154.

2. Milwaukee, etc., R. Co. *v.* Loutter, 2 Wall. (U. S.) 510.

3. Jenkins *v.* Briant, 7 Sim. 171.

But where the receivers of an insolvent corporation institute proceedings for an accounting, during the pendency of which one of the receivers dies, the court may order the accounting revived and continued against his executors, and compel them to come into such accounting and stand by such orders and decrees as may be made therein. *In re* Columbian Ins. Co., 30 Hun (N. Y.) 342. See also *In re* Foster, 7 Hun (N. Y.) 129.

Under the *English* chancery practice an executor may obtain or consent to an order to pass the accounts and to pay the balance. 2 Daniel's Ch. Pr. (5th Am. ed.) 175.

pass the accounts, discharge the bonds, and appoint a ne receiver.[1]

l. PRACTICE ON PASSING ACCOUNTS.—The established prac tice is for the accounts of a receiver to be filed and passed in th office of the master.[2] And, the well-established practice of th Federal courts is that, unless exceptions to the accounts are firs taken before the master, they cannot afterwards be taken befor the court.[3]

Strictly speaking, exceptions to the master's report on a r ceiver's account will not properly lie, as the master acts in th place of the court, in a judicial rather than a ministerial capac ity.[4] A similar rule obtains in *England*[5] and under the *Ne York* chancery system.[6]

1. Smith on Rec. 191.

And where, on the executors' application, liberty has been given them to pass the accounts and pay in the balance, they will not be allowed, after the lapse of many years, to object to the order on the ground of the want of assets. Gurden *v.* Badcock, 6 Beav. 159.

And an admission of assets to answer rents by the executor of a receiver makes him liable to interest if made. Foster *v.* Foster, 2 Bro. C. C. 616; Tew *v.* Lord Winterton, 4 Ves. 606. But not if the parties are guilty of laches. Gurden *v.* Badcock, 6 Beav. 157.

2. Foster's Federal Practice, p. 383, § 257.

3. Cowdrey *v.* Railroad Co., 1 Woods (U. S.) 331; *aff'g* 11 Wall. (U. S.) 459. This is required in justice both to the master and to the receiver. To the master, that he may have an opportunity to reconsider his decision; to the receiver, that he may sustain his account (if he can), by additional evidence, or make such explanation as the case may require. *This rule, it is true, would not deter the court from directing an account to be reformed which contained manifest errors, or plainly improper charges;* but such errors or improper charges ought to be clearly s'.own to exist, and their character as such evinced by the proofs in the case, or by their intrinsic nature. Cowdrey *v.* Railroad Co., 1 Woods (U. S.) 331.

4. Cowdrey *v.* Railroad Co., 1 Woods (U. S.) 331. For the books make a distinction between a master's report on a receiver's account and a master's report containing an account taken and stated by himself, or a report upon a matter referred to him for his own investigation and ascertainmen A receiver is an officer of the court a well as a master, and states his own ac counts, and submits them to a maste for inspection under the order of th court; the master acting in place o the court, in a judicial, rather than ministerial capacity. Strictly speak ing, exceptions to his report in suc cases do not properly lie, as they do t an account stated by himself, as in th case of executors, administrators, trus tees or partners, who are ordered t account before him. *Nevertheless, i the master adopt any erroneous prin ciple in allowing a receiver's accoun the court, on petition of the proper par ties, will refer the matter back to hi for correction.* The duty of the cour when the master has submitted his re port upon a receiver's accounts, con sists in reviewing the principles an rules adopted and followed by the mas ter in allowing the receiver's account rather than in examining the items o the accounts, in detail, or the evidenc on which those items are severall founded; the latter duty belongin more especially, to the province of th master acting in his judicial capacity analogous to the province and duty o a jury on questions of fact. Cowdre *v.* Railroad Co., 1 Woods (U. S.) 33

5. A master's report of a receiver account does not require confirmatio and cannot be excepted to; but th court will enter into consideration o objections to the general principle o which the master has proceeded i taking such account, but not of objec tions to particular items in it. Shewe *v.* Jones, 2 Sim. & L. 170; *aff'g* 3 Rus 522.

6. Brower *v.* Brower, 2 Edw. Ch (N. Y.) 621. And under the laws o

WHOSE INSTANCE ACCOUNTS RENDERED.—If a make default in rendering his accounts at the time ap- the court will compel him to do so, upon the application arty interested.[1]

ECTIONS TO ACCOUNTS—HOW TAKEN.—When a cred- s to review proceedings had on the settlement of the ac- a receiver, on the ground that claims allowed and paid ne receivership funds, under an order of court, are fic- nd unfounded, the proper course is for him to apply to a party to the suit in which such order was made, and ame vacated.[2]

78, the creditors of an insol- ration are entitled to notice, present at the receiver's ac- Greason *v.* Goodwillie- o., 38 Hun (N. Y.) 138.

sey Practice.—A master's a receiver's account requires n, and exceptions may be to; and the several items of t may be examined. Rich- rris Canal, etc., Co., 4 N. J. ee also Mechanics' Bank *v.* ew Brunswick, 3 N. J. Eq. lsey *v.* Cummings Car N. J. Eq. 432.

f Accounting Under English ystem.—A receiver must file ts at the judge's chambers, e appointed by the judge. filing same, his solicitor a summons to proceed hich must be served upon rs of such parties as have a tend the passing of the ac- o a copy of the order of the appointment, certified by correct copy, must be filed e time, if not done before. iver neglect to take out the any of the parties may do the summons is returned, attend, and the accounts rough before the chief clerk. er is generally ordered to of his accounts to such are entitled to attend the ereof. When the accounts they are entered by the re- icitor in duplicate books, ntry in each book must be his affidavit. One of these d the "Receiver's Book," is ambers until the receiver- npleted, at which time it is nt the "Record and Writ fice." The other book is the receiver from time to time. After allowance of the account, a certificate of the allowance, setting out the balance due from the receiver, and the time for payment of same into court, is then made out and signed by the chief clerk, and approved and signed by the judge, and thereupon is left at the report office and acted upon forthwith. Where the certificate directs a payment into court, the receiver's solicitor should obtain an office copy thereof, and leave same at the office of the accountant-general, together with the order directing the payment of the receiver's balances into the bank, and obtain a direction for such payment. The amount is then paid in on such direction. 2 Daniel's Ch. Pr. (5th Am. ed.), p. 1753, *et seq.*

1. Lowe *v.* Lowe, 1 Tenn. Ch. 515; Stretch *v.* Gowdey, 3 Tenn. Ch. 565; Adams *v.* Woods, 8 Cal. 306.

Application by a third person that the receiver shall pass his accounts, and that the applicant be at liberty to attend, will be refused. Colburn *v.* Cooper, 8 Ir. Eq. 510.

But a creditor who has proved his debt under a decree is entitled to apply for summons on the receiver to account. Locke *v.* Ashe, 1 Hog. 143.

However, a receiver cannot be compelled, in the middle of a suit, to account to a party; being an officer of the court, and not of the party, he is accountable only to the court which appointed him. Musgrove *v.* Nash, 3 Edw. Ch. (N. Y.) 172.

2. Schenck *v.* Ingraham, 4 Hun (N. Y.) 67; 5 Hun (N. Y.) 397.

If, however, the accounts of a receiver have been passed, the only mode of assailing them is by a direct proceeding in court, and before the court, showing special reasons why they should be re-examined. Farmers' L.

o. APPEAL FROM SETTLEMENT OF ACCOUNTS.—A receiver, being a mere officer or agent of the court for the custody of the receivership property or funds, cannot appeal from an order of the court to turn over the property or funds in his hands.[1] But when the order erroneously fixes the amount of property in the receiver's hands, and directs him to turn over more than he has in custody, it is essential to the protection of his rights that he should be allowed to appeal, and in such a case the law will permit him to do so.[2] He also has the right of appeal from a final decree ascertaining the balance for which he is liable;[3] the receiver, though an officer of the court, for this purpose occupies the position of a party to the suit.[4]

5. Removal and Discharge.—The court which appoints a receiver has also power to remove or discharge him. The distinction made by the cases between removal and discharge is this: The removal of an officer takes place when for sufficient cause it is best that the receiver be displaced by a successor in the office. A receiver will be discharged when the objects sought by the receivership have been attained. Removal, therefore, merely affects the person who is receiver, while discharge terminates the receivership itself.[5]

The rules of law as to notice, practice, appeals, etc., being applicable for the most part alike to removal and discharge of receivers, will be treated together. On the other hand, the cause for removal and the grounds for discharge being different, each subject will in these respects receive separate special treatment.[6]

a. REMOVAL—POWER IN GENERAL.—The power of a court of equity to remove or discharge, at any time, a receiver whom it has appointed as its representative or agent for the custody of property, is well established, and must be regarded as a necessary incident or consequence of the power to appoint.[7] Formerly i

& T. Co. *v.* Central R. Co., 1 McCrary (U. S.) 352; 2 Fed. Rep. 751.

1. How *v.* Jones, 60 Iowa 70.

In *Georgia* when an auditor is appointed by the court to pass upon the accounts of a receiver, he may demand a jury to pass upon such exceptions as he may take to the auditor's report. Akers *v.* Veal, 66 Ga. 302.

2. How *v.* Jones, 60 Iowa 70.

3. Hinckley *v.* Gilman, etc., R. Co., 94 (U. S.) 467; Hovey *v.* McDonald, 109 U. S. 150.

4. Hinckley *v.* Gilman, etc., R. Co., 94 U. S. 467; *In re* Guardian Sav. Inst., 78 N. Y. 408.

5. Foster's Fed. Prac., § 260; High on Receivers (3d ed.), §§ 820, 832; Beach on Receivers, §§ 775, 791.

6. See *infra*, this title, *Removal—Power in General;* also, *Discharge—Power in General.*

7. Gluck & Becker on Receivers, § 11 High on Receivers (3d ed.), § 820; *re* Colvin, 3 Md. Ch. 300; Ferry Bank of Central N. Y., 15 How. P (N. Y.) 446; Crawford *v.* Ross, 39 G 44; McCullough *v.* Merchants' L. T. Co., 29 N. J. Eq. 217.

The appointment and discharge receivers, as well as the passing other orders in chancery, the object which is to protect the property or preserve things in *statu quo* until regular hearing can be had, are, fro their nature, such powers as, to be any practical use, must be exercised vacation by the chancellor, and for th purpose a court of equity is alwa open. The same public policy whic makes it proper to take action in suc cases on an emergency, also requir that it should be in the power of th chancellor on motion and notice

e inflexible rule in chancery that the court alone which ap-
d a receiver had the power to remove or discharge him;[1]
the United States this rule has suffered essential modifica-
rendered necessary where there arises a conflict of jurisdic-
etween the Federal and State courts upon the removal of
from the latter to the former.[2] In some States also, statu-
rovisions permit, in proper cases, a court other than the ap-
ng court, to remove a receiver.[3] The exercise by the
ting court of its power to remove or discharge a receiver

d vacate. Crawford *v.* Ross,
4.
io, the authority of the several
of the court of common pleas
court, and to exercise jurisdic-
chambers in their respective
is coequal, and extends
out the district. Cincinnati,
Co. *v.* Sloan, 31 Ohio St. 1.
ng *v.* Montgomery, etc., R. Co.,
ls (U. S.) 619. In this case it
d that the power to remove a
exists in no other court than
which appointed him, no
what showing interested par-
be able to make as to the in-
ency, dishonesty, or unfitness
eceiver.
ster's Fed. Judiciary Acts, 19,
on on Removal of Causes, § 80,
ahaney Min. Co. *v.* Bennett, 4
U. S.) 289; Texas, etc., R. Co.
17 Fed. Rep. 280; Hinckley *v.*
etc., R. Co., 100 U. S. 153;
v. Wabash, etc., R. Co., 29 Fed.
1.
general rule the court to which
ication for an order of dis-
must be made is the court of
he receiver is an officer. A
tion of this doctrine has grown
American practice out of the
of removal exercised by the
States courts. Thus, where in
n pending in the State court a
has been appointed, and then
ny motion for discharge was
e case is removed into the
States court, the motion for
harge may be made in that
t any time after the record is
such motion having been
the State court. Texas, etc.,
v. Rust, 17 Fed. Rep. 275; Ma-
Min. Co. *v.* Bennett, 4 Sawy.
289; Dillon on Removal of
§ 80, p. 99. "But if the defend-
made the motion and submit-
the determination of the State
efore the removal, and that
court had denied the motion, and they had then removed the cause, this court would not have entertained a motion on the same record until the trial term." Texas, etc., R. Co. *v.* Rust, 17 Fed. Rep. 275.

3. N. Y. Laws 1883, ch. 378, § 7 (re-enacting Laws of 1882, ch. 331, § 3, and amending Laws of 1880, ch. 537, § 3). This section has the following provision: "The attorney-general may, at any time he deems that the interest of the stockholders, creditors, policy holders, depositors, or the beneficiaries interested in the proper and speedy distribution of the assets of any insolvent corporation, will be subserved thereby, make a motion in the supreme court, at a special term thereof in any judicial district, for an order removing the receiver of any insolvent corporation and appointing a receiver thereof in his stead, or to compel him to account, or for such other and additional order or orders as to him may seem proper to facilitate the closing up of the affairs of such receivership, and any appeal from any order made upon any motion under this section shall be to the general term of said court of the department in which such motion is made."

In Cincinnati, etc., R. Co. *v.* Sloan, 31 Ohio St. 1, construing Ohio Code, § 253, which provided that, "A receiver may be appointed by the supreme court, the district court or the court of common pleas, or any judge of either, or, in the absence of such judges from the county, by the probate judge thereof," Judge White said: "The same power to appoint receivers is conferred on the judges named as on the courts, and although there is no express provision authorizing the discharge of a receiver, either by the court or a judge, yet we think the power to vacate is clearly implied in the power to appoint. . . . It is claimed that neither the appointment nor discharge of a receiver can

rests in the sound discretion of such court upon cause shown; as, where the existence of the receivership is no longer necessary for the preservation of the property and protection of the interest therein of all parties, or where, from negligence, misconduct or abuse in the exercise of the power with which a receiver has been clothed, his removal or substitution becomes necessary.[1]

be made out of the county in which the action is pending. There is no ground for this claim. The judges of the court of common pleas are judges of their respective districts. The subdivision of the districts is for election purposes merely. The authority of the several judges to hold court and to exercise jurisdiction at chambers is coequal, and extends throughout the district. Any number of them may sit holding the same court. The judicial labor of the district is to be apportioned by the judges among themselves. It is also claimed that it is implied, from the clause of the statute which authorizes a probate judge to act in the absence of the other judges from the county, that the authority of those last named is also limited to the county. We think no such implication arises. The clause in relation to the probate judge was merely designed to give parties the privilege, when there was no other judge in the county, of applying to the probate judge rather than to compel them to go out of the county to find one of the other judges to whom to make the application," See also Penn. v. Whiteheads, 12 Gratt. (Va.) 83.

1. High on Receivers (3d ed.), § 824; First Nat. Bank v. Barnum Wire, etc., Works, 58 Mich. 315; Crawford v. Ross, 39 Ga. 44; *In re* Colvin, 3 Md. Ch. 300; Bayly v. Gaines (Va. 1887), 2 S. E. Rep. 739; Ferry v. Bank of Central N. Y., 15 How. Pr. (N. Y.) 458; Siney v. New York Consolidated Stage Co., 28 How. Pr. (N. Y.) 481; 18 Abb. Pr. (N. Y.) 435. In this last case Clerke, J., said: "Before the person who was in the first instance appointed receiver entered on his duties, and indeed before the appointment was consummated by the filing of the requisite bonds, the judge, in the exercise of the same discretion which induced him to make the first nomination, reconsidered his action, revoked that nomination, and substituted another person. It is of no consequence how or where he received any information which induced him to make the substitution. We think he exercised a discretion which cannot be controlled by us." And in Copper Hill Min. Co. v. Spencer, 25 Cal. 16, Justice Sawyer said: "If it should appear subsequently that the appointment of the receiver was improvidently made, the court would undoubtedly have power to vacate it. In this instance the court, upon the trial, was satisfied that the plaintiff upon his own testimony failed to sustain the *prima facie* case made by his pleadings and affidavit. Upon such a state of the case, it was clearly competent for the court to vacate the order, notwithstanding a motion for a new trial was pending, and admitting the effect of the motion to be to stay proceedings generally. The order might have been vacated before trial, upon a proper showing, and with much greater reason after it had appeared upon the trial, to the satisfaction of the judge, that there was no probability of an ultimate recovery in the action. The judge does not appear to have vacated the order as a matter of course upon granting the non-suit. He took the question under advisement, and it must be presumed that the propriety of continuing the receiver, under all the circumstances of the case, was fully considered. We cannot perceive, from anything shown by the record, that the court, in vacating the order, exceeded the bounds of a sound judicial discretion. We may add, it is not clear that the affidavit makes a sufficient *prima facie* case to justify the appointment of the receiver in the first instance."

Where a receiver is ready and willing to pay in full the debt of a creditor of the estate who has petitioned for his removal, and it appears that the other creditors are satisfied with the receiver, the petition will be denied. First Nat. Bank v. Barnum Wire, etc., Works, 60 Mich. 487.

In *Ohio* a receiver of the assets of an insolvent bank, appointed pursuant to the provision of § 41 of the act of Feb. 24, 1845, "to incorporate the State Bank of Ohio and other banking companies," could not, under the then

What Have Been Held Sufficient Causes for Removal.—The ving have been held sufficient causes for the removal of a re- : interest in the subject-matter of the litigation;[1] informalities

g laws be, removed from his t the pleasure of the officers by he was appointed. State *v.* ol, 13 Ohio St. 14.

he discharge of a receiver may a matter of absolute right, in of which the court has no dis- ; as where the primary object action was to foreclose a mort- he amount of which, together nterest, had been fixed by the and the mortgagor was ready ling to pay the same, the right that sum and have the receiver ged and his property restored is bject to the discretion of the Justice Miller, in rendering the n of the court, said:

e right of the owner to this s, under ordinary circumstances, ear, and a refusal by the court him this right would seem to r the revisory power of this when the whole case is before it, record brought here by appeal final decree.

e only doubt which the court ave on the question arises from nciple that the appointment and ge of a receiver are ordinarily s of discretion in the circuit with which this court will not e.

a general rule, this proposition is nied. But we do not think it ble to the case before us. While ties to this suit were fiercely liti- the amount of the mortgage nd questions of fraud in the of that debt, the appointment, or scharge of a receiver for the ged property, very properly be- to the discretion of the court in the litigation was pending. But hose questions have been passed y the circuit court, and by this lso on appeal, and the amount debt definitely fixed by this the right of the defendant to pay m, and have a restoration of his ty by discharge of the receiver, r and does not depend on the ion of the circuit court. It is a which the party can claim; and nows himself entitled to it on the the record, there is no discre- the court to withhold it. A re- s error—judical error—which this court is bound to correct when the matter, as in this instance, is fairly before it. That the order asked for by appellants should have been granted, seems to us very clear." Milwaukee, etc., R. Co. *v.* Soutter, 2 Wall. (U. S.) 521.

The discretion of the court is not an arbitrary or capricious discretion. Conner *v.* Belden, 8 Daly (N. Y.) 257.

1. Williamson *v.* Wilson, 1 Bland. (Md.) 427.

Although there be nothing against the character or ability of the person, yet if he have a private interest in conflict with the management, he will not only not be selected to receive and manage, but will be removed from a situation which he already occupies. Fripp *v.* Chard R. Co., 22 L. J. Ch. 1084; 11 Hare 260. And see Cookes *v.* Cookes, 2 De G. J. & S. 530.

In Bank of Monroe *v.* Schermerhorn, Clarke Ch. (N. Y.) 366, the vice-chancellor said: "It is unquestionably the usual and sound rule that a party to the suit, or a party interested in the suit, should not be appointed a receiver. This officer should be indifferent to the parties and not tempted to be swerved by self-interest from the independent and impartial performance of his duties. No authorities can be needed to sustain such a proposition. It commends itself to every one's notions of justice and propriety." But when a party interested in a suit, as stock holder in a corporation plaintiff, has been appointed receiver without knowledge of the fact that he was such stockholder, and has acted as such for some months, has made himself familiar with the property intrusted to his care, and has acquired an information in relation to it and its complicated details, and the circumstances of the numerous tenants, which a new receiver would be some time in acquiring, and there is no objection to his fidelity, responsibility or fitness for the office, or any complaint of an improper exercise of his powers, or an improper discharge of his duties, such receiver will not be removed immediately, but it will be referred again to the master with liberty to propose the same receiver, and the receiver will in the mean time have the custody and charge of the property. Bank of Mon-

in the appointment, but this may be affected by the acquiescence of the defendant for an unreasonable length of time;[1] collusive appointment in fraud of the rights of the parties;[2] where the receiver's security was, or afterwards became, insufficient,

roe *v.* Schermerhorn, Clarke Ch. (N. Y.) 366.

In Lafayette Bank *v.* Buckingham, 12 Ohio St. 419, the petition of the plaintiff averred that he was a judgment creditor of the Licking County Bank; that said bank was a branch of the State Bank of Ohio, organized under the act of 1845; and that in 1852 said Licking County Bank committed an act of insolvency, and that shortly afterwards the board of control, under said banking act of 1845, appointed the defendant a receiver, into whose hands the remaining assets of said insolvent bank then came; that among the assets were certain credits of the bank and parcels of real estate; that the real estate so belonging to the bank had not been sold by the receiver, nor by him converted into money for purposes of said trust, and that plaintiff did not know what disposition had been made of the other assets. The plaintiff then alleged that the defendant had, in disregard of his duties, purchased from the State Bank of Ohio all its beneficial interest in the subject-matter of said trust, and received from said State Bank a deed of conveyance of the said real estate, and claimed the same as his own; and thereupon the plaintiff asked that the defendant be required to discover and account as to the assets so by him received, and that the plaintiff have judgment against him. On demurrer to the petition it was held that the facts in the petition did not constitute a cause of action; that by section 24 of said banking act of 1845, the property, real and personal, of the insolvent bank, became vested in the State Bank, in trust for the purposes mentioned in the act; and that the defendant, as receiver, is to be regarded as a ministerial officer or agent of the State Bank, and as acting under its direction in settling up the affairs of the insolvent bank. The gist of the action, as stated in the petition, seemed to be that the defendant had been delinquent in the discharge of his duties as a trustee, to the prejudice of the plaintiff as a beneficiary of the trust. But the only trust stated in the petition resting upon the defendant was that arising from his office of receiver; and it was not only not charged that the defendant had not acted in accordance with the directions of the board of control, but was expressly charged that the board of control sold and conveyed their interests in the assets of the bank to him. Nor was it said that the defendant had not paid the full value of said assets to the state board of control, and all the charges of misfeasance and delinquency of duty made against the defendant connected him with the board of control, and impliedly, if not expressly, admitted that the defendant had in those particulars, as well as in others, acted under the direction of the board. The doctrine of *respondeat superior* seemed, therefore, opposed to the right of the plaintiff to recover of the ministerial officer of the board of control for so acting under and in accordance with their directions.

1. Bank of Monroe *v.* Schermerhorn, Clarke Ch. (N. Y.) 366.

2. And a receiver who obtains his appointment by fraud and collusion will be compelled to restore the fund with interest to the one from whom it was obtained, without any allowance for fees or expenses, and will be charged with any loss that the fund has incurred while in his hands.

In O'Mahoney *v.* Belmont, 62 N. Y. 133, the facts of the case were these: Plaintiff sued defendants for the purchase price of certain bills of exchange which were lost, and asked that said sum be paid into court and an order made appointing a receiver to take charge of and receive the same. Before the hearing and without the knowledge or assent of the parties, B procured himself to be appointed receiver of the moneys "deposited for said bills of exchange," and obtained an order directing defendants to pay over the amount to him. The receiver made a demand of the defendant for the money, who declined to pay. An order was then obtained that defendant show cause why he should not be punished for contempt, and notwithstanding the opposition of the parties, an order was granted directing L (the defendant) to pay over the moneys, or, in default, be committed to jail, whereupon L paid over the amount to B. An order was

sequently granted on motion of intiff's attorney directing the re- ver to pay to him, for counsel fees d disbursements in the action, $2,500, ich was paid by the receiver with the owledge that an appeal would be en by the defendant. L appealed m all the aforesaid orders and they re all reversed, and an order, upon tice, subsequently made appointing eferee to take and state the accounts the receiver. The referee reported, owing the receiver for the $2,500 d to the plaintiff's attorney, and also commissions and disbursements, and arging him with the sum originally eived, with four per cent. inter- . L excepted to so much of the re- rt as charged the receiver with inter- only at the rate of four per cent. d for so much as allowed him for bursements, commissions, fees, etc. e exceptions were sustained and the urt charged the receiver with the orig- l amount, with lawful interest, not- thstanding the fact that the bank in ich the moneys had been deposited B had subsequently failed, and allowed the disbursements for nmissions and fees, and charged him the receiver's fees. In rendering decision, Miller, J., said:

"The appointment of the receiver this action, and the subsequent pro- edings had in regard to the same, s an invasion of the rights of the rties, calculated to waste and deplete alleged fund, and not demanded by nature of the action or the circum- nces of the case. The reasons for ch a conclusion are entirely appar- t. The action was in reality for oney had and received by the de- ndants, and if any liability existed, it ose from the purchase of bills of ex- ange of the defendants which had en delivered, and it is claimed were t. It was not a legal claim for any ecific property or fund which be- ged to the plaintiff, but in reality ordinary action to recover money. ere is no principle which sanctions appointment of a receiver in such ase, and it is entirely without a pre- dent to uphold it. . . . Where ch a right exists it is usually called in ercise upon the application of one more of the parties in interest. hile the court may upon its own tion nominate a receiver where the se requires it, such a proceeding nnot, according to the regular prac- e, be inaugurated and conducted by outside parties who had no connection with the case, or interest in the subject-matter of the litigation. A person not having any interest cannot propose a receiver, and it is contrary to the orderly and regular proceedings of a court of justice to allow a stranger to participate in a motion for such an appointment. Attorney-Gen'l *v.* Day, 2 Madd. 246; Edw. Receiver 22. The attorney for the receiver had no interest whatever in the controversy, and was an entire stranger to the suit and the parties. Nor had the receiver any connection with the attorneys in the case. Both of these persons, the receiver and his attorney, undertook to obtain control of the money in a most unaccountable and unjustifiable manner. The attorney who was employed by the receiver appeared without any authority whatever from the parties, participated in the proceedings without any solicitation or request of either of the parties; and against their remonstrance, resistance and determined opposition, the receiver was thrust into the office. Nor was this all. A fraud was perpetrated in procuring the order. While the motion had been suspended to enable the plaintiff to serve additional affidavits, and before counter affidavits could be procured, and in violation of an express stipulation, the order was entered and the receiver appointed. Such a transaction could not stand the test of a judicial scrutiny, and this with the other proceedings of the receiver was very properly reversed upon appeal. . . . It is sufficiently apparent that the entry of the order under the circumstances, by the attorney employed by and with the concurrence of the receiver, was an abuse of the proceedings which cannot be disregarded, and for which he should be held responsible. It constituted him an intruder and a trespasser upon the rights of the parties. As he assented to and participated in the transaction, there is no sufficient reason why he should not be held accountable for his acts. He had full notice that the order of appointment was not to be entered until the defendants had an opportunity to be heard at a subsequent day agreed upon by the attorneys, and the conclusion is irresistible that it was done before the time stipulated, with his knowledge and approval. He also knew that the parties to the suit did not desire that a receiver should be appointed, and in

[illegible] provide additional security;[1] irreg- [illegible] bankruptcy or insolvency of re-

[illegible] protest [illegible] to [illegible] to [illegible] he [illegible] to [illegible] in an- [illegible] receiver [illegible] interven- [illegible] con- [illegible] cir- [illegible] had [illegible] tection [illegible] giving [illegible] the [illegible] and [illegible] egal and [illegible] lead to [illegible] as in the [illegible] belonging [illegible] frittered [illegible] the pay- [illegible] expenses [illegible] authorized, to [illegible] and the

[illegible] contracts, and a [illegible] obtained binds [illegible] the parties. It [illegible] acts. Kerr on [illegible] 294. The re- [illegible] control of the [illegible] entirely unneces- [illegible] and in opposition [illegible] parties in interest, [illegible] cannot be justi- [illegible] subjected them to [illegible] expenses, there is [illegible] should not be held [illegible] or that he [illegible] for any of the [illegible] And see Bow- [illegible] Pr. (N. Y.) [illegible] Mechanics' Banking [illegible] Co. 60 Barb. (N.

[illegible] Barney, 5 Hun (N. [illegible] of a joint stock [illegible] receiver of its [illegible] by a judge of New [illegible] special term, in an [illegible] for an account- [illegible] appointment of a re- [illegible] the commencement [illegible] action was com- [illegible] county by a stock- [illegible] of himself and other [illegible] a similar purpose, and [illegible] for certain alleged [illegible] breaches of duty on the part of the trustees. At special term in the city of Albany, the court, upon the application of the complainant, and after the report of a referee that the appointment of the first receiver was improper, because as a trustee of the company he had "assisted in and consented to an improper and unauthorized disposition of portions of the assets and property" of the company, "and had thereby rendered himself liable to an action therefor, by any receiver of such property and assets who might be appointed on behalf of the plaintiff and any other stockholder who had not assented to such improper and unauthorized transfer," vacated the appointment of the first receiver and appointed another, directing the former to deliver up, transfer, and convey to his appointee, all books, papers, vouchers, assets and property in his hands or under his control, belonging to the corporation. The receiver first appointed thereupon applied at special term in New York county for an injunction perpetually restraining the second receiver from interfering with him as receiver; this application was refused, and, upon appeal by the receiver, the judgment was affirmed, the court by Daniels, J., saying: "A collusive or fraudulent proceeding, even though judicial in its nature, cannot be maintained, but it may be assailed and disregarded whenever and wherever it may be brought into question."

1. Upon the security becoming insufficient a rule will be made upon the receiver to show cause why he should not give other sureties, and upon his failure to do so, he will be removed; and it must very clearly appear that the court below erred before the appellate court will reverse its action. Schakelford *v.* Schakelford, 32 Gratt. (Va.) 481.

2. Bertie *v.* Lord Abingdon, 8 Beav. 53; *In re* St. George's Estate, 19 L. R. I. 566.

And where the receiver had been accustomed to bring in his account very irregularly in point of time and thereby the actual balance in his hands never clearly appeared, he was specially ordered to bring in his accounts before a given day in every year, accompanied with an affidavit showing the actual balance in hand. Inquiries were also directed as to former balances, and he

ceiver;[1] misconduct or misbehavior on the part of the receiver;[2]

was ordered to pay the cost of the application. Bertie *v.* Lord Abingdon, 8 Beav. 53.

1. Daniel's Ch. Pl. & Prac. (5th Am. ed.) vol. 2, p. 1765; Kerr on Rec. (Bispham's ed.) p. 267; Crawford *v.* Ross, 39 Ga. 48; Bank of Monroe *v.* Schermerhorn, 1 Clarke Ch. (N. Y.) 366.

In Ellard *v.* Cooper, 17 Ir. Ch. N. S. 15, the receiver had presented a petition to the court of bankruptcy, and had compromised for the payment of his debts by installments. The compromise had been approved by the court, and on motion, the master of the rolls made an order that the receiver should be discharged, and should forthwith pass his final account.

2. A receiver of an insolvent railroad company may be removed for unjust discrimination against rival shippers. As, where a receiver, on taking charge of his office, found that there existed a verbal contract between the Standard Oil Company and the traffic manager of the road, by the terms of which the Standard Oil Company was charged ten cents per barrel for the transportation of its oil over the road, while all rival shippers of oil were charged thirty-five cents per barrel, the excess of twenty-five cents collected from other shippers being paid over to the Standard Oil Company as a rebate, making them, as the receiver said in a letter, "twenty-five dollars a day, clear money," on the oil of one shipper alone. The receiver was forced to carry out this contract by a threat of the Standard Oil Company to store its oil until they could lay pipe lines to Marietta, and thus deprive the road of their shipments (which were far in excess of all others combined), entirely. After agreeing to the contract, however, he sought to fortify himself by obtaining an opinion from his counsel that it might be legally carried out. These facts were disclosed in an action brought by one of the shippers discriminated against, and the court by Baxter, J., in removing the receiver, thus commented on his conduct, and that of the parties to the discrimination:

"May a receiver of a court in the management of a railroad, thus discriminate between parties having equal claims upon him, because he can thereby accumulate money for the litigants? It has been repeatedly adjudged that he cannot legally do so. Railroads are constructed for the common and equal benefit of all persons wishing to avail themselves of the facilities which they afford. While the legal title thereof is in the corporation of individuals owning them, and to that extent private property, they are, by the law and the consent of the owners, dedicated to public use. By its charter, and the general contemporaneous law of the State, which constitute the contract between the public and the railroad company, the State, in consideration of the corporators to build, equip, keep in repair and operate said road for the public accommodation, authorized it to demand reasonable compensation from every one availing himself of its facilities for the service rendered. But this franchise carried with it other and correlative obligations. Among these is the obligation to carry for every person offering business, under like circumstances, at the same rate. All unjust discriminations are in violation of the sound public policy, and are forbidden by law. We have had frequent occasion to enunciate and enforce this doctrine in the past few years. If it were not so, the managers of railways, in collusion with others in command of large capital, could control the business of the country, at least to the extent that the business was dependent on railroad transportation for its success, and make and unmake fortunes for men at will. The idea is abhorrent to all fair minds. No such dangerous power can be tolerated. Except in the mode of using them, every citizen has the same right to demand the service of railroads on equal terms that they have to the use of a public highway or the government mails; and hence, when in the vicissitudes of business, a railroad corporation becomes insolvent, and is seized by a court and placed in the hands of a receiver, to be by him operated pending the litigation, and until the rights of the litigants can be judicially ascertained and declared, the court is as much bound to protect the public interest therein as it is to protect and enforce the rights of the mortgagors and mortgagees. But after the receiver has performed all obligations to the public, and to every member of it—that is to say, after carrying passengers and freight offered, for a reasonable

compensation, not exceeding the maximum authorized by law if such maximum rates shall be prescribed upon equal terms to all—he may make for the litigants as much money as the road thus managed is capable of earning. But all attempts to accumulate money for the benefit of the corporators or their creditors, by making one shipper pay tribute to his rival in business, at the rate of twenty-five dollars per day or any greater or less sum, thereby enriching one and impoverishing another, is a gross, illegal and inexcusable abuse of a public trust, that calls for the severest reprehension.

"The discrimination complained of in this case is so wanton and oppressive that it could hardly have been accepted by an honest man, having due regard for the rights of others, or conceded by a just and competent receiver, who comprehended the nature and responsibility of his office; and a judge who would tolerate such a wrong, or retain a receiver capable of perpetrating it, ought to be impeached and degraded from his position. A good deal more might be said in condemnation of the unparalleled wrong complained of, but we forbear. The receiver will be removed. The matter will be referred to a master to ascertain and report the amount that has been, as aforesaid, unlawfully exacted by the receiver; which sum, when ascertained, will be repaid to the shipper. The master will also inquire and report whether any part of the money exacted by the receiver has been paid to the Standard Oil Company, and, if so, how much, to the end that if any such payments have been made, suit may be instituted for its recovery." Handy *v.* Cleveland, etc., R. Co., 31 Fed. Rep. 689.

A railway company became embarrassed. Several of its directors and officers, who were also indorsers of its paper, determined, as managers of the company, to apply in its behalf for the appointment of a receiver. The application was granted by the United States court in Missouri as to all the property of the railroad, including lines in Illinois, and two of the officers of the company were appointed receivers, one of them being an indorser of the company's paper. In making the application for a receiver, important facts were suppressed, and in their subsequent management of the road the receivers allowed large rebates in favor of another railway company owned by persons identified in business with the receivers. Excessive rebates were also allowed to a coal company in which they were shareholders, and large amounts of coal purchased from the same company, for the use of the road, at too high a price. Coal was also carried for the coal company at too low rates, in addition to the rebate given. The receivers also co-operated with a "purchasing committee" seeking to buy the road, in its efforts to force, by threats of long and expensive litigation, a minority of bond and stockholders who objected to the sale, to agree thereto. With the same end in view, they also refused to pay the interest on bonds held by those who refused to agree to the scheme of the "purchasing committee" while paying the interest on the same issue of bonds held by parties agreeing thereto. It was held that these and other such facts warranted the United States court in Illinois, on a bill filed by the objecting bond holders, to assume control of so much of the property as lay within its jurisdiction, remove the receivers, and appoint in their place "some capable, trustworthy person" to act as receiver. Beers *v.* Wabash, etc., R. Co., 29 Fed. Rep. 161; 26 Am. & Eng. R. Cas. 441.

Where a receiver is an officer of a corporation at the time it becomes insolvent, and it appears proper that his conduct, as such officer, should be investigated to see whether he has not obtained a benefit or advantage which in equity he ought not to be permitted to retain, sufficient cause for his removal exists. McCullough *v.* Merchants' L. & T. Co., 29 N. J. Eq. 217. And where the receiver of a company, who had been one of its directors, was charged with having known of, and acquiesced in the mismanagement for which the suit was begun, and with being improperly interested in contracts made by the company, facts being shown tending to prove these charges, many of which were not denied, it was held that he was not a proper person to exercise the powers of a receiver, and that his appointment should be revoked. The fact that the suit was instituted for his benefit would not justify his being continued as a receiver. Keeler *v.* Brooklyn El. R. Co., 9 Abb. N. Cas. (N. Y.) 166.

Where the charges against a receiver to wind up partnership affairs were,

gross dereliction of duty;[1] substitution of another receiver by the consent of the parties to the action;[2] receiver's own application for

amongst others, that although he had assets in his hands, he allowed the rent of the partnership premises to fall into arrear, so that the landlord distrained, and that he had attempted to remove the business from London to Battersea, to the injury of the defendant and the advantage of the plaintiff, there was sufficient evidence at least in support of these charges to lead the vice-chancellor to say that the receiver had forfeited the confidence of the court, and he was discharged, and required to pay the costs of the motion. Mitchell *v.* Condy, W. N. (Pt. II, 1873) 232.

A charge against a receiver of misbehavior, which consisted in permitting the owner of the estate to remain in part possession to the prejudice of the estate, will not, it seems, be admitted as a reason for discharging the receiver, because the parties themselves have caused the loss by not invoking the power of the court to compel the owner to deliver up possession to the receiver. Griffith *v.* Griffith, 2 Ves. 400.

When a receiver acts entirely upon the suggestions and advice of his attorneys, in whom the court has full confidence, in compromising suits to recover property in the interest of the fund, he will be held blameless, whether the attorneys acted in good faith or not. A receiver had acted upon the advice of his attorneys in petitioning the court for leave to compromise a suit instituted to recover a large amount of valuable real estate, which it was supposed had been conveyed to third persons in secret trust for the defendant corporation, the evidence, in the opinion of the attorneys, not being sufficient to establish such trust. Authority was asked, and granted, to release the receiver's claims to all the land sued for, though no representations were made in the petition as to the actual value of the property, and it was not claimed that the corporation had received compensation for all it had conveyed. There was also scattered around amongst various local organizations, a large quantity of personal property belonging to the corporation, consisting of sheep, horses, cattle, etc., which the receiver, in his numerous attempts to recover in specie, found it impossible to identify, and which was in such a condition that had he attempted to reclaim it, enormous expense would have been incurred. Acting, therefore, upon the advice of counsel, he compromised and settled all the claims for $75,000 cash, though the total value was probably far in excess of that amount. No special report was made of the settlement, but there was no attempt made to conceal it, and it was a matter of common knowledge. It was held that the receiver's action in both cases was proper, and that neither he nor his attorneys were guilty of any misconduct in their representations to the court. United States *v.* Church of Jesus Christ (Utah, 1889), 21 Pac. Rep. 506.

Evidence of Misconduct.—Questions relating to the conduct and financial condition of a receiver while acting as a private citizen, or in any other capacity than that of receiver, will not be allowed upon an examination of charges against him relating to his conduct as an officer of the court. U. S. *v.* Church of Jesus Christ (Utah, 1889), 21 Pac. Rep. 503.

1. *In re* St. George's Estate, 19 L. R. I. 566.

This was an application by an incumbrancer for the discharge of a receiver on the ground of general neglect of duty, whereby the incumbrance had sustained, or was liable to sustain, very serious loss. The particulars of the alleged negligence were, that the receiver had not used due diligence in the collection of rents; that he failed to take the direction of the court on occasions where active exertion was essential; that he has permitted the owner of the estate to remain in possession of a considerable portion of the lands without seeking to make them available to pay the interest accruing on the charges; that he failed to lodge and pass his accounts in accordance with his prescribed duty.

2. Upon a consent entered into *bona fide* by the parties in a cause, and by B, the receiver, and A, a person proposed to fill that office, the court will order that A be substituted for B as receiver, and that certain persons be approved of as his sureties, and the security measured at a given sum, without reference, and that B and his sureties be discharged from their recognizance. Farran *v.* Morris, 1 Irish

[illegible] incapacity, such as blindness and ill-health,[1] [illegible] disagreement of joint receivers;[3] where the

[illegible] also said that [illegible] consent will not be [illegible] appears to be an [illegible] office of re- [illegible] receiver will not [illegible] for a receiver [illegible] private parties in- [illegible] Sanders v. [illegible] Eq. 43.

[illegible] application of a [illegible] discharged, it appeared [illegible] and also that of his [illegible] had consented to be [illegible] at the urgent re- [illegible] the defendants, and had [illegible] capacity for two years; [illegible] first year of his service [illegible] had become affected, and [illegible] entirely the use of one [illegible] to read or write; [illegible] to giddiness in the [illegible] impaired his memory, [illegible] affection was increased [illegible] from his situa- [illegible] was not only or- [illegible] discharged and his recog- [illegible] on passing his ac- [illegible] was allowed, although [illegible] application was op- [illegible] the costs "of this [illegible] incidental thereto," [illegible] in his hands. Rich- [illegible] Mad. 276.

[illegible] Rapelye, Edw. on [illegible] the receiver's application [illegible] desire to go to Europe [illegible] private affairs and remain [illegible] the chancellor on petition, [illegible] to pass his accounts, [illegible] recognizance vacated, and a [illegible] to be appointed, and also [illegible] the costs of being dis- [illegible]

[illegible] Kansas Pac. R. Co., 5 [illegible] 470. In this case, at the [illegible] appointment of the two re- [illegible] parties controlling the pro- [illegible] plaintiffs and defendants, [illegible] in harmony and thought [illegible] different interests should be [illegible] and protected by different [illegible] So long as harmony pre- [illegible] difficulty was experienced in [illegible] road under the double [illegible] but upon the interests [illegible] becoming hostile, thus oc- [illegible] dissensions and involving [illegible] expense in the double [illegible] it was held that one dis- [illegible] receiver should be appointed, the court, per Miller, J., saying: "I am of opinion that both receivers should be removed, and a single receiver appointed, for the following reasons:

"The existence of two receivers is unnecessary and embarrassing, even if they were on amicable terms and had but a single place of business at or near the theater of the road's operations. They are obviously unnecessary as regards the successful operation of this road, which I assume to be the principal—if not the only—purpose for which a court should appoint receivers. If they should chance to disagree about the management of the road or the exercise of any functions of their office, as they have done in this case, the difficulty of the successful or proper discharge of their duties becomes manifest. When, in addition to this want of harmony, they establish separate places of business a thousand miles apart, and neither of them within two hundred miles of the road whose operations they are to control, it is apparent, without argument, that the hand of the court which they are, must be, if not paralyzed, rendered very inefficient and uncertain in its grasp and control of the business of the company.

"The main argument against any action by the court is that the receivers were appointed by an agreement between the parties interested, and at their instance, because they represented certain classes of lien creditors of the company, and that to remove one would be to sacrifice one of those interests, or at least leave it unprotected. There can be no doubt that such was the motive which led to the appointment of the two receivers instead of one, and there can be as little doubt that it was a mistake to have done this, whatever the motive. But while a court may very properly conform its action in such matters to the wishes of all the parties interested in the suit, when their wishes harmonize, it must consider for itself what is proper to be done when that harmony is turned into hostility, so that the two receivers represent two hostile camps, each intent upon securing the whole or the larger share of the spoils. It then becomes a duty of the court to see that its powers are exercised on principles of strict neutrality as regards the belligerents, and this

appointment was improper;[1] and where there are several receiver-

can only be done in this case by removing the representatives of these hostile interests and appointing a receiver who, in feeling and conduct, will be strictly neutral and strictly honest. The foundation of the agreement by which the two receivers were appointed has given way and the only possible excuse for appointing two receivers is gone.

"I have only a word to add. In my view, a receiver is strictly and solely the officer of the court. By reason of the inability or neglect of the officers of the corporation to conduct its business as it ought to be done, the conduct of that business is taken charge of by the court and carried on by its agent. It is the duty of that agent so to conduct the business as that the lawful rights and legal interest of all persons in the property and in the business shall be protected as far as possible, with equal and exact justice. This is much more likely to be done by a receiver who has no interest in the capital stock of the road, none in its debts, and no obligations to those who have. Such a person, acting under the control of the court, seeking its advice (as he would be inclined to do in all questions of doubtful duty), and bound in a sufficient surety for the faithful performance of his duty, is, in my opinion, the proper one for such an office. While it may be true that a large personal interest may stimulate the activity and direct the vigilance of the receiver, it is equally true that such vigilance, whenever occasion offers, will be directed unduly to advancing that personal interest and that activity to securing personal advantages.

"For these reasons, I think that the offices of the two receivers should be consolidated into one; that both the present receivers should be discharged, and that one living in the State in which the road mainly lies, and where its business operations are conducted, and who also has the requisite capacity and knowledge of the business, and the honesty and firmness to discharge his duty faithfully, free from the influence of the hostile interest in the case, should be appointed."

But where an appeal was had from an order removing, on account of their inability to agree as to the proper management of the receivership affairs, two joint receivers who had been appointed with the consent of all the parties to wind up a partnership, Van Hoesen, J., in rendering the decision of the court reversing the order, said: "We have before us a case in which the sole ground on which the removal was ordered was incompatibility of temper between the two receivers. Back of that lay their conflicting interests which made them personally hostile to each other. Their personal quarrels are of no consequence to the court. If the estate is not to suffer through their strife they ought not to have been removed. The sole object of the receivership is to protect and properly distribute the partnership funds, and the only sufficient cause for the removal of a receiver is the loss or danger of loss to the fund. Contumacy or contempt would, of course, be punished by removal, but the court would act by its own motion in such a matter. There was nothing shown to warrant the belief that the assets have been, or are likely to be, wasted or misapplied by B, and there was not, in my opinion, any cause for his removal. The discretion of the court is not an arbitrary or capricious discretion. Where, as in this case, the parties defendant consented to the judgment of dissolution and to the appointment of two co-receivers, of whom a defendant was one, it must be assumed that part, at least, of the inducement to such consent was that the expense of an ordinary receivership might be saved, and that each party might have a hand and a voice in the winding up of the business. The defendants ought not to be deprived of these advantages without cause. I think the order removing B should be reversed; but as it seems that C consented to his own removal in order to compass B's displacement, and that that was his only object in expressing a willingness to give up his place, I deem it best to restore both parties to the position in which they stood before the order was made. They will then be in the position in which they agreed to stand, and to which by their stipulation they induced the court to appoint them." Conner *v.* Belden, 8 Daly (N. Y.) 257.

1. *In re* Wells, W. N. (1890) 104; *In re* Lloyd, L. R., 12 Ch. Div. 448.

In this last case, A, who was a member of a firm of solicitors, was appointed executor of a will, probate of which was contested, and immediately after

ships covering the entire estate, all will be removed but one, whose authority will be extended over the whole.[1]

(2) *What Have Been Held Insufficient Causes for Removal.*—The following have been held insufficient causes for the removal of a receiver: Relationship, alone, to one of the parties to the

the testator's death commenced against his widow an action in the chancery division to administer his estate, the writ in which was by leave of the court amended by asking for a receiver pending the litigation in the probate division. A's firm appeared for both plaintiff and defendant in the action in chancery, and an order was made appointing A to be receiver of the personal estate until the decision of the probate action, and also to receive the rents of the real estate, the only security ordered being the payment into court of £2,000, although the rents were about £3,500 per annum. The widow afterwards obtained an order to change her solicitors, and moved to discharge A from his receivership. She denied having given the firm any authority to appear for her, and it being established, at all events, that she had never sanctioned the appointment of A as receiver, it was held, on appeal, that the appointment of A as receiver was improper, since the appointment of a member of the firm of plaintiff's solicitors to be receiver makes it impossible to secure the proper checking of the receiver's accounts, and that a party to the action ought not, except in an extreme case, to be appointed a receiver without the assent of the other party. A was accordingly discharged, and ordered to pay the costs both in the appeal court and the court below. *In re* Lloyd, L. R., 12 Ch. Div. 448.

It is improper for a court in appointing a receiver to wind up partnership affairs to clothe him with greater powers than a partner would have had, as, for example, to accept shares in a company, even though fully paid up, in satisfaction of a debt due to the firm, there being no power in one partner so to do, in the absence of special authority from his copartners, or evidence of a special course of dealing permitting such acceptance. Accordingly an order for such an appointment was, on appeal, discharged with full costs, but without prejudice to any other application to be made for the appointment of a receiver. Niemann *v.* Niemann, 43 Ch. Div. 198.

And where, in order to obtain satisfaction of plaintiff's judgment, a conditional order had been obtained for the appointment of a receiver of the pension payable to a retired town clerk under the provisions of 32 & 33 Vict., ch. 79, the order for a receiver was, on motion, discharged with cost to the defendant, such pension not being assignable or chargeable with debts.

1. Kelley *v.* Rutledge, 8 Ir. Eq. 228.

As a general rule, a receiver appointed in a prior suit should not be displaced by the appointment of a receiver of the same subject-matter by the same court in a subsequent suit. The receivership in the first suit should be extended to the second, subject to the legal and equitable claims of all the parties, and the rights of the parties in each suit are substantially the same as if different persons had been appointed at the several times when such receiverships were granted. Howell *v.* Ripley, 10 Paige (N. Y.) 43; State *v.* Jacksonville, etc., R. Co., 15 Fla. 275. If, however, a different receiver is appointed, then, if the court has jurisdiction of the subject-matter and parties and is the same court which made the first appointment, the receiver in the first suit must deliver up the trust property to the receiver appointed in the second. State *v.* Jacksonville, etc., R. Co., 15 Fla. 270.

And in Kelley *v.* Rutledge, 8 Irish Eq. 228, which was an application for the discharge of all receivers but one, where several receivers had been appointed at the instance of different creditors of the defendant, and each over a distinct portion of his property, a condition of things which resulted in placing the whole of his estates under the administration of the court, by means of such several receivers, the master of the rolls said: "The hardship of such a state of things in relation to the owner of the lands, and the vast increase of expense incidental to it, are obvious and cannot be allowed to continue. I think the application just and reasonable; and I shall therefore direct that one of those receivers shall be appointed over all the lands, and that the other three shall be removed from lands

action;[1] employment by the receiver of the counsel of one of the parties, as his counsel,[2] or his employment of the defendant, a judgment debtor, as his assistant in making collections;[3] and

over which they have been respectively appointed."

The management of the estate by the court is one and the same, although it has become necessary to change the receiver, and hence claims against a former receivership are not invalidated by the removal of a receiver and appointment of a successor. Gibbes *v.* Greenville, etc., R. Co., 15 S. Car. 518; 9 Am. & Eng. R. Cas. 723.

1. Relationship to a party to the action is not alone a sufficient ground for the removal of a receiver; at most, it is but a circumstance to be taken into consideration at the time of making the appointment. Wetter *v.* Schlieper, 7 Abb. Pr. (N. Y.) 92, 95.

A brother, the complainant in a creditor's bill, may act as receiver, where the bankrupt admits that he was party to a fraudulent transfer and concealment of his property. Shainwald *v.* Lewis, 8 Fed. Rep. 878; and in such case the receiver may employ the complainant's solicitor. In rendering the decision of the court, Hammond, D. J., said: "If (the receiver is to be) successful in baffling the admitted fraudulent designs of the respondent, he can only be so by the exercise of the utmost energy and industry, and probably by considerable litigation. He is not, and ought not to be, indifferent between the parties. His duty requires him to be the active adversary of his fraudulent debtor and his accomplices. In the selection of a person to discharge these duties, the respondent, in the position he now occupies, should have no voice, any more than a criminal should have in the choice of a detective to ferret out and recover the fruits of his crime. A person, therefore, who, by relationship or other connection, may be supposed to feel in some degree the desire felt by the complainant to collect the sum decreed to be due, would seem, if otherwise unobjectionable, to be eminently fit to be appointed a receiver in a case like the present."

But in Williamson *v.* Wilson, 1 Bland (Md.) 427, which was a bill filed by one of the partners for the appointment of a receiver to wind up the partnership affairs, a receiver who was the brother of one of the parties, and the son of one who claimed to be a large creditor of the firm, was removed because of his active efforts in behalf of the plaintiff, Bland, Ch., saying: "The recommendations of those most interested, and who are most likely to sustain injury without an appointment of a receiver, have generally been most regarded. The being a near relation of either party is not in itself an absolute disqualification, but it must be allowed to have its weight when connected with other circumstances. In this case I am of opinion that the present receiver ought to be removed. Jealousies have been excited against him. He is the brother of one of the parties, and the son of one who claims to be a large creditor of the firm. He is admitted by the plaintiff to have taken an active part in this controversy as his agent and friend. And he is charged by the defendant with having been actuated by undue means to their great prejudice. His feelings and affections appear to have become too much enlisted to permit him to be as unbiased and impartial as a receiver ought to be in winding up the partnership affairs of these insolvent debtors."

2. Bank of Monroe *v.* Schermerhorn, Clarke Ch. (N. Y.) 366; Smith *v.* New York Consolidated Stage Co., 18 Abb. Pr. (N. Y.) 419.

In Hynes *v.* McDermott, 3 N. Y. St. Rep. 582, it was said: "The general rule that a receiver should not employ the counsel of either of the parties to a litigation in which he is appointed, is subject to certain limitations. It is only when the receiver is acting adversely to one of the parties, that it has ever been supposed there was any impropriety in employing the counsel of the other."

In the great Mormon Church case it was held that the interests of the receiver and the United States being in exact harmony there was no impropriety in the receiver employing the United States district attorney to assist him. U. S. *v.* Church of Jesus Christ (Utah, 1889), 21 Pac. Rep. 516.

3. The employment of the defendant, a judgment debtor, by the receiver in supplementary proceedings, to make collections for him, where it appears that the defendant had no possession or control of the property which he

insufficiency of the receiver's bond, which was not objected to at the time of his appointment.[1] Where the security of a creditor gives him the right thereunder to appoint a receiver, the court will not, in order to assist such creditor, remove a receiver previously appointed by it;[2] and consent of the defendants to the appointment of a receiver will, in some cases, operate to estop them from applying for his removal.[3] If a receiver is ready and willing to pay, in full, the debt of a creditor of the estate who has petitioned for his removal, and the other creditors are satisfied with him, the petition will be denied.[4]

b. DISCHARGE—POWER IN GENERAL[5]—(1) *Grounds for Discharge.*—The following have been held sufficient grounds for the dissolution of the receivership and discharge of the receiver: Where the necessity for the receivership no longer exists,[6] as

assigned to the receiver, or of the place where the receiver has seen fit to keep it under his own control and that of the agents whom he has employed, where the personal responsibility of the receiver is unquestioned and his security ample, does not constitute a sufficient ground for removal of the receiver. Ross *v.* Bridge, 24 How. Pr. (N. Y.) 163; 15 Abb. Pr. (N. Y.) 150.

1. In Bank of Monroe *v.* Schermerhorn, 1 Clarke Ch. (N.Y.) 366, the court said, in reference to the alleged insufficiency of the bond as a cause for removal: "The master doubtless fixed the penalty of the bond at a sum which he thought amply sufficient to protect the interest of all the parties. The defendants themselves did not appear to make any objection; and I am now, with the facts all before me, inclined to think the penalty of the bond large enough. The estate that goes into the receiver's hands is almost entirely real estate. This the receiver cannot sell without the order of the court. He can only get into his possession the rents, and of these he is not likely to receive an amount greater than his bond will cover. There is no suggestion of insolvency, or irresponsibility, or bad faith on the part of the receiver. If the rents should accumulate or if the real estate should be ordered sold, provision can be made in future for the protection of the interests of the parties. At present I see no reason to increase the receiver's security, much less to vacate his appointment on this ground."

2. Sanders *v.* Lord Lisle, 4 Ir. Rep. Eq. 43. This was a motion to remove a receiver over lands charged with an annuity, and to secure the appointment of an agent of the applicants, in order to obtain their annuity, the court saying: "This motion is altogether misconceived, for the court cannot be asked to displace its officer, to make way for the agent of private persons."

3. An agreement by the defendants in an action with the plaintiffs, that the latter, upon giving security in a specified amount, should have the possession and management of the property and name the receiver, places the defendants in a somewhat different attitude towards that officer from what they would be in if he were appointed by the court in the ordinary way. Accordingly, it does not lie with such defendants in an application for the removal of a receiver so appointed to object to the person of the receiver unless he commits some overt act of unfaithfulness to his trust, which can be specified and pointed out. And it is incompetent, on this as well as on other accounts, for the defendants to go into previous transactions of the receiver, as complainant, in order to show that he had heretofore done acts which exposed him to personal animadversion. Cowdrey *v.* Railroad Co., 1 Woods (U. S.) 350.

4. First Nat. Bank *v.* Barnum Wire, etc., Works, 60 Mich. 487.

5. See *supra*, this title, *Removal and Discharge*, and authorities cited to note 1, and *Removal—Power in General.*

6. Ferry *v.* Bank of Central New York, 15 How. Pr. (N. Y.) 445.

In the absence of a collusion in the appointment, a receivership continues as long as the court may think it necessary to the performance of the duties pertaining thereto. Young *v.* Rollins,

where the plaintiff's claim has been satisfied,[1] or the litigation has terminated;[2] where the removal is for the interest of the

90 N. Car. 125; 25 Am. & Eng. R. Cas. 646. But where the duties of a receiver are not yet performed, he will not, on his own application, assigning as reasons pressure of other business engagements and consequent inability to give the affairs of the trust estate the attention they require, be excused from the performance of duties which he has voluntarily undertaken to perform. Beers *v.* Chelsea Bank, 4 Edw. Ch. (N. Y.) 277; though where no property has come into his hands and his appointment has been vacated, he will be entitled to his discharge. People *v.* Bushwick Chemical Co. (Supreme ct.), 18 N. Y. Supp. 542; *In re* Brookfield (Supreme ct.), 18 N. Y. Supp. 542.

A receiver is usually continued until the decree; but if the right of the plaintiff ceases before that time, the receiver may be discharged, and cannot be continued at the instance of the defendant. As where, upon new trustees being appointed in a suit, a receiver was, upon application of the plaintiff and upon the new trustees' undertaking, though without entering into recognizances, to account half-yearly in the same way as the receiver, ordered to be discharged, notwithstanding the motion to discharge was opposed by some of the defendants who were beneficially interested in the property as legatees. Tempest *v.* Ord, 1 Madd. 89.

1. It is the duty of the court to get rid of a railroad receiver at the earliest possible moment consistent with the interests of the creditors and stockholders, and that when the admitted liabilities and the receiver's expenses are paid, the receiver will be discharged. Sewell *v.* Cape May, etc., R. Co. (N. J.), 30 Am. & Eng. R. Cas. 155; and the general ground upon which an application for the discharge of a receiver is based, must always be the satisfaction of the plaintiff's claim. Beach on Rec., § 793.

But the payment of a judgment by the debtor, after the appointment of a receiver in supplementary proceedings, does not *ipso facto* discharge the receiver, but the receiver holds title as before, until formally discharged, for he may have claims for expenses incurred in the exercise of his authority which may be required to be paid before the property held by him can be taken out of his possession. Crook *v.* Findley, 60 How. Pr. (N. Y.) 375. But the debtor may obtain an order of discharge upon paying his lawful charges, and this right is clear and does not depend upon the discretion of the court. A refusal to grant it is error which may be reversed on appeal. Milwaukee, etc., R. Co. *v.* Soutter, 2 Wall. (U. S.) 510.

In Davis *v.* Duke of Marlborough, 2 Swanst. *p. 167, Lord Eldon determined that where the plaintiff had been satisfied by the payment of his demand, the order appointing a receiver must be discharged, although the discharge was opposed by two creditors having prior annuities to the plaintiff's. His lordship observed: "I apprehend that with the right of the plaintiff to have the receiver, must fall the rights of the other parties. It would be extraordinary if, because a receiver has been appointed on behalf of the plaintiff, any defendant is entitled to have a receiver appointed on his behalf." 2 Daniel's Ch. Pl. & Prac. (5 Am. ed.), *p. 764; Largan *v.* Bowen, 1 S. & L. 296.

2. The discontinuance of a suit does not discharge a receiver appointed therein. But it will entitle him to apply for his discharge, and to pass his accounts, so that he may pay over the balance, if any, in his hands, and exonerate himself and his sureties from further liability; unless the interest of the defendants require that he should continue in the receivership to protect their rights. If the protection of the rights of a defendant requires the continuance of a receiver the court will not grant a discharge, although the suit is at an end; but it will require the defendant thus protected to file a bill forthwith to settle his rights. Whiteside *v.* Prendergast, 2 Barb. Ch. (N. Y.) 472; Murrough *v.* French, 2 Moll. 497; Largan *v.* Bowen, 1 S. & L. 296.

Where a receiver has been appointed by a court of chancery, in a case pending, and has taken charge of the property in litigation, a compromise and dismissal of the bill do not discharge the receiver from accountability to the court; nor is he liable to an action on his bond, as receiver, until he has failed to obey some order of the court in relation to the property. State *v.* Gibson, 21 Ark. 140.

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15 How. Pr. (N. Y.) 445.

A receiver who had been appointed
consequence of the misconduct and
incapacity of trustees under a will was
discharged upon the appointment by
the court of new trustees, who con-
sented to act, without security. The
application for the discharge of the re-
ceiver was resisted by creditors who
were not present at the appointment of
the new trustees, although served with
all the proceedings. The master of the
rolls said: "What I have to consider is,
that one party ought to have proper
protection, and that the other ought not
to be unnecessarily charged with the
costs of a receiver; and I think I
ought not to continue the receiver if
he may be discharged without injury to
the legatees. The question then comes
to this, whether there is sufficient reli-
ance to be placed in the trustees. It
would be quite a different case if the
receiver were discharged, and the owner
thereby put into possession; that is not
the proposal here; it is proposed by
means of the trustees, to do without
expense that which is done by the re-
ceiver at the expense of the owner of
the estate; and the only question is,
whether it can be properly and satis-
factorily done. If any objections were
shown to the trustees, I would not
grant the application. In the absence
of any personal objections to the trus-
tees, and on the understanding that
they will perform this duty gratuitously,
I am disposed to discharge the re-
ceiver." Bainbrigge *v.* Blair, 3 Beav.
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Where an application was made by
the defendant that the receiver who
had been appointed over his estate
should pay him a small sum for his
maintenance; and it appeared that the
estate was more than sufficient to pay
all his debts; but some of the creditors
refused to sign a consent for the pur-
pose though they did not resist this ap-
plication, the master of the rolls, said:
"I cannot grant such an order except
on the consent of all parties. The only
course which is open to the defendant is
to apply for a reference to the master to
inquire whether it is necessary for the

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lent and collusive.[1] Where the plaintiff neglects to proceed with the cause after obtaining the appointment of the receiver, he will be discharged;[2] but the mere abatement of the action does not of itself result in the determination of the receivership. A receiver's functions can only be determined by a formal order of court.[3] Dismissal of a bill for want of equity,[4]

purpose of the cause that the receiver should be continued over the entire estate; and if not, what would be a competent part thereof for the purposes of the rights of the parties and creditors in the cause, and on the report coming back, the receiver will be removed from off the rest of the estate; and if the probable result of the reference appeared clear upon the facts, the order would proceed at once to discharge the receiver from such parts of the premises as the master should report it unnecessary that he should continue over." Magrath *v.* Veitch, 1 Hog. 110.

1. A court of equity will not conduct the business of the corporation through a receiver, unless the interest of creditors unmistakably requires it; and when a railroad company, by collusion with the creditor, who prays for the appointment of a receiver, allows its property to go into a receiver's hands, not for the purpose of meeting its obligations to the petitioning creditor, but for the purpose of keeping its property from other creditors, the court which appointed the receiver will, upon information of the facts, discharge him of its own motion. Sage *v.* Memphis, etc., R. Co., 18 Fed. Rep. 571; 17 Am. & Eng. R. Cas. 539.

But the concurrence of directors in an attempt to secure the appointment of a receiver does not amount to fraud unless injury is intended to the company or its creditors. Brassey *v.* New York, etc., R. Co., 19 Fed. Rep. 663; 17 Am. & Eng. R. Cas. 285.

In Walters *v.* Anglo-American Mortgage, etc., Co., 50 Fed. Rep. 316, the facts of the case were these: The directors were about to turn the president, secretary and treasurer out of office, and the latter two filed a bill alleging that the company was insolvent and asking for the appointment of a receiver to wind up its affairs. The president immediately appeared in court and consented thereto in behalf of the company. The court thereupon appointed a receiver without any consideration of the bill and without its attention being called to the fact that the president had no authority to enter consent. Upon the application of the directors the receiver was discharged, it appearing to the court that the bill was entirely without merit, and that the proceeding was instituted for the purpose of wrecking the company and obtaining control of its business.

2. National Mechanics' Banking Assoc. *v.* Mariposa Co., 60 Barb. (N. Y.) 423, which was a motion to set aside an order appointing a receiver. It appeared that the plaintiff, after moving for a receiver of his debtor's property, consented that the proceedings might be dormant, and took no further steps for over a year, until another creditor had procured the appointment of a receiver. The court refused to allow the one thus appointed upon the subsequent application to be displaced, but discharged the other.

3. An abatement of the action does not determine the jurisdiction of a receiver and his authority continues until an order is made for his removal. Until then he may obtain orders on the tenants and take every step to enforce the rents, which he must continue to receive and account for. Newman *v.* Mills, 1 Hog. 291.

An abatement by the death of a co-plaintiff is not cause for the discharge of a receiver who was appointed on process; but it would be otherwise if the cause had abated by the death of the defendant against whom the process issued. Woods *v.* Creaghe, 1 Hog. 174; McCosker *v.* Brady, 1 Barb. Ch. (N. Y.) 329.

4. When, in an *ex parte* proceeding and before answer, a receiver has been temporarily appointed, and it appears subsequently from the defendant's pleadings or otherwise that the appointment ought not to have been made, or that the complainant has presented no case for the intervention of a court of equity, the receiver will be removed. The requisites of a bill praying for a receiver, and the course to be pursued, are laid down in Blondheim *v.* Moore, 11 Md. 365; also in Voshell *v.* Hynson, 26 Md. 92.

parties to the cause,[1] and where the

A court of equity may appoint a receiver to preserve the property of an intestate or testator, by appointing a receiver pending a litigation in the orphan's court for probate and administration. But when letters *pendente lite* have been granted, the powers of a receiver previously appointed cease to exist, and he will be directed to deliver the property to such administrator and be discharged. *In re* Colvin, 3 Md. Ch. 278.

1. In Popper *v.* Scheider, 7 Abb. N. S. (N. Y.) 56, where a receiver been appointed in an action to dis a partnership and for a settlem the accounts, and the answer defendant denied the existen partnership, it also appearing very small proportion, if an capital was contributed by th and that by the injunction ership a large and flourishi would be arrested and pe it was held that the rece be discharged upon the the defendants and upo ing adequate security t tiff any sum that ma him on final settlem McCunn, J., saying but the equity of a rescission of the and receivership. of an order to the is thus that a co adapts the rem so as to reach justice witho rights or inte litigation."

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Accordingly, where a vent and its property and it was unable to nty miles of its road in he forfeiture of its land arter, and the contractor dertaken the construction d was insolvent, and had the work, it was held that consequences to the interests d and the bondholders were d as would warrant the ere by the appointment of a Allen *v.* Dallas, etc., R. Co., ds (U. S.) 316.

railroad ninety-five miles long and good condition, being a link in an rtant route, whose gross annual ings are $800,000, is ample secu- for mortgage debts thereon amount- g to $2,200,000; and a receiver of such road, appointed at the suit of a party on whose debt $300,000 is ffered to be paid, and who has a decree which provides for sale in case of default of payment as therein pro- vided, will be discharged. Such re- ceiver will also be discharged where he was appointed on a creditor's bill, showing a judgment for $16,000, when the plaintiff enjoys all the ordinary remedies for enforcing his lien, and has received only $1,000 in four years, dur- ing which the receiver has been in pos- session of the road. Howard *v.* La Crosse, etc., R. Co., 1 Woolw. (U. S.) 49. This last case was an application for a receiver; but by reason of a disa- greement between Mr. Justice Miller and Mr. District Judge Andrew J. Mil- ler upon the subject-matter of the mo- tion, the application was overruled. But on appeal to the Supreme Court of the United States, the order of the cir- cuit court dismissing the application was reversed. Mr. Justice Miller de- livering the opinion of the court, said: "The idea of appointing or continuing a receiver for the purpose of taking ninety-five miles of railroad from its lawful owners, which is earning a gross revenue of $800,000 per annum, to en- force the payment of $16,000, the lien of which is seriously controverted, is so repugnant to all our ideas of judicial proceedings that we cannot argue the question." Milwaukee, etc., R. Co. *v.* Soutter, 2 Wall. (U. S.) 523.

Where an order was made in the State court upon an *ex parte* application appointing a receiver of a rail- road company, and after removal of the suit to the circuit court upon a

of a judgment adverse to the party who procures ·er's appointment, terminate the duties or functions of but do not wholly discharge him.[1] An entry of a ·ree which fails to provide for a continuance of the re- ·hip, supersedes the appointment of the receiver,[2] but an

of both sides, it not appearing the property of the company was ·ardy or in need of the protect- ·ontrol of the court, and the con- ·ance of the receivership being ·ely to prove prejudicial to innocent holders of the securities of the company, it was held that the order appointing the receiver should be rescinded, Acheson, J., delivering the opinion of the court, said: "It is not shown to our satisfaction that the property of the defendant company is in any jeopardy or needs the protecting control of the court. On the other hand, it is not difficult to see how the innocent holders of the securities of the company may be greatly embarrassed and prejudiced by the continuance of the receivership. Indeed, the effect of the order in question is to suspend the operation of the trust established by the agreement of all the parties in interest, and this, too, when the trustees are not before the court." McHenry *v.* New York, etc., R. Co., 25 Fed. Rep. 114.

Where, upon the filing of a creditor's bill against a judgment debtor and a mortgagee to whom he had mortgaged his personal property in trust for the payment of his various debts, an injunction is granted and a receiver appointed, upon allegations in the bill that the debtor is in possession of the property and converting the proceeds of sales to his own use, the bill also alleging the debtor's insolvency and consequent danger of plaintiff losing his debt, if such charges are fully and expressly denied by the answer, the court should dissolve the injunction and discharge the receiver. Furlong *v.* Edwards, 3 Md. 99.

A bill being filed to subject certain property in the hands of a third person to the payment of judgments in favor of the complainants, and a receiver being appointed to collect and hold the rents, issues, and profits, the bill was demurred to for want of equity, and the demurrer sustained and bill dismissed, it being held that the functions of the receiver ceased *inter partes*, but that his amenability continued, as an officer of the court, to the court, and that the fund itself was subject to the order of the court, and would rightfully return to the party as whose fund it was taken and impounded, unless retained upon a claim properly made known and presented to the chancellor. Field *v.* Jones, 11 Ga. 413.

1. The entry of a judgment in favor of the defendant has the effect of ending the functions of a receiver, although the receiver is not thereby discharged. The court may, according to the exigencies of the case, upon good cause shown, either continue or discharge him by a further order, upon an examination of the peculiar facts of the case. Ireland *v.* Nichols, 9 Abb. Pr. N. S. (N. Y.) 71; Beverly *v.* Brooke, 4 Gratt. (Va.) 187; Field *v.* Jones, 11 Ga. 413; State *v.* Gibson, 21 Ark. 140; Colwell *v.* Garfield Nat. Bank, 119 N. Y. 412.

Notwithstanding the stay of proceedings on a judgment in favor of defendant, effected by an appeal to the court of appeals with security, the court below have power to discharge a receiver whose appointment, as a provisional remedy, was ordered before judgment. Ireland *v.* Nichols, 9 Abb. Pr. N. S. (N. Y.) 71; 40 How. Pr. (N. Y.) 85.

A receiver in some cases is deemed after judgment to hold the property not as receiver but as trustee for the party found to be entitled thereto. Very *v.* Watkins, 23 How. (U. S.) 469.

2. In Ponsonby *v.* Ponsonby, 1 Hog. 321, on the discussion of a motion, it appeared that there was a sale under the decree, and the purchaser was put into possession by injunction, and that the receiver afterwards distrained some of the tenants of the lands sold to enforce payment of rent which they owed before the purchaser was put into possession, alleging that his power continued until an order was made for his removal. In passing upon his motion, the master of the rolls said: "The injunction to put a purchaser into possession is *ipso facto* a discharge of the order appointing a receiver over the land mentioned in the injunction, and

election of officers by a corporation whose assets are in the hands of a receiver does not work a revocation.[1]

c. NOTICE OF MOTION FOR REMOVAL OR DISCHARGE.—When application is made by motion or otherwise for the removal or discharge of a receiver, notice must be given to the parties to the proceeding,[2] and should be given to the receiver also, notwith-

the court can only proceed by attachment for the arrears due by the tenants at the time the injunction issued."

And in Anonymous, 2 Ir. Eq. 416, where it appeared that the receiver had passed his final account and that there were £8 due him; that the purchaser under a decree in the cause was put in possession; and that the receiver had not received any of the rents since his last account, the court, on motion of his sureties to vacate the receiver's recognizance, granted the motion agreeably to the contention of the applicant's counsel, that the injunction to put the purchaser into possession amounted to a discharge of the receiver, Pennefeather, B., saying: "I think it does; and upon this ground let the recognizance be vacated."

But where a receiver had rented part of the receivership lands to a tenant, after a decree claimed to be final in the action in which the receiver was appointed, but the decree did not in terms discharge the receiver, and had not been fully executed, and the tenant was holding over his term, he having been a party to the litigation which resulted in the decree, and the receiver applied for an order to dispossess said tenant, and to restore the possession of the land to the receiver in order to put in a new tenant, Jackson, J., in affirming the judgment to restore possession to the receiver, said: "The single question made is, whether the defendant to the rule having rented from the receiver since the decree of the court, and his term having expired, and the receiver having rented the land to another, could hold over so as to keep the receiver out and prevent him putting his new tenant in. We think he had no such right, although it was based on a decree which seemed final. The receiver remained in office and the property was in possession of the court, he being its officer until regularly discharged, which was not done by the decree or otherwise. Besides, this defendant rented from the receiver after decree." Visage *v.* Schofield, 60 Ga. 680.

The entry of a final decree which does not provide for the continuance of a receivership supersedes the appointment of a receiver. Daniel's Ch. Pl. & Prac., *p. 1765; Foster's Fed. Prac., § 260.

And it has been held that the discharge of a receiver by a decree cannot be set aside after the term at which it was made. Davis *v.* Duncan, 19 Fed. Rep. 477; 17 Am. & Eng. R. Cas. 295.

1. But it will be ground for revoking the appointment. Keokuke, etc., Packet Co. *v.* Davidson, 13 Mo. App. 561; Ireland *v.* Nichols, 40 How. Pr. (N. Y.) 85; McCosker *v.* Brady, 1 Barb. Ch. (N. Y.) 329; Newnan *v.* Mills, 1 Hog. 291.

2. 2 Dan. Ch. Pract. (5th ed.) *1764-5; Foster's Fed. Pract., § 260; Kerr on Receivers (Bispham's ed.), p. 269; Beach on Receivers, § 778; High on Receivers (3d ed.), §§ 824, 846; Gluck & Becker on Receivers, § 114; Davis *v.* Duke of Marlborough, 2 Swanst. 118; Bainbrigge *v.* Blair, 3 Beav. 423; Attrill *v.* Rockaway Beach Imp. Co., 25 Hun (N. Y.) 383. *Contra* Coburn *v.* Ames, 57 Cal. 201.

In Attrill *v.* Rockaway Beach Imp. Co. 25 Hun (N. Y.) 383, it was said by Davis, P. J., in a concurring opinion: "The receiver appointed in the action was removed without notice to the plaintiff, or indeed to any party in the suit. The order to show cause why the receiver should not be removed was only directed to be served on the receiver himself. It was served upon neither the plaintiff nor the defendant, nor did either of them appear on the hearing. No notice of application for the appointment of a new receiver was given to the plaintiff, or to the defendant corporation. The motion was made under the act of 1880, and was of necessity a motion in the pending action. It was in no sense an original proceeding. It was the duty of the moving party to have given notice to the plaintiff, and no order binding upon him could be made without such notice or without his appearing on the motion and expressly, or by necessary inference,

standing the latter is acting as the agent or officer of the court.[1]

waiving such notice. This irregularity was too gross to be disregarded. The plaintiff, who is now appellant, had the fullest interest in the receivership. He was entitled to be heard upon any question affecting it. He was especially interested in the question who should be appointed receiver if the existing one should be removed. No action taken without notice to him, or a hearing on his behalf, can be upheld. This principle is so elementary and so controlling in all cases that no authority need be cited. In this case it was wholly disregarded. The irregularity was therefore fatal to the order so far as it affects or can affect the plaintiff or his rights."

The petition, or summons, or notice of motion for the removal of a receiver, should be served on all the parties; otherwise the court will not entertain a motion for removal. It is not sufficient merely that there exists good and sufficient cause for such removal; the order will be invalid if due notice is not served. 2 Dan. Ch. Pract. (5th ed.) *1765; Kerr on Receivers (Bispham's ed.), p. 269.

The fact that a receiver has been discharged is no answer to a motion for leave to bring an action against him for the claim and delivery of property, where it appears that the claimants of the property had no notice of the motion to discharge the receiver, although he was aware of their claim; and that the receiver has sold the property claimed, after notice of the claim, and after the service upon him of a petition and notice of motion for leave to prosecute. Miller *v.* Loeb, 64 Barb. (N. Y.) 454.

While service of notice of a motion to vacate an order for the appointment of a receiver served upon the officer of a railroad company authorized by its charter or the law to receive such service is good, yet, where such officer fraudulently conceals the service upon him of a motion for the appointment of a receiver of the property and effects of the railroad company, and by means of such concealment the company fails to resist such appointment, and claims that the same is an invasion of its rights and ought not to have been made, the court will reopen the case and allow the company to move to vacate the appointment. An unreasonable delay in making the motion to vacate the appointment of the receiver will, however, be regarded as an acquiescence in such appointment. Allen *v.* Dallas, etc., R. Co., 3 Woods (U. S.) 316.

Under N. Y. Laws, 1880, ch. 537, as amended by ch. 639 of the laws of 1881, for the removal of receivers of insolvent corporations, the proceedings thereby authorized apply to such receivers only as are by statute required to make and file reports of their proceeding at certain definite and prescribed times, and in an action brought by a stockholder and creditor to close up the business of a corporation, wherein a receiver of its property has been appointed, it was held that notice of a motion by the attorney general under said acts for the removal of the receiver should have been served upon all the parties who had appeared in the action, and that it was improper to remove the receiver and appoint another in his place, when notice of the motion had been served upon the receiver alone. Attrill *v.* Rockaway Beach Imp. Co., 25 Hun (N. Y.) 509.

But in one case it has been held that a failure to give notice to all the parties of a motion to discharge a receiver was not such an irregularity as to justify a reversal of an order of discharge. Coburn *v.* Ames, 57 Cal. 201.

When Creditors Not Entitled to Notice of Receiver's Discharge.—Where the receiver of an insolvent corporation has been appointed in a suit brought by the State, the creditors are represented in the suit by the people and their debtor, and they are not entitled to notice of the receiver's discharge. New York, etc., Tel. Co. *v.* Jewett, 115 N. Y. 166; 28 Am. & Eng. Corp. Cas. 465.

1. Attorney-Gen'l *v.* Haberdashers' Soc., 2 Jur. 915; Dougherty *v.* Jones, 37 Ga. 348; Bruns *v.* Stewart Mfg. Co., 31 Hun (N. Y.) 195; Campbell *v.* Spratt, 5 N. Y. Wkly. Dig. 25; Smith *v.* Trenton Delaware Falls Co., 4 N. J. Eq. 505. *Compare* Herman *v.* Dunbar, 23 Beav. 312. But see *contra* L'Engle *v.* Florida Cent. R. Co., 14 Fla. 266; Howard *v.* Lowell Machine Co., 75 Ga. 325.

Thus, a motion to remove a receiver was properly refused, when he had had no reasonable notice in writing of such motion. He was entitled to such notice in writing, specifically setting forth the

And if his removal is sought on the ground of misconduct, he should not only have reasonable notice in writing, but also be served at the same time with a written statement, specifying the grounds on which his removal is sought, in order that he may have an opportunity to be heard.[1]

d. WHO MAY APPLY FOR REMOVAL OR DISCHARGE.—The plaintiff, the defendant, or the receiver himself on sufficient cause shown, in fact any one who is injured by the appointment of a receiver, may, although he is not a party to the suit in which the appointment was made, apply for the removal or discharge of a receiver.[2] But where a receiver has been appointed at the

grounds for the motion. Dougherty *v.* Jones, 37 Ga. 348.

There should be a personal service on the receiver, and such notice will not be dispensed with, unless an order for substituted services be obtained. Attorney-Gen'l *v.* Haberdashers' Soc., 2 Jur. 915. In this case the notice of an application for a receiver's discharge from his office was required to be served personally upon him. The petition prayed for a reference to the master to inquire into certain matters relating to the future management of a charity estate, and to inquire also whether the receiver's health was not such as to render him incompetent to perform the duties of his office, and prayed that if the master should so find, then that the receiver should be discharged from the receivership and another appointed in his stead. Counsel for the petitioners stated that the receiver had not been personally served with notice of the petition in consequence of the state of the receiver's mind, which was such as to render personal service upon him impossible; but that the petition had been left at his house and served on his brother. An affidavit of these facts was tendered, but the master of the rolls held that personal service could not be dispensed with, unless an order for substitution of service was first obtained.

But under the English practice a receiver, though served with notice, is not entitled to appear at the hearing of the application; and if he appear, he will not be allowed the costs of the application. Herman *v.* Dunbar, 23 Beav. 312.

Where a receiver was removed without proper notice of the application therefor, so that no opportunity was afforded him to be heard in opposition, it was held, on appeal, that such removal could not be sustained, although it appeared from the record that sufficient grounds existed for the removal. Campbell *v.* Spratt, 5 N. Y. Wkly. Dig. 25.

Where a receiver of a corporation had been appointed, and a motion to vacate the appointment denied, it was held that the court could not, upon objections made by other persons, remove the receiver for other or different reasons, without first giving him notice of the charges against him and affording him thus an opportunity to be heard. Bruns *v.* Stewart Mfg. Co., 31 Hun (N. Y.) 195.

In *Florida*, however, it has been held, on a motion to remove a receiver, that he is not entitled to be heard in opposition, because he is merely an officer of the court and not a party in interest. L'Engle *v.* Florida Cent. R. Co., 14 Fla. 266.

And in *Georgia* an order appointing a receiver may be revoked, without giving him notice to show cause why it should not be done. Howard *v.* Lowell Machine Co., 75 Ga. 325.

1. Dougherty *v.* Jones, 37 Ga. 348; Smith *v.* Trenton Delaware Falls Co., 4 N. J. Eq. 505.

In *Georgia* the only cases requiring notice of an application for the receiver's discharge to be served upon him, are where his conduct is called in question, or where it is sought to make him liable, or to require him to render an account, or to make a return; but he is not so entitled, when the question is as to the necessity of his appointment or its continuance. Howard *v.* Lowell Machine Co., 75 Ga. 325.

2. Grenfell *v.* Dean of Windsor, 2 Beav. 544; Thomas *v.* Brigstocke, 4 Russ. 65; Milwaukee, etc., R. Co. *v.* Soutter, 2 Wall. (U. S.) 510; Foster's Fed. Prac., § 260.

When receivers have executed the

instance of a single creditor, the latter cannot, upon the satisfaction of his demand, have the receiver discharged as a matter of right, but the court will consider the interest of all concerned.[1]

duty for which they were appointed, it is the right and duty of the party upon whose application they were appointed to see to it that they are discharged, if he would avoid the consequences of their continuing to act in that capacity. Langdon *v.* Vermont, etc., R. Co., 53 Vt. 228; 4 Am. & Eng. R. Cas. 33.

But a receiver appointed for the benefit of all the parties, will not be discharged on the *ex parte* application of the party at whose instance he was appointed. Davis *v.* Duke of Marlborough, 2 Swanst. 118; Bainbrigge *v.* Blair, 3 Beav. 421.

Where an individual creditor, who had filed his bill against a moneyed corporation, obtained an injunction and the appointment of a receiver, and the receiver had taken upon himself the trust and other creditors had filed their claims, it was held that the creditor who had filed his bill was not entitled as a matter of right on being paid his demand to dissolve the injunction, dismiss the bill, and discharge the receiver. There is no doubt that the court has the power in such case to dissolve the injunction, discharge the receiver and permit the party to dismiss the bill, when it is satisfied that it is for the interest of all concerned to permit the corporation to manage its own affairs; yet at the same time it is the duty of the court to look into the condition of the corporation before it will discharge the receiver and make such order, either absolute or conditional, as the case may require. Fay *v.* Erie, etc., Railroad Bank, Harr. (Mich.) 194.

Where the entire capital stock of a railroad company, and more, had been expended in building and equipping the road and an indebtedness of $1,100 at least had been incurred, and subsequently mortgage bonds to the amount of $29,000 had been issued, but the indebtedness had not been liquidated, or the interest on the bonds paid, it was held that the company was insolvent within the meaning of the statute providing for the appointment of receivers of insolvent corporations, and that the receiver already appointed would not be discharged and the possession of the road remanded to the company until the admitted liabilities and the receiver's expenses were paid. Sewell *v.* Cape May, etc., R. Co. (N. J.), 30 Am. & Eng. R. Cas. 155.

Where a legatee in a suit to obtain satisfaction of his legacy files a bill in behalf of himself and all other creditors and legatees who may come in, the receiver will not be discharged upon the motion of the plaintiff, against the consent of the incumbrancer who is a party defendant. Largan *v.* Bowen, 1 S. & L. 296.

But a plaintiff who has procured the appointment of a receiver cannot dismiss his bill and have the receiver discharged without first requiring him to pass his accounts. White *v.* Lord Westmeath, 2 Hog. 33.

The stockholders of a defendant corporation cannot by petition obtain the removal of a receiver where, from the pleadings, it appears that such corporation has a regularly elected board of directors and that such board is in active sympathy with the petitioners. Fifth Nat. Bank *v.* Pittsburg, etc., R. Co., 1 Fed. Rep. 190.

1. Fay *v.* Erie, etc., Railroad Bank, Harr. (Mich.) 195. In this case the court by Farnsworth, Chancellor, said: "May an individual creditor, after having commenced proceedings under the statutes before referred to, and pursued his remedy until a receiver has been appointed, and taken upon himself the trust, and until other creditors have filed their claims, and still, at this late stage of the proceedings, upon being paid his particular demand, as a matter of right, dissolve the injunction, dismiss his bill, and discharge the receiver, without any right or duty, on the part of the court, to protect the rights of the other creditors, who may have filed their claims with him, or to protect and save harmless the receiver, who has acted under its authority? I think not. . . . This view necessarily involves another question: Is it imperative upon the court, after the appointment of a receiver, to hold jurisdiction of the case, and require the receiver to pursue his duties, until the concern is wound up and dissolved, although the party complainant in the suit is satisfied, and declines further to prosecute, and when the proper prosecuting offi-

[illegible]MOVAL MUST BE MADE.—As [illegible] may be made at any time for the [illegible] term time or vacation.[1] But in [illegible] must be made within a reason- [illegible] delay in making a motion to [illegible] receiver will be regarded as an [illegible]ment.[2]

[illegible] DISCHARGE.—A change of incum- [illegible] does not affect the status of claims [illegible] against the property.[3] The same [illegible] discharge of a receiver.[4] But in the

[illegible] land grant. In doing this he expended the sum of $5,000. . . . The receiver took possession of the road on May 29. . . . It was not until June 26 that notice of the present motion was given. The officers of the railroad company, as soon as the receiver took possession of the road, learned how the notice of the motion to appoint the receiver had been served, to-wit, on Calder, the vice-president. If they intended to claim that the notice was insufficient and defective, it was their duty to move at once. The delay of nearly a month, while the receiver was going on with the construction of the road and expending money and materials, furnished certainly not by the railroad company, but by others interested in its prosecution, was an acquiescence in the action of the court, and they are estopped now from making objections."

3. Bond *v.* State, 68 Miss. 648; Gibbes *v.* Greenville, etc., R. Co., 15 S. Car. 304; 9 Am. & Eng. R. Cas. 723. In the latter case it was held that the mere transfer of the office of receivership cannot have the effect of invalidating claims which were good under the first administration. The management of the court is one, even if it becomes necessary to change the receiver once, twice, or oftener. Claims against receivers would stand on a very unstable basis if they could be defeated by a change which could so easily be made.

4. Texas, etc., R. Co *v.* Johnson, 76 Tex. 461; 42 Am. & Eng. R. Cas. 7. In this case it was held that after the discharge of a railroad receiver and the restoration of the property to the control of the railroad company, the latter is liable upon any cause of action which arose against the receiver in connection with his management of the road. Although, after the discharge of a receiver and surrender by him of the

latter case, the owner of the property must be made a party to the action, before any judgment can be entered which will be binding upon him for the property.[1] After a receiver is discharged, his liability for acts done in his official capacity is at an

assets, no judgment can be rendered against him to bind the property in his possession when suit was begun, nevertheless the discharge does not abate the suit, which may be prosecuted against his successor. Bond *v.* State, 68 Miss. 648.

Where a judgment is recovered against the receiver of a railroad company for injuries sustained through the negligence of his servants, the company is liable on such judgment after the discharge of the receiver, where it has received, in improvements, earnings out of which the injured person was entitled to have his judgment paid, though he failed to establish his claim by intervening in the suit in which the receiver was appointed, as the decree ordering that the property shall be relieved from liability on claims not established by intervention in such suit does not affect him. Texas, etc., R. Co. *v.* Griffin, 76 Tex. 441; Texas, etc., R. Co. *v.* Johnson (Tex. 1890), 13 S. W. Rep. 463.

Pending the foreclosure of a railroad mortgage, the plaintiff commenced an action against the receiver in charge of the road to recover for personal injuries sustained through the alleged negligence of the receiver's employés, between the date of the foreclosure sale and the execution of the sheriff's deed thereon. After the receiver had appeared and answered in the action, a sheriff's deed was executed, and the receiver made final settlement and was discharged. It was held that the judgment subsequently rendered in the action against the receiver did not become a lien upon the property in the hands of the purchaser at the foreclosure sale. White *v.* Keokuk, etc., R. Co., 52 Iowa 97.

Jurisdiction of Court.—Where the receiver appointed by a court to take charge of the property of a railroad company has, by its decree, been discharged, and directed to surrender the property to the railroad company, that is a termination of that court's exclusive jurisdiction over claims against such property. Mobile, etc., R. Co. *v.* Davis, 62 Miss. 71; 26 Am. & Eng. R. Cas. 425. And *compare* Texas, etc., R. Co. *v.* Johnson, 76 Tex. 421; 42 Am. & Eng. R. Cas. 7; Kretz *v.* Texas, etc., R. Co. (Tex. 1890), 14 S. W. Rep. 1067, where it is held that if a receiver has been discharged by the court appointing him, and the property returned to the defendant, the jurisdiction of the court is ended.

Where the personal property of a debtor was sold at sheriff's sale and bought by the debtor's wife for less than its real value, and thereupon a creditor obtained the appointment of a receiver to take charge of the property so bought, and an injunction to restrain interference, alleging that the purchase was not an honest one; but the *bona fides* of the transaction afterwards being established, and the receiver, having settled his accounts and been discharged, turned over to the purchaser the residue of the property remaining in his hands, a portion of the same, having been sold by him the said purchaser then claimed damages upon the injunction bond against said creditor, by reason of the wrongful interruption of her possession of the property, it was held that she was entitled to recover. Lehman *v.* McQuown, 31 Fed. Rep. 138.

And the rescission of an order appointing a receiver, "without prejudice to any one, party or claimant," is no defense to a possessory warrant for an engine before that time sued out against such an officer. If on such rescission he surrendered the possession of the engine to the company from which he had taken it under the order of his appointment, he did so at his own risk. Peacock *v.* Pittsburgh Locomotive, etc., Works, 52 Ga. 417.

1. Brown *v.* Gay, 76 Tex. 444; 42 Am. & Eng. R. Cas. 23, in which case it was held that where an action has been commenced against a receiver, not personally, but in his official or representative character, and he is discharged by the court which appointed him, and the property is restored to the control of the owner, the latter must be made a party to the action before any judgment can be entered which will be binding upon him or the property.

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2. Miller *v.* Loeb, 64 Barb. (N. Y.) In this case it was held that the discharge of a receiver is no answer to a motion for leave to bring an action against him for the claim and delivery of property, where it appears that the claimants of the property had no notice of the motion to discharge the receiver, although he was aware of their claim, and where it appears that the receiver has sold the property claimed, after notice of the claim, and after the service on him of a petition and notice of a motion for leave to prosecute; an order, moreover, which refuses the claimants such leave is appealable. See *supra*, this title, *Notice of Motion for Removal or Discharge.*

It has been said that the creditors in an action in which a receiver has been appointed are not entitled to notice of his discharge, and that the remedy of a creditor whose rights have been injuriously affected by such discharge is by a motion to vacate the order. New York, etc., Tel. Co. *v.* Jewett, 115 N. Y. 166; 28 Am. & Eng. Corp. Cas. 465.

3. Lehman *v.* McQuown, 31 Fed. Rep. 138; Ryan *v.* Hays, 62 Tex. 42; 23 Am. & Eng. R. Cas. 501. In the latter case suit was brought against the receiver of a railroad to recover damages for injuries inflicted on the plaintiff through the negligence of the servants of the railroad company at a time when the road was under the exclusive management and control of the receiver. It was held that after all the property once in his control as receiver had been turned over to purchasers of the railroad property, and after he had received his discharge from the court, he was not liable to the plaintiff.

4. Bayles *v.* Kansas Pac. R. Co., 13 Colo. 181; 40 Am. & Eng. R. Cas. 42. In this case it was decided that where the receiver of a railroad company has been discharged, he is not a necessary

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g. PRACTICE IN REMOVAL OR DISCHARGE.—A proceeding for the removal or discharge of a receiver must be taken before the court of which he is an officer,[1] and in the suit in which he was appointed.[2]

h. APPEAL FROM ORDER FOR REMOVAL OR DISCHARGE.—The removal of a receiver, as in the case of his appointment, rests largely in the discretion of the court whose receiver he is; and it may be stated as a general rule that matters which have been passed upon by the lower court, involving a discretionary power, will not be reviewed by an appellate tribu-

party to an action against the railroad company to recover the amount of the claim founded upon a contract assumed by the railroad company, even though a reformation of the contract is prayed for as part of the relief asked.

1. **Modification.**—As a general rule, the court to which an application for an order of discharge must be made, is the court of which the receiver is an officer. A modification of this doctrine has grown up in the American practice, out of the power of removal exercised by the United States courts. Thus, where, in an action pending in a State court, a receiver has been appointed, and then before any motion to discharge has been made, the case is removed into the United States court, the motion for the discharge may be made in that court at any time after the record is filed. Texas, etc., R. Co. *v.* Rust, 17 Fed. Rep. 275; Mahaney Min. Co. *v.* Bennett, 4 Sawy. (U. S.) 289; Dillon on Removals, § 80, p. 99.

2. It rests in the discretion of the court to allow a party claiming rights against its receiver to bring an independent action against him, or to compel such party to proceed against him by petition in the action in which he is receiver. With the exercise of such discretion this court cannot interfere on appeal, unless there has been a manifest abuse of it. In the present case, if the appellants can obtain the same relief against the receiver, by petition in the action in which the receiver was appointed, that they seek in the creditor's suit, it certainly was no abuse of discretion to deny the petition for leave to sue the receiver in the latter suit. Lyon, J., in Davis *v.* Michelbacher Wis. (1887), 31 N. W. Rep. 160.

Motion for Change of Receiver.—Upon a mere formal motion to substitute one person instead of another as receiver in an action, the opposing party is not at liberty to examine the regularity of the original order appointing such receiver, or of the proceedings generally in the suit, even though the plaintiff moves upon all the pleadings, decree and proceedings in the case. It would act as a surprise upon the latter, and he is entitled to notice of so serious an objection. If there be no personal incapacity in the proposed substituted receiver, such motion should be granted without prejudice to the right of the defendant to move in the usual way to set aside the whole proceedings as irregular. Fassett *v.* Tallmadge, 13 Abb. Pr. (N. Y.) 12.

When Receiver Not Necessary Party.—The receiver of an insolvent firm appointed in an action brought by one of the parties for a dissolution of the partnership and an account, is not a necessary party to a bill by judgment creditors of the firm to have certain judgment notes given by the firm, prior to the dissolution, to other creditors, declared fraudulent, and to have the moneys realized thereon, and assets of the firm in the receiver's hands, and the value of the good-will of the firm's business, alleged to have been lost by the fault of the receiver, applied to the payment of their claims, *and to have such receiver suspended.* Davis *v.* Michelbacher (Wis. 1887), 31 N. W. Rep. 160.

Upon an application by the receiver of an insolvent corporation for adjustment of his compensation and allowance of his accounts, and an application by the parties interested for his discharge, both applications being heard together, the court may grant the discharge, and determine the matter of compensation and accounts in a subsequent order. Joslyn *v.* Athens Coach, etc., Co., 43 Minn. 534; 32 Am. & Eng. Corp. Cas. 530.

nal; nor is this rule changed, whichever party attempts to take the appeal.[1]

1. *In re* Colvin, 3 Md. Ch. 302; Gluck and Becker on Rec., § 114; Beach on Rec., § 781; High on Rec. (3d ed.), § 825.

Substituting One Receiver for Another.—An order of a judge substituting one receiver in place of another, is not an appealable order. Where both parties to the action being dissatisfied with the appointment of the special term, appealed, the court by Clerke, J., said: "But this is not an appealable order. Before the person who was in the first instance appointed receiver entered on his duties; and, indeed, before the appointment was consummated by the filing of the requisite bond, the judge, in the exercise of the same discretion which induced him to make the first nomination, reconsidered his action, revoked that nomination, and substituted another person. It is of no consequence how or where he received any information which induced him to make the substitution. We think he exercised a discretion which cannot be controlled by us."

Where an order directs the discharge of a receiver, and provides for the rendering of an account by the receiver on service of notice of the order upon him; for the passing of his account when rendered; for the canceling of his bond; for the payment into court of any surplus in his hands, and for the restoration of the property taken into his possession as receiver. *Held*, such order not appealable. Colgate *v.* Michigan Lake Shore R. Co., 28 Mich. 288.

The appointment or discharge of a receiver ordinarily rests wholly within the discretion of the court below, upon all the facts and circumstances of the case, but it is not always absolutely so. As where there is a proceeding to foreclose a mortgage given by a railroad corporation on its road, a long and actively worked one (this being a sort of property over which a receiver should be appointed only on necessity), and the amount due on the mortgage is a matter still unsettled and fiercely contested, the appointment or discharge of a receiver is matter belonging to the discretion of the court in which the litigation is pending. But when the amount due has been passed on and finally fixed by this court, and the right of the mortgagor to pay the sum thus settled and fixed is clear, the court below has then no discretion to withhold such restoration; and a refusal to discharge the receiver is judicial error, which this court may correct, supposing the matter (not itself one in the nature of a final decree) to be in any way fairly before it otherwise. If other parties in the case set up claims on the road, which they look to the receiver to provide for and protect these other claims being disputed, and, in reference to the main concerns of the road, small, this court will not the less exercise its power of discharge. It will exercise it, however, under conditions, such as that of the company's giving security to pay these other claims, if established as liens. Milwaukee, etc., R. Co. *v.* Soutter, 2 Wall. (U. S.) 510.

An appeal does not lie to reverse an *ex parte* order of a vice-chancellor if merely irregular. The proper remedy of the party against whom such *ex parte* order has been made, is to apply to the vice-chancellor to have it set aside. Gibson *v.* Martin, 8 Paige (N. Y.) 481.

The discharge of a receiver furnishes no ground of appeal. Washington City, etc., R. Co. *v.* Southern Md. R. Co., 55 Md. 153; 6 Am. & Eng. R. Cas. 603.

Where, by the discharge of a receiver, the rights of a creditor have been injuriously affected, his remedy is by motion to vacate the order discharging the receiver. New York, etc., Tel. Co. *v.* Jewett, 115 N. Y. 166; 28 Am. & Eng. Corp. Cas. 465.

But an order refusing claimants of property taken and sold by a receiver, after notice of their claim, and without notice to them of his discharge, leave to prosecute the receiver is appealable. Miller *v.* Loeb, 64 Barb. (N. Y.) 454.

In *Illinois*, a writ of error will not lie to reverse a decree removing a receiver, although such decree gave the defendant in error possession of the property, he being required by the same decree to give bond and security to hold all moneys which might come into his hands subject to any final decree which the court may ultimately render in the case. The reason assigned being that when the original bill came on to be heard on the merits, and a final decree settling the rights of all the parties concerned had been removed, it would then be ample time,

A receiver, being merely an officer of the court, and usually having no interest in the matter which can be affected one way or the other by his removal or discharge, has no more authority to ask for a revision of an order directing his removal or discharge than a mere stranger to the cause.[1]

VII. Remedies Concerning — 1. Suits by Receivers — *a.* Regulated by Statute or Court.—The powers of receivers in regard to bringing actions depend either upon the orders of the court or upon statute. In some States the English practice prevails,

if the decree were erroneous, for either party to appeal or sue out a writ of error. Farson *v.* Gorham, 117 Ill. 137.

In *Maryland*, an order refusing to rescind the appointment of a receiver is not appealable, since it is not an order in the nature of a final decree. Hull *v.* Caughy, 66 Md. 105. But see Speights *v.* Peters, 9 Gill (Md.) 472; Voshell *v.* Hynson, 26 Md. 83.

In Cincinnati, etc., R. Co. *v.* Sloan, 31 Ohio St. 1, in construing the provision of the Ohio Code, 253, which confers on the judges the same power in respect to the appointment and discharge of receivers as it confers on the courts, the question arises whether the subsequent order of the court annulling the action of the judges is of such a nature as to be subject to review on error. On this point the supreme court, speaking by White, J., said: "As a general proposition it is true that the appointment or discharge of a receiver is a matter resting in the discretion of the court. But before judicial action can be justified on the ground of discretion, the case must be one calling for the exercise of discretion.

The power to appoint or discharge is not an arbitrary power. The cases in which the power may be exercised are prescribed by law, and it is only in such cases that the power can be legally exercised. If the petition makes no case for the appointment of a receiver, or if the appointment was originally proper, yet under changed conditions it is clear from the undisputed facts that he ought not to be continued, a refusal of the court, on proper application, to discharge him is judicial error." See also Milwaukee, etc., R. Co. *v.* Soutter, 2 Wall. (U. S.) 510; Gibson *v.* Martin, 8 Paige (N. Y.) 481.

1. If there is any reasonable doubt upon the question of the right of a party in interest to appeal from an order discharging a receiver, and directing him to deliver over the property, it is clear that no such right exists in the receiver himself. A receiver has no rights whatever; he is but an officer of the court; his removal determines no right, and in no way affects the title of the property. His holding is that of the court for him from whom the possession is taken, and he has no more right to ask for a revision of the order removing him than an entire stranger to the cause. *In re* Colvin, 3 Md. Ch. 302.

And the fact that a receiver has entered an appeal from the order discharging him, and filed an appeal bond, will not prevent this court from enforcing by attachment its order of removal. *In re* Colvin, 3 Md. Ch. 278.

In this case Johnson, Chancellor, said: "But it is said, that though he cannot complain of the order removing him, yet as this order goes further, and directs him to deliver over property to the administrator *pendente lite*, he may, on that account, be entitled to take the judgment of the appellate court. But what is it to him what the court does with the property, provided he is discharged from his responsibility as receiver? And that he would be so discharged by obeying the order of the court, cannot be questioned. It is, moreover, conceded that the receiver has no rights himself, and, of course, cannot appeal or interfere in any way in the conduct of the cause, unless he can be considered as representing those at whose instance he was appointed. But to view him in that light, would be to give him a character inconsistent with the nature of his office, as defined by Chancellor Bland. How can he be the officer of the court, and the hand of the court, and, at the same time, the representative of the interests of certain of the parties to the cause? The court must act by its officers and agents, and there is as much propriety in calling the court the representative of any of the parties to the cause, as its agents and

officers, who derive their authority from the court, and are removable at its discretion.

"If, however, there could be a doubt upon the subject, it would be removed by the passage from 5 Lib. of Law & Eq. 435, which proves that a receiver is appointed on behalf of all parties, and not of the plaintiff, or of one defendant only, and that when the title to the property has been ascertained, the receiver will be considered as his receiver. Surely, it would be attended with dangerous consequences to allow parties in interest to stand back and shun personal responsibility for costs and damages, whilst the receiver, instigated by them, carried on controversies with other parties to the cause. If the receiver may prosecute this appeal on behalf of the parties whom he may be supposed to represent, why may he not interfere at any and every stage of the cause, when he may think the interests of those parties require it? But surely this could never be tolerated. The proceedings in the cause, except, indeed, where his own accounts and allowances are concerned, are as to him *res inter alios acta*, as was decided in regard to a trustee appointed by the court to sell property and pay debts.

"I hold it, therefore, to be too clear for doubt, that a receiver has no right to intermeddle in questions affecting the rights of the parties, or the disposition of the property in his hands; that he cannot in any sense, or to any extent, be regarded as the representative of any one or more of the parties to the cause, and that he must retire from his office, and give up the property committed to his custody, whenever required so to do by the court; and this, whether the power to discharge him was reserved or not, as was correctly stated in the argument. In this case, the power was expressly reserved, not because it was deemed necessary, but to indicate plainly to all parties that the order of the 9th of February last was to be regarded as temporary only, and only passed in view of the peculiar exigencies of the case.

"The only remaining question is, will the court, notwithstanding the appeal of the receiver and the bond given by him, execute the order appealed from? Why not? How can his rights be affected one way or the other by the execution of the order, no matter what may be the decision of the court of appeals? . . . . . He is simply removed from an office, which certainly was not conferred upon him for his own benefit, and he is required to deliver up and account for property to which it is conceded on all hands he has no shadow of title. The question, then, is, not whether this court, or the appellate court, is to decide whether an appeal will lie or not in any given case. But the question here is, whether the order of this court shall be stayed, because a party outside of the cause, who has no rights, and consequently against whose rights no order or decree has been or could be passed, thinks proper to pray an appeal and give bond? As well might it be said that the register of this court, when ordered to draw a check for money paid into court to the credit of a cause, could stay the execution of the order, by appealing and giving bond. It appears to me impossible to maintain such a proposition. If the court can be thus embarrassed and delayed by its officers and agents, it would be rendered powerless for good, and prolific only of inconvenience and mischief."

In L'Engle *v.* Florida Cent. R. Co., 14 Fla. 266, the defendant railroad moved, with the consent of the plaintiff, to vacate an order previously made appointing a receiver. The receiver objected, and the court ordered the receiver to restore the railroad, its appurtenances and management to the company, but required him still to receive and disburse its earnings. This was held on appeal to be error, the supreme court, by Frazer, J., observing: "The motion was to vacate, and being concurred in by all the parties in interest, should have been granted so far as to restore the possession, management and control of the road to the owner, and such control should manifestly include the receipt and disbursement of its future earnings. The receiver should not have been heard in opposition to his motion. He is not a party in interest. He has no standing in court for such a purpose. He has no right to interfere in questions affecting the rights of the parties or the disposition of the property in his hands. When his accounts come up for adjustment, his relations will be different. He will then be a party in interest, and may be heard, and it will be the duty of the court to see that his rights are fully protected."

and the matter is controlled entirely by the orders of the court, while in other States the question is regulated to a considerable extent by statutes.[1]

(1) *Control of Court Over*—(a) **Receiver Cannot Sue Without Leave.**—A receiver may not bring any suit without first obtaining leave to do so from the court which appointed him.[2] This rule is universal in the absence of statutory provisions changing it.

But where the receiver is a party to the action, he may appeal from an order removing him. Conner *v.* Belden, 8 Daly. (N. Y.) 257; Wilson *v.* Barney, 5 Hun (N. Y.) 257.

1. In Alexander *v.* Relfer, 9 Mo. App. 134, the court by Lewis P. J., said: "All the authorities agree that under the ancient chancery procedure, as it has existed in this country, without statutory modification, a receiver, as such, has no authority to institute a suit . . . unless by order or leave of the court or judge who appointed him. . . . In New York and some other states the traditional powers of receivers have been greatly enlarged by statute, especially in regard to the institution of suits in their own names and at their own discretion"

The court exercises a strict control over its receiver in the matter of bringing suits, and will not permit a receiver to abuse his power by unauthorized suits under pretense of authority from the court. If he brings suit in the name of a third person, without his authority, or without foundation of right, the parties to such suit will be protected by the court, which will direct him to discontinue the action, and enjoin him from further proceeding therein. *In re* Merritt, 5 Paige (N. Y.) 125.

2. Pitt *v.* Snowdon, 3 Atk. 750; Wynne *v.* Lord Newborough, 3 Bro. C. C. 88; 1 Ves. Jr. 164; Ward *v.* Swift, 6 Hare, 309; Swaby *v.* Dickon, 5 Sim. 629; Anonymous, 6 Ves. 287; Conyers *v.* Crosbie, 6 Ir. Eq. 657; Booth *v.* Clark, 17 How. (U. S.) 331; Green *v.* Winter, 1 Johns. Ch. (N. Y.) 60; Merritt *v.* Lyon, 16 Wend. (N. Y.) 405; *In re* Merritt, 5 Paige (N. Y.) 125; Davis *v.* Snead, 33 Gratt. (Va.) 705; Reynolds *v.* Pettyjohn, 79 Va. 327; Garver *v.* Kent, 70 Ind. 428; Battle *v.* Davis, 66 N. Car. 252; Screven *v.* Clark, 48 Ga. 41; Patrick *v.* Eells, 30 Kan. 680; 4 Am. & Eng. Corp. Cas. 152; Alexander *v.* Relfe, 9 Mo. App. 133; Fichtenkarmn *v.* Gambs, 68 Mo. 289; Glenn *v.* Busey, 5 Mackey (D. C.) 233.

A receiver cannot commence any action for the recovery of outstanding property without an order of court. He is but the creature of the court, has no powers except what are conferred upon him by the order of his appointment, and the course and practice of the court. He cannot even institute or defend actions except by authority. Booth *v.* Clark, 17 How. (U. S.) 331; 33 Gratt. (Va.) 710; Battle *v.* Davis, 66 N. Car. 252; Glenn *v.* Busey, 5 Mackey (D. C.) 233; Screven *v.* Clark, 48 Ga. 41.

Where, in the order appointing the receiver, the language was, "And he is hereby ordered to collect immediately all said property together, and hold the same subject to the further order of the court," it was held that this did not confer authority to bring suit. Screven *v.* Clark, 48 Ga. 41. This case also decided that notwithstanding the code of procedure regulates the appointment of receivers, the practice of courts of equity still governs receivers as to their power to bring suits.

In Screven *v.* Clark, 48 Ga. 41, the court by McKay, J., said: "The rule is perhaps an arbitrary one, but is, nevertheless, well settled, that a receiver has no right to sue without express authority from the chancellor; his general authority to collect and keep the assets is not sufficient to justify him in bringing an action. A receiver is at last only an officer of the court, and the foundation of the rule probably is that it is always for the court itself to determine whether it shall be dragged into litigation. At law the party having the legal right to sue is the proper party, and if one comes suing for the property of another he must show, as part of his right to recover, the authority he has to come into a court of law asserting another's right. We think this failure to show any authority to sue is fatal to the case of the plaintiff below."

Maryland.—In Everett *v.* State, 28

(b) **Court May Give General Leave.**—It has become customary, in order to avoid the necessity of frequent applications, for the court to give the receiver general leave to bring suits.[1] If such authority is not given in the order of appointment it may be confirmed by a subsequent order.[2]

(2) *Statutory Regulations.*—When the receiver's authority is derived from statute his functions in regard to bringing actions depend, of course, upon the extent of the power conferred thereby, and must be determined with reference thereto.[3]

b. RECEIVER MUST PROCEED LIKE ORDINARY SUITOR.—The fact that receivers are officers of the court makes no difference in their standing as suitors. They must commence actions in the same manner, and employ the same process as other suitors,[4]

Md. 190, it was held that where receivers are in possession of property which is taken from them pending an appeal, and bond given, they have a right, on their appointment being affirmed, to sue out the bond without obtaining leave from the court. The decision was however based upon a statute, and the court said that in this particular case the question of the receiver's right to bring actions without leave did not arise.

Louisiana.—The rule stated in the text does not seem to prevail in Louisiana, where the receiver is held to have power to bring suits as incident to his general authority to get in the assets. Helme *v.* Littlejohn, 12 La. Ann. 298.

1. But the authority to sue conferred by such an order is confined to such suits as are contemplated by the order, and to property under the receiver's control. Where the order authorized the receiver to sue for all the assets of every kind and character, it was held that it gave him no authority to sue for waste or injury to property not in his possession, without special order of court. Alexander *v.* Relfe, 9 Mo. App. 133. And an order to collect together the assets was held not to authorize the receiver to bring suit without leave. Screven *v.* Clark, 48 Ga. 41.

2. Lathrop *v.* Knap, 37 Wis. 307.

3. A consideration of the statutes of the various States herein is not attempted for the reason that they are of purely local interest.

Where a statute authorized the receiver to sue for all the estate, debts and things in action, the term "chose in action" was construed as extending to all rights to personal property not in possession, which may be enforced by action, whether sounding in contract or in tort, and it was held that a receiver appointed under such statute could maintain trover though the conversion occurred prior to his appointment. Gillet *v.* Fairchild, 4 Den. (N. Y.) 80.

4. A receiver must pursue the appropriate remedy; he cannot change legal into equitable remedies. In Freeman *v.* Winchester, 10 Smed. & M. (Miss.) 577, the receiver brought a bill in equity to recover of W the amount of an unpaid subscription to capital stock, and on demurrer it was held that the liability of W was purely a legal one, which could only be enforced in an action of law. Rules of practice are the same in his case as those of other suitors. In State Bank *v.* First Nat. Bank, 34 N. J. Eq. 450, the receiver began a proceeding by petition to recover moneys of the bank received by one of its creditors subsequent to the appointment of the receiver, but the court held that the receiver could have no relief by petition, but must proceed by bill. When a receiver comes into a court of law he must show his superior legal right; the case will not be determined upon principles of equity. Conley *v.* Deere, 11 Lea (Tenn.) 275. An assignee of funds procured an order directing the person in whose hands they had been placed by the court, to deliver the fund to him. A receiver of the assignee, afterward appointed, tried to obtain the fund by an order setting aside the order of delivery, but it was held that he must bring an action to test the title. *In re* Castle, 41 Hun (N. Y.) 637. Where a receiver was appointed over a company, and before his qualification a creditor attached some of the company's property, the receiver

and have like freedom in the conduct of the litigation after it is begun.[1]

c. IN WHOSE NAME SUIT TO BE BROUGHT—(1) *General Rule, Must be in Name of Original Party.*—Where not otherwise provided by statute it is the general rule that a receiver cannot bring an action in his own name, but must, unless the legal title has been formally assigned to him, proceed in the name of the party over whom he has been appointed a receiver.[2] There has been a gradual revolt against the doctrine, and it is now generally accepted that the court has power by express order to authorize

obtained an order on the sheriff to show cause why the attachment should not be dissolved. *Held* on appeal that the receiver had mistaken his remedy as his motion was made in a proceeding to which neither sheriff, attaching creditor nor receiver was a party; that he must bring an action to avoid the attachment, and make the attaching creditor a party. Andrews *v.* Paschen, 67 Wis. 43.

1. After entering upon the litigation he has all the freedom of action of any other person, and has a right to appeal from a decision which is adverse to him. Devendorf *v.* Dickinson, 21 How. Pr. (N. Y.) 275.

Employment of Counsel.—A receiver has a right to employ counsel to conduct the litigation. He can employ whom he chooses, except that it is a general rule that he shall not employ the counsel of either of the parties to the suit in which he was appointed; as their acting in such capacity would frequently cast upon them conflictory duties. Ryckman *v.* Parkins, 5 Paige (N. Y.) 543; *In re* Ainsley, 1 Edw. Ch. (N. Y.) 576; Ray *v.* Macomb, 2 Edw. Ch. (N. Y.) 165; Adams *v.* Woods, 8 Cal. 306; Moore *v.* O'Loghlin, 3 L. R. Ir. 405.

For the same reason it is improper for the receiver in an action pertaining to personal property, to employ the counsel of persons holding the property or interested therein. *In re* Ainsley, 1 Edw. Ch. (N. Y.) 576. Where counsel for the plaintiff in a dissolution of partnership proceeding also acted as associate counsel for the receiver, the court refused to allow compensation. Adams *v.* Woods, 8 Cal. 306. This rule prohibiting the employment of counsel of either party is limited to cases where the receiver is acting adversely to some of the parties to the litigation. In other cases it may be done. And where no objection is made by the parties themselves, the receiver may employ counsel of either of them, and a stranger to the original action has no standing to object. Smith *v.* New York Consolidated Stage Co., 28 How. Pr. (N. Y.) 377; 18 Abb. Pr. (N. Y.) 431; Warren *v.* Sprague, 11 Paige (N. Y.) 200; *affirming* 4 Edw. Ch. (N. Y.) 416.

In a creditor's suit to set aside fraudulent transfers, it is considered appropriate for the receiver to employ the counsel of the creditors. Shainwald *v.* Lewis, 8 Fed. Rep. 878.

Interpleader.—A receiver may compel claimants to the same fund to interplead, and meantime pass his accounts and pay the fund into court to await the result. Winfield *v.* Bacon, 24 Barb. (N. Y.) 154.

2. Yeager *v.* Wallace, 44 Pa. St. 294; Manlove *v.* Burger, 38 Ind. 211; Garver *v.* Kent, 70 Ind. 428; Moriarty *v.* Kent, 71 Ind. 601; Harrell *v.* Kent, 71 Ind. 602; Ingersoll *v.* Cooper, 5 Blackf. (Ind.) 426; King *v.* Cutts, 24 Wis. 627; Newell *v.* Fisher, 24 Miss. 392; Freeman *v.* Winchester, 10 Smed. & M. (Miss.) 577; Battle *v.* Davis, 66 N. Car. 252; State *v.* Wilmer, 65 Md. 178; Graydon *v.* Church, 7 Mich. 36; Booth *v.* Clark, 17 How. (U. S.) 331; Green *v.* Winter, 1 Johns. Ch. (N. Y.) 60; Dick *v.* Struthers, 25 Fed. Rep. 103; St. Louis, etc., Coal, etc., Co. *v.* Sandoval Coal, etc., Co., 111 Ill. 32.

Trover.—A receiver cannot maintain trover in his own name where the conversion took place prior to his appointment, but must proceed in the name of the party who has the legal title. Yeager *v.* Wallace, 44 Pa. St. 294. But he may do so where the conversion took place after he had obtained possession. Singerly *v.* Fox, 75 Pa. St. 112.

Forcible Entry and Detainer.—A receiver cannot maintain an action of

the receiver to sue in his own name.[1] In some States the courts have gone to the extent of holding that the rule is entirely wrong, and that the receiver, when he has the right to bring actions at all, should do so in his own name, *virtute officii*, and this view seems to be gaining ground.[2]

forcible entry and detainer in his own name, but must obtain leave to sue in the name of the lessor. King *v.* Cutts, 24 Wis. 627; *contra*, Baker *v.* Cooper, 57 Me. 388.

Patent.—A receiver cannot sue in his own name for infringement of letters patent. Booth *v.* Clark, 17 How. (U. S.) 331; Dick *v.* Struthers, 25 Fed. Rep. 103; Graydon *v.* Church, 7 Mich. 36.

Notes.—A receiver cannot bring suit in his own name to recover on a promissory note drawn to the party over whose property he has been appointed. Battle *v.* Davis, 66 N. Car. 252; King *v.* Cutts, 24 Wis. 627.

Practice.—The practice was for the receiver to apply to the court for an order to prosecute the action, which order was obtained on notice to the person whose name was to be used. King *v.* Cutts, 24 Wis. 627, *citing* Taylor *v.* Allen, 2 Atk. 213; Wynne *v.* Lord Newborough, 1 Ves. Jr. 165; Green *v.* Winter, 1 Johns. Ch. (N. Y.) 60; Merritt *v.* Lyon, 16 Wend. (N. Y.) 410; Freeman *v.* Winchester, 10 Smed. & M. (Miss.) 577.

1. Hardwick *v.* Hook, 8 Ga. 354; Leonard *v.* Storrs, 31 Ala. 488.

That the court has such power is assumed, though not directly decided in Manlove *v.* Burger, 38 Ind. 211; Freeman *v.* Winchester, 10 Smed. & M. (Miss.) 577; King *v.* Cutts, 24 Wis. 627; Garver *v.* Kent, 70 Ind. 428; Davis *v.* Gray, 16 Wall. (U. S.) 203. But in Alexander *v.* Relfe, 9 Mo. App. 133, decided in 1880, the question arose, and while not decided, as the court held that the decree could not be construed as authorizing the receiver to sue in his own name, the court by Lewis, P. J., said: "Even if the decree could be construed as directing a suit in the receiver's name, its validity in that particular would be far from certain. The right or title in the thing to be sued for remains where it was before the receiver's appointment. Can such an order of appointment be made to divest the right or title and vest it in the new owner, without authority expressly given by some statutory enactment or settled rule of law? It was held in Hannah *v.* Moberly Bank, 67 Mo. 678, that the decree could not confer upon a receiver appointed under the execution law greater powers than were given him by the statute. The rule would seem to apply quite as well to powers which are clearly defined by established law, independently of any special statute. When no statute has intervened, the law which withholds from a receiver any right, title, or trust, by virtue whereof he might sue in his own name, is as well established and of controlling authority derived from both settled usage and legal necessity, as if it were embodied in the statutes."

This case was reversed in Alexander *v.* Relfe, 74 Mo. 495, on the ground that a statute of *Missouri* conferred authority on the court to make such an order in a class of cases of which this was one, but seemed to agree with the court below as to the inability of the court to make such order in the absence of an enabling statute. See the remarks of Sherwood, C. J., on page 516. See also Gill *v.* Balis, 72 Mo. 424.

The leading text writers in the United States on this subject are of opinion that the courts possess the power to authorize receivers to sue in their own names. High on Receivers, (3rd ed.), § 209; Beach on Receivers (1st ed.), § 688; Gluck & Becker on Receivers of Corporations (1st ed.), pp. 155, 156.

2. Wray *v.* Jamison, 10 Humph. (Tenn.) 186; Helme *v.* Littlejohn, 12 La. Ann. 298; Baker *v.* Cooper, 57 Me. 388; Harrison *v.* Maxwell, 44 N. J. L. 319; Wilkinson *v.* Rutherford, 49 N. J. L. 241; Hardwick *v.* Hook, 8 Ga. 354.

This view is supported by Beach on Receivers, § 689 (1st ed.), where the author says that the old rule "has not been universally approved even by the courts which adhere to it, and has been directly opposed in a line of decisions, which hold, in effect, that the receiver, by virtue of his appointment and of his character as representative of all parties interested in the property, is a *quasi* assignee, and is invested with the title to all rights of action possessed by his principal at the time of

his appointment, to such an extent, at least, as will enable him to sue upon them in his official character. This position seems to be entirely reasonable and to be in accord with other well recognized rules concerning the powers and duties of the receiver, as, *e. g.*, that he may make sale of the property and give a valid title, whereas the insolvent cannot do so after a receiver of his effects is appointed"—and that he may sue for the purchase money of property sold by him, in his own name."

In Wray *v.* Jamison, 10 Humph. (Tenn.) 186, it was held that the necessary effect of the appointment of a receiver was to invest him with such an interest that he alone could sue for it, and that he must do so in his own name.

In Helme *v.* Littlejohn, 12 La. Ann. 298, it was held that a receiver of a partnership has the right by virtue of his appointment to bring suit in his own name for money owing to the partnership.

In Baker *v.* Cooper, 57 Me. 388, receivers were allowed to maintain in their own name an action of forcible entry and detainer to get possession of premises in the possession of a tenant.

The receiver may file a bill in his own name to foreclose a mortgage given to a corporation, but the corporation must be joined. Comer *v.* Bray, 83 Ala. 217.

Where the receiver is authorized by the court to sue at law and in equity, he may sue in his own name. Frank *v.* Morrison, 58 Md. 423; Hayes *v.* Brotzman, 46 Md. 519.

In Wilkinson *v.* Rutherford, 49 N. J. L. 241, decided in 1887, a receiver was allowed to bring suit in his own name, and the court by Beasley, C. J., expressed the new view very fully as follows: "The bond in this case is payable to the corporation represented by the plaintiff as receiver; and the contention is that, as the statute, by virtue of which the receivership has been created, is silent as to the powers annexed to such office, a right to sue in his own name has not been imparted to him. This proposition has undoubtedly considerable authority in his favor; so much, indeed, that a recent text-writer has declared it to be the doctrine that has, in general, found favor in the courts. High Rec., § 209. The rule thus affirmed is that the receiver must sue in the name of the persons having the legal right. When neither the statute law nor the order of his appointment authorized him to proceed in his own name, he must proceed in the name of the person in whom the right of action existed before his appointment. It has been already shown that there is no statutory definition of the powers of the receiver. The question, consequently, that arises, is as to the inherent abilities of a receiver by force of the usual rules of jurisdiction. I cannot agree to the doctrine that a receiver is a mere custodian of the property of the person whom in certain respects he is made to supplant, and it would seem he is an assignee of the assets within the scope of his office. There seems to be no reason why his powers should not be held to be coextensive with his functions; and it is clear that he cannot conveniently perform those functions unless upon the theory that some interest in the property, akin to that of an assignee's, passes to him. The receiver is to discharge the executory duty of collecting the debts, and taking into his possession, even against antagonistic claims, the tangible property; and, after his appointment, a sale of such property by the insolvent would, it is presumed, be absolutely void; and yet, if the interest in the property thus transferred was not vested in the receiver, it would be difficult to find ground on which to invalidate the transaction. If no title resides in the receiver, in disposing of property, he would be obliged to make sale in the name of the insolvent owner, and, if the money that became due was not paid, to collect it by suit in the name of such owner, and yet, in the case of Singerly *v.* Fox, 75 Pa. St. 112, it was decided that such officer should sue in his own name for the purchase money of an article sold by him in his official capacity. The inconvenience of requiring these agents of a court of equity to institute all actions in the name of the insolvent was exemplified in a case arising in the State of *Maine;* the question being whether the receivers of a bank could maintain in their own names an action to obtain possession of real estate to which the bank was entitled; the right to prosecute in the form adopted was upheld by the Supreme Court of the State, the circumstances being emphasized that the writ under a judgment, if obtained

(2) *Statutory Regulation as to Name.*—In some States statutes determine, either directly or by necessary implication, in what name the receiver shall sue in bringing actions on behalf of the property he represents.[1]

in the name of the bank, would require the officer executing it to put the bank, and not the receivers, in possession, which was not the object of the suit. Baker *v.* Cooper, 57 Me. 388. These embarrassments, as well as many others of a like kind, are obviated by the adoption of the doctrine, that, *virtute officii*, a receiver becomes a provisional assignee of the property committed to him, and this doctrine is recognized in the case of Harrison *v.* Maxwell, 44 N. J. Law 319. It will be observed that the theory thus approved attributes to a receiver of the kind in question only a limited power to institute action in his own name, as he is supposed to have the power, in this respect, of an assignee, and nothing more. A chose in action that is not so transferable as to enable an assignee to sue for it in his own name is transmitted to a receiver subject to the same qualification."

1. The statutes vary in their terms in the several States, and as they are purely local in their effect do not deserve separate treatment in a work of this kind. The general tenor of such statutes is to authorize receivers to sue in their own names or otherwise, and very often the statutes also provide that the receiver may sue without obtaining special leave of court. These statutes are but the outgrowth of the extension of a receiver's functions, which is so noticeable in the United States, and a recognition of the fact that a receiver has become to a great extent a substitute for an assignee in insolvency. In *North Carolina* it seems to be held that a statute abolishing the distinction between courts of law and chancery courts will enable the receiver to sue in his own name. The point was not necessary to the decision, but in Gray *v.* Lewis, 94 N. Car. 392, the court by Smith, C. J., said: "It is true that under a system in which legal and equitable rights are administered in separate tribunals, a court of equity could not confer upon a receiver or officer of its own appointment a capacity to sue, not recognized in a court of law. . . . It is otherwise in the present procedure." As to *Connecticut* statutes, see Terry *v.* Bamberger, 44 Conn. 558; Cooke *v.* Orange, 48 Conn. 401. As to *Ohio* statutes, see Miami Exporting Co. *v.* Gano, 13 Ohio 269; Renick *v.* Bank of West Union, 13 Ohio 298; 42 Am. Dec. 203. As to *Missouri*, see Alexander *v.* Relfe, 9 Mo. App. 133, *reversing* 74 Mo. 495. See also Gill *v.* Balis, 72 Mo. 424; State *v.* Fichtenkamm, 68 Mo. 289. For *New York*, see Nathan *v.* Whitlock, 9 Paige (N. Y.) 152; Gillet *v.* Fairchild, 4 Den. (N. Y.) 80; Sheldon *v.* Adams, 41 Barb. (N. Y.) 54; 27 How. Pr. (N. Y.) 179; Talmage *v.* Pell, 9 Paige (N. Y.) 410; Palmer *v.* Murray, 18 How. Pr. (N. Y.) 545.

Where such statute provides that actions may be brought in the name of the party over whom the receiver is appointed "or otherwise," the receiver may proceed in his own name. Manlove *v.* Burger, 38 Ind. 211; Garver *v.* Kent, 70 Ind. 428; Frank *v.* Morrison, 58 Md. 423; Hayes *v.* Brotzman, 46 Md. 519.

Where the statute gave receivers of corporations power to sue for and collect demands or recover property "in the same way and to the same extent that the corporation itself might have done" it was held that the receivers might sue in their own name, and that the effect was to prevent the corporation from suing in its own name. Miami Exporting Co. *v.* Gano, 13 Ohio 269; Renick *v.* Bank of West Union, 13 Ohio 298; 42 Am. Dec. 203.

The term "chose in action" in a statute giving the receiver power to sue in his own name was held to extend to all rights, arising either out of contract or tort, and the receiver was allowed to bring trover in his own name, although the conversion took place prior to his appointment. Gillet *v.* Fairchild, 4 Den. (N. Y.) 80.

Where the statute gave the court power to make "such orders and decrees as may be necessary in winding up the affairs" the court may authorize the receiver to sue in his own name. Gill *v.* Balis, 22 Mo. 424; Alexander *v.* Relfe, 74 Mo. 495; but it was apparently the opinion of the court that even this statute did not permit the receiver

d. PARTIES TO ACTIONS BY RECEIVERS.—In the notes below will be found decisions on the question of the proper parties to actions by receivers in various cases.[1]

e. LIABILITY OF RECEIVER FOR COSTS.—The liability of the receiver in relation to costs in actions is fully treated elsewhere in this article.[2]

f. RECEIVER'S POSITION CO-EXTENSIVE WITH THAT OF PARTY OVER WHOM APPOINTED—(1) *Succeeds to Same Rights and Contract Relations.*—The receiver succeeds to all rights of action belonging to the party over whose property he has been appointed, and occupies, in general, substantially the same relation which was occupied by the original parties. Contract relations and rights of action remain unchanged.[3]

(a) **Can Collect Unpaid Subscription to Capital Stock.**—A receiver of an insolvent corporation, appointed on behalf of the creditors, is vested with the right of action against stockholders for unpaid

to sue in his own name without express order of the court.

1. The receiver is the proper party complainant to a bill to set aside an assignment made by directors of a bank. Leavitt *v.* Yates, 4 Edw. Ch. (N. Y.) 134. Under the *Wisconsin* statutes the bank comptroller, and not the receiver, is the proper party to bring suit on a stockholder's bond. Rusk *v.* Van Nostrand, 21 Wis. 159. Where judgment has been entered by the bank comptroller on such a bond, it may be enforced by a receiver subsequently appointed. Van Steenwyck *v.* Sackett, 17 Wis. 645. It is not necessary for the receiver of a corporation in New Jersey to make creditors and stockholders parties when he files a bill. Mann *v.* Bruce, 5 N. J. Eq. 413.

2. See this title, *Relation to Court, Accounting Enacted, For Costs.*

3. Griffin *v.* Long Island R. Co., 102 N. Y. 449; Coope *v.* Bowles, 42 Barb. (N.Y.) 87; 28 How. Pr. (N.Y.) 10; Williams *v.* Babcock, 25 Barb. (N. Y.) 109; Bell *v.* Shibley, 33 Barb. (N. Y.) 610; Thomas *v.* Whallon, 31 Barb. (N. Y.) 172; McIlrath *v.* Snure, 22 Minn. 391; Litchfield Bank *v.* Peck, 29 Conn. 384; Litchfield Bank *v.* Church, 29 Conn. 137; Bank of North America *v.* Wheeler, 28 Conn. 433; 73 Am. Dec. 683; Curtis *v.* McIlhenny, 5 Jones Eq. (N. Car.) 290.

A receiver of a corporation is subject to all the rights and equities existing against the company. He takes its place and stands as its representative. Where a note was made to an insurance company as a premium note, and with the understanding that it was to be used for no other purpose than as a premium note, the subsequent use of such note as a stock note is a fraud on the maker, which renders it invalid except in the hands of a *bona fide* holder, and is a good defense as against the company, and likewise against a receiver appointed over the company. Bell *v.* Shibley, 33 Barb. (N. Y.) 610. See also Thomas *v.* Whallon, 31 Barb. (N. Y.) 172. Where receivers of a bank institute an action on a note given for subscription to the capital stock, and the maker's defense is that the note was obtained through fraudulent representations of agents of the bank as to its condition, such defense is available against the receiver to the same extent as it would have been against the bank. Litchfield Bank *v.* Peck, 29 Conn. 384; Litchfield Bank *v.* Church, 29 Conn. 137. A judgment recovered by receivers is a bar to an action in another State against the same defendants for the same cause of action, even if the judgment was recovered in the name of the receiver and the other action is brought in the name of the corporation. Bank of North America *v.* Wheeler, 28 Conn. 433; 73 Am. Dec. 683. A receiver of a corporation is its "legal representative" within the meaning of the U. S. Rev. Stat., § 5198 providing that double the amount of usurious interest paid to a national bank may be recovered by "the person by whom it was paid or his legal representatives." Barbour *v.* National Exchange Bank, 45 Ohio St. 133; 17 Am. & Eng. Corp. Cas. 134.

subscriptions to capital stock,[1] and the same rule applies where

1. *In re* Empire City Bank, 18 N. Y. 199; Phœnix Warehousing Co. *v.* Badger, 67 N. Y. 294; Whittlesey *v.* Frantz, 74 N. Y. 456; Dayton *v.* Borst, 31 N. Y. 435; Dean *v.* Biggs, 25 Hun (N. Y.) 122; Cutting *v.* Damerel, 88 N. Y. 410; Ruggles *v.* Brock, 6 Hun (N. Y.) 164; Van Wagenen *v.* Clark, 22 Hun (N. Y.) 497; Sagory *v.* Dubois, 3 Sandf. Ch. (N. Y.) 466; Pentz *v.* Hawley, 1 Barb. Ch. (N. Y.) 122; Nathan *v.* Whitlock, 9 Paige (N. Y.) 152; Clarke *v.* Thomas, 34 Ohio St. 46; Voorhees *v.* Bank of Circleville, 19 Ohio 463; Frank *v.* Morrison, 58 Md. 423; Stillman *v.* Dougherty, 44 Md. 380; Means' Appeal, 85 Pa. St. 75; Lathrop *v.* Knapp, 27 Wis. 214; Lathrop *v.* Knapp, 37 Wis. 307; Stewart *v.* Lay, 45 Iowa 604; Schoonover *v.* Hinckley, 48 Iowa 82; Farmers', etc., Bank *v.* Jenks, 7 Met. (Mass.) 592; Litchfield Bank *v.* Church, 29 Conn. 137; New Orleans Gaslight Co. *v.* Bennett, 6 La. Ann. 456; Stark *v.* Burke, 5 La. Ann. 740; Upton *v.* Hansbrough, 3 Biss. (U. S.) 417; Chandler *v.* Liddle, 3 Dill. (U. S.) 477; Payson *v.* Withers, 5 Biss. (U. S.) 269; Payson *v.* Stoever, 2 Dill. (U. S.) 427; Upton *v.* Tribilcock, 91 U. S. 45; Sawyer *v.* Hoag, 17 Wall. (U. S.) 610.

In General.—If a stockholder is a debtor to the corporation to the amount of his subscription to the stock, such debt is an asset of the corporation. Dayton *v.* Borst, 31 N. Y. 435; Frank *v.* Morrison, 58 Md. 423; Sagory *v.* Dubois, 3 Sandf. Ch. (N. Y.) 466.

Illinois.—The rule is changed by statute in Illinois, which requires that the stockholder is not liable unless he was made a party to the suit in which the receiver was appointed. Chandler *v.* Brown, 77 Ill. 333.

Fraud—Illegality.—Stockholders cannot set up the invalidity of their subscription, if they have by their own acts recognized their validity, expressly or impliedly, previous to the appointment of the receiver. In Maryland a valid call cannot be made on stockholders until the whole capital stock is subscribed, but one who, knowing the whole capital has not been taken, attends the meetings of the company and cooperates in the votes for expenditure of money and other acts which could only be properly done upon the assumption that the subscribers intended to proceed with the stock partially taken, will be estopped from setting up such a defense. Stillman *v.* Dougherty, 44 Md. 380. Where one became a stockholder on the faith of representations made to him that the amount required by the charter had been paid in cash, and it had not in fact and he subsequently acted as one of the directors, it was held that he was estopped from setting up, as against creditors, the invalidity of his subscription. Ruggles *v.* Brock, 6 Hun (N. Y.) 164. One who subscribed for stock, took part in the management and contracted with it as corporation, cannot in an action to recover the unpaid balance of his subscription dispute the validity of the incorporation. Phœnix Warehousing Co. *v.* Badger, 67 N. Y. 294; nor defeat the action by showing that he and all the other stockholders gave their notes for stock instead of paying money as required by the banking laws. Farmers', etc., Bank *v.* Jenks, 7 Met. (Mass.) 592. Irregularities in the proceedings to increase the stock, or unauthorized provisions as to such stock, is not a defense where the subscriber, having knowledge of the facts, acquiesced. Clarke *v.* Thomas, 34 Ohio St. 46; Payson *v.* Withers, 5 Biss. (U. S.) 269; Payson *v.* Stoever, 2 Dill. (U. S.) 427.

Where a company has all the *indicia* of a corporation, one voluntarily taking stock therein cannot deny the authority of the company to issue such stock, in an action to recover unpaid subscription, for the benefit of creditors. Upton *v.* Hansbrough, 3 Biss. (U. S.) 417.

Foreclosure.—A railroad was sold on foreclosure of a mortgage purporting to cover the road constructed and to be constructed, etc., and also all right, title, interest, property and possession, claims and demands whatsoever of the said railroad. Subsequently in a judgment creditor's action a receiver was appointed who sold the unpaid subscriptions to capital stock. It was held in a suit by the purchaser under the foreclosure sale that the subscription was not covered by the mortgage, and that the title thereto passed under the receiver's sale, and not under the foreclosure sale. Dean *v.* Biggs, 25 Hun (N. Y.) 122.

Call or Assessment.—As an incident

of his right to collect unpaid stock subscriptions, the receiver has the power to make calls therefor, Dane *v.* Young, 61 Me. 160; Hightower *v.* Thornton, 8 Ga. 486; Rankine *v.* Elliott, 16 N. Y. 377; Hall *v.* United States Ins. Co., 5 Gill. (Md.) 484; Johnson *v.* Laflin, 5 Dill. (U. S.) 65. In *England* a receiver has no such power, under the Railway Companies Act. *In re* Birmingham, etc., R. Co., L. R., 18 Ch. Div. 155.

Where the subscription provides that the stockholders shall pay as called for by the directors, held that the receiver may compel payment although there was no resolution of the directors requiring such payment. Sagory *v.* Dubois, 3 Sandf. Ch. (N. Y.) 466. A provision that the balance was to be paid on the call of the directors when ordered by a vote of the majority of the stockholders, does not prevent the power being effectually exercised by the court. Upton *v.* Hansbrough, 3 Biss. (U. S.) 417. But some action equivalent to a call or assessment is essential to fix the liability of the stockholder. Chandler *v.* Siddle, 3 Dill. (U. S.) 477.

Extent of Liability.—It is the receiver's duty to call for the full balance due from the stockholders respectively when he has reason to suppose that the whole amount due from those who are solvent will be required. Pentz *v.* Hawley, 1 Barb. Ch. (N. Y.) 122. If some stockholders have paid cash and others have given stock notes, those who have paid have a right to insist on the collection of the stock notes, or so much thereof as is necessary to equalize the losses among all the stockholders. Each stockholder has a vested right in the contract of subscription of every other stockholder, and the court has no power to give the receiver discretion to release or compromise with one stockholder respecting the payment of his subscription without notice to the other stockholders. Chandler *v.* Brown, 77 Ill. 333. This case seems however to rest upon a statute of Illinois. The liability of one stockholder is not affected by the amount which can be collected from the others. Stewart *v.* Lay, 45 Iowa 604. The receiver is not bound to bring one action and make all the stockholders parties thereto, but may sue each separately. Van Wagenen *v.* Clark, 22 Hun (N. Y.) 497.

Creditor's May Compel.—The creditors of a corporation may compel the receiver to exercise his power in the matter of collecting unpaid stock subscriptions. Gas Light Co. *v.* Haynes, 7 La. Ann. 114; New Orleans Gas Light Co. *v.* Bennett, 6 La. Ann. 456; Stark *v.* Burke, 9 La. Ann. 341; Atwood *v.* Rhode Island Agricultural Bank, 1 R. I. 191; Eppright *v.* Nickerson, 78 Mo. 482; 4 Am. & Eng. Corp. Cas. 138; but see Mann *v.* Pentz, 3 N. Y. 415.

Defenses.—While the receiver has the same power as was possessed by the corporation as to the collection of unpaid subscriptions, he has no greater power. Billings *v.* Robinson, 94 N. Y. 415, affirming, 28 Hun (N. Y.) 122; 5 Am. & Eng. Corp. Cas. 67. So, where property was transferred to a corporation and full paid stock issued therefor, the transaction cannot be impeached except for fraud on the corporation, and a receiver appointed long after cannot maintain a suit to set it aside. Coffin *v.* Ransdall, 1 Ry. & Corp. L. J. 326; see Scoville *v.* Thayer, 105 U. S. 143; Mills *v.* Scott, 99 U. S. 25.

One who makes a purchase of shares from a company or individual holder, and allows himself to be represented to the world as a stockholder must take the responsibilities of the situation, and cannot disown the ownership when it becomes a burden instead of a benefit. *In re* Reciprocity Bank, 22 N. Y. 9. Ignorance by the stockholder as to the condition of the company at the time he subscribed, is not a defense. Upton *v.* Tribilcock, 91 U. S. 45; nor representations by an agent of the corporation as to non-assessibility, when the subscriber fails to use due diligence to ascertain the truth or falsity of such representations. Upton *v.* Tribilcock, 91 U. S. 45.

Contract.—The original holder of stock in a corporation is liable for unpaid assessments. and a contract between him and the corporation limiting his liability is void as against creditors. Upton *v.* Tribilcock, 91 U. S. 45.

Where a statute provides that a *bona fide* transfer shall relieve the stockholder from liability, and that the purchaser shall become liable in his stead, a transfer or surrender to the corporation itself does not exonerate him. *In re* Reciprocity Bank, 22 N. Y. 9.

Set-off.—The fact that a stockholder is also a creditor does not relieve him from liability on an unpaid subscription. The capital stock is a trust fund

the receiver represents all the parties to a subscription to a common purpose.[1]

(2) *Actions Against Corporation Officers.*—A receiver, since he represents both creditors and stockholders, may assert their rights when injured by the illegal acts of the officers of a corporation over which he is appointed.[2]

(3) *Maintenance in Sundry Cases.*—In the note below will be found illustrations of the receiver's right of action in some miscellaneous cases.[3]

for the payment of creditors. To allow a stockholder to set-off his claim would give him a preference. Williams *v.* Traphagen, 38 N. J. Eq. 57; 5 Am. & Eng. Corp. Cas. 57.

1. Lathrop *v.* Knapp, 27 Wis. 214; 37 Wis. 307, where it was held that the receiver succeeded to the rights of a subscriber to control payment by the other subscribers, and that the fact that he represented all the subscribers, including those sued, was not a valid objection to his right of action.

2. Thus he may repudiate illegal transfers of corporate property, or illegal incumbrances created, or illegal contracts entered into professedly on behalf of the corporation. Leavitt *v.* Palmer, 3 N. Y. 19; 51 Am. Dec. 331; Gillet *v.* Moody, 3 N. Y. 479; State of Ohio *v.* Leavitt, 7 N. Y. 328; Bank Com'rs *v.* St. Lawrence Bank, 7 N. Y. 513; Leavitt *v.* Tylee, 1 Sandf. Ch. (N. Y.) 207; Leavitt *v.* Yates, 4 Edw. Ch. (N. Y.) 134; Hubbell *v.* Syracuse Iron Works, 42 Hun (N.Y.) 182; Ackerman *v.* Halsey, 37 N. J. Eq. 356; 1 Am. & Eng. Corp. Cas. 239; McCarty's Appeal, 110 Pa. St. 379.

Against Officers.—Corporate officers are liable to the corporation for breach of trust, or for gross mismanagement and neglect of their duties, and the receiver can enforce such liability. Ackerman *v.* Halsey, 37 N. J. Eq. 356; 1 Am. & Eng. Corp. Cas. 239; McCarty's Appeal, 110 Pa. St. 375.

3. **Against Stockholders.**—It is no objection to a suit by a receiver to recover money received by stockholders for stock sold to it, that the creditors had a remedy at law; since equity takes cognizance of all trusts. Crandall *v.* Lincoln, 52 Conn. 73; 52 Am. Rep. 560.

In a *New York* case, it was held that the right of action for recovery of improperly declared dividends is in creditors and not in the receiver. Butterworth *v.* O'Brien, 39 Barb. (N. Y.) 192. Under the *Maine* statute, before a receiver can maintain an action against stockholders for contribution, it must appear from a judicial decision that there has been a loss to the capital stock occasioned in the required manner, and that the directors are unable to make it good. Hewett *v.* Adams, 50 Me. 271.

Possession of Personal Property.—Where a receiver has been in possession of personal property he may maintain in his own name actions founded upon the right of possession, title in the plaintiff not being necessary in such actions, but only the right of possession. So he may bring replevin. Boyle *v.* Townes, 9 Leigh (Va.) 158, or trover. Singerly *v.* Fox, 75 Pa. St. 112.

But a receiver cannot have an action of replevin for mortgaged chattels which were reduced to possession by the mortgagee before the commencement of the proceedings in which the receiver was appointed. Campbell *v.* Fish, 8 Daly (N. Y.) 162. In *England* a receiver of a pawnbroker is not entitled to possession as against the sheriff who levied after the appointment of the receiver but before he had perfected his security. *In re* Rollason, 56 L. T. N. S. 303.

Rent.—A receiver cannot maintain an action for rent until he has notified the tenants of his appointment. Hunt *v.* Wolfe, 2 Daly (N. Y.) 298.

Purchase Money.—Where one had executed an absolute deed, but it was intended as security for a loan as between the parties, and the grantee conveyed to an innocent third party, a receiver appointed over the grantor was allowed to maintain an action against the first grantee for the balance of the purchase money after deducting the amount of the loan. Van Dusen *v.* Worrell, 4 Abb. App. Dec. (N. Y.) 473.

Under Certain Statutes.—A statute of *Virginia* gives the party entitled to money collected by a sheriff in that

(4) *Defenses Available Against*—(a) **Same as if Suit by Original Party.**—As a general rule[1] the same defenses are available by the defendant in an action brought by a receiver to recover a demand due to the estate which he represents, as might have been set up in the action if brought on the same claim by the original party.[2]

(b) **Set-off.**—Questions as to the availability of defenses against a receiver most frequently arise under the form of a set-off. This subject will be found fully treated elsewhere in this article.[3]

(c) **When Rights of Creditors Affected.**—Where the receiver represents creditors, no defense is available against him which would be

capacity to enter judgment against the sheriff on motion, and the receiver of the party originally entitled may make such motion. Goss *v.* Southall, 23 Gratt. (Va.) 825. Under the *New Jersey* statute, the receiver of an insolvent corporation is the proper person to bring an action against attaching creditors of the corporation property, and the creditors at whose suit the receiver was appointed cannot maintain the action. Minchin *v.* Second Nat. Bank, 36 N. J. Eq. 436; 1 Am. & Eng. Corp. Cas. 524.

1. This rule is the necessary result of the nature of receiverships. The appointment of a receiver does not affect questions of right or title involved in the litigation, nor does it change existing contract relations between the parties themselves, nor between them and third persons; hence the rule stated in the text inevitably follows. The rule is narrowed in the text by the phrase "in general," for the reason that an apparent exception exists. Where the receiver is appointed for the benefit of creditors, a defendant is not always permitted to set up matter which would have been a good defense against the original party. The exception, however, is only apparent, and does not conflict with the principle on which the rule rests. In such cases the receiver, in addition to his function as a custodian *pendente lite*, represents also the creditors; and therefore any defense which, by reason of fraud, collusion, or superior equity, would be unavailable in an action by the creditors is likewise unavailable against the receiver. The distinction is clearly brought out where, for instance, a receiver takes proceedings to set aside a transfer of property made in fraud of creditors. As between the original parties the transfer is valid, but the receiver, representing creditors as well as the party over whom appointed, may set it aside. For an examination of the cases illustrating this distinction, see *infra*, this title, *Suits by Receivers; Defenses Available Against; When Rights of Creditors Affected.*

2. Moise *v.* Chapman, 24 Ga. 249; Devendorf *v.* Beardsley, 23 Barb. (N. Y.) 656; Williams *v.* Babcock, 25 Barb. (N. Y.) 109; Thomas *v.* Whallon, 31 Barb. (N. Y.) 172; Hyde *v.* Lynde, 4 N. Y. 387; Berry *v.* Brett, 6 Bosw. (N. Y.) 627; Colt *v.* Brown, 12 Gray (Mass.) 233; Van Wagoner *v.* Patterson Gas Light Co., 23 N. J. L. 283; Chase *v.* Petroleum Bank, 66 Pa. St. 169; Mechanics' Bank *v.* Bank of New Brunswick, 3 N. J. Eq. 266; Litchfield Bank *v.* Peck, 29 Conn. 384; Brooks *v.* Bigelow, 142 Mass. 6; Hade *v.* McVay, 31 Ohio St. 231; Cox *v.* Volkert, 86 Mo. 505.

Where a bank loans money to a depositor on the agreement that his individual balance and that of a firm of which he is a member shall be applied in payment of the advances, and the bank goes into the hands of a receiver, the depositor, in an action on his note, is allowed to set off such balances. Chase *v.* Petroleum Bank, 66 Pa. St. 169.

The defendant in a suit by receivers for an unpaid subscription to capital stock was allowed to set up the defense that his subscription had been obtained by false representations by agents of the bank. Litchfield Bank *v.* Peck, 29 Conn. 384.

3. See this title, *Management and Control of Property, Set-off Against Receivers.*

unavailable in a proceeding by creditors to impeach the transaction for fraud on their rights.[1]

(d) **Failure to Execute Bond or Take Oath.**—The omission by the receiver to take an oath of office directed by statute does not incapacitate him to sue.[2] The execution of the bond required by the order of appointment is essential to the receiver's title, and a failure to do so is ground for non-suit,[3] but a mere informality in its execution is no defense to an action brought by the receiver.[4]

(e) **Appointment Not Collaterally Attackable.**—This subject is fully treated elsewhere in this article.[5]

(f) **Miscellaneous.**—In the note below will be found instances of various miscellaneous matters which were not valid defenses as against a receiver.[6]

1. For a statement of this rule and its limitations, see this title, *Suits by Receivers, Defenses Available Against, Same as if Suit by Original Party*, p. 239, n. 1.

Fraud.—Where all the parties to the transaction participated in the fraud, it is no defense against an action by the receiver on a note, that the note was given without consideration, in aid of an illegal transaction. Farmers', etc., Bank *v.* Jenks, 7 Metc. (Mass.) 592. In an action by a receiver against a shareholder for the recovery of illegal dividends paid while the bank was insolvent, the defendant cannot set off an independent claim against the corporation. The foundation of the action is to recover the illegal dividend for the benefit of the creditors, and the receiver is regarded as their representative, and not that of the corporation. Osgood *v.* Ogden, 4 Keyes (N. Y.) 70. In an action by receivers of a bank to recover notes illegally transferred to one of the directors, the defendant will not be allowed a claim for the amount actually paid for such notes by him. Gillet *v.* Phillips, 13 N. Y. 114.

In an action to recover assets converted by corporation officers, they will not be allowed to set up against the receiver the plea that such assets are not needed for the payment of debts of the corporation. McCarty's Appeal, 110 Pa. St. 375.

A receiver of a defendant in a divorce suit, after a decree for alimony has been made, may set aside a fraudulent conveyance of real estate made to avoid the decree. Barker *v.* Dayton, 28 Wis. 367.

The receiver appointed at the suit of judgment creditors may take proceedings to reach real estate paid for by the debtor, though title was taken in the name of another, and the creditor's judgments were never a lien on such real estate. Scoville *v.* Halladay, 16 Abb. N. Cas. (N. Y.) 43.

Garnishment.—A receiver represents all parties to the suit, plaintiffs, defendants and creditors, and may therefore garnish the plaintiff in the suit in which he was appointed. McDonald *v.* Carney, 8 Kan. 20.

2. Dayton *v.* Borst, 7 Bosw. (N. Y.) 115.

3. Johnson *v.* Martin, 1 Thomp. & C. (N. Y.) 504.

4. Morgan *v.* Potter, 17 Hun (N. Y.) 403.

5. See this title, *Management and Control of Property, Set-off Against Receivers, Effect of Irregular or Erroneous Appointment; Management and Control of Property, Receiver's Possession, Interference With, Irregularity of Appointment Immaterial: Management and Control of Property, Receiver's Sales, Order for, Cannot be Attacked Collaterally.*

6. Where trust funds were loaned without legal authority, the want of such authority is not a good defense in an action, by a receiver subsequently appointed over the trust estate, on the note given for such loan. Corbin *v.* De Labergne, 44 N. J. L. 70.

Where a transfer of B's property to a receiver, made by order of court on application by judgment creditors, is voidable by other creditors under an insolvent law, that fact is not a defense in an action by the receiver against a

(5) *When Right of Action Accrues.*—The receiver's right of action relates back to the beginning of the title of the party for whose property he is receiver. He acquires, by subrogation, all the rights of the owner to whom he is substituted.[1]

g. SUITS IN FOREIGN COURTS—(1) *General Rule.*—Strictly speaking, a receiver, being simply an officer of the court, has no extra-territorial power. The rule has been laid down, therefore, that a receiver cannot sue outside of the jurisdiction of the court which appointed him.[2] The rule has been applied where receivers

debtor of B's. Naglee *v.* Lyman, 14 Cal. 450.

Receivers of a *New York* corporation received as part of the assets, notes due from a resident of *Massachusetts.* Afterwards the notes were attached in action by a creditor in *Massachusetts. Held,* not a defense to an action on the notes in *New York,* brought by the receivers. Osgood *v.* Maguire, 61 N. Y. 524.

1. Hardwick *v.* Hook, 8 Ga. 354. See in general, this title, *supra, Management and Control of Property, Receiver's Title, Receiver's Possession.*

2. Booth *v.* Clark, 17 How. (U. S.) 322; Brigham *v.* Luddington, 12 Blatchf. (U. S.) 237; Hazard *v.* Durant, 19 Fed. Rep. 471; Farmers', etc., Ins. Co. *v.* Needles, 52 Mo. 17; Moseby *v.* Burrow, 52 Tex. 396; Warren *v.* Union Bank, 7 Phila. (Pa.) 156; Hope Mutual L. Ins. Co. *v.* Taylor, 2 Robt. (N. Y.) 278.

The same rule, while not expressly decided, is supported by implication in Holmes *v.* Sherwood, 3 McCrary (U. S.) 405; 16 Fed. Rep. 725; Wilkinson *v.* Culver, 23 Blatchf. (U. S.) 416; Graydon *v.* Church, 7 Mich. 36; Bartlett *v.* Wilbur, 53 Md. 485.

A receiver appointed by the United States circuit court for the eastern district of *Wisconsin,* brought suit in the United States circuit court for the Southern District of *New York;* held, that the suit would not lie, for the reason, *inter alia,* that a receiver cannot sue in another territorial jurisdiction. Brigham *v.* Luddington, 12 Blatchf. (U. S.) 237.

A receiver appointed by an *Illinois* court brought suit, jointly with other complainants, in the United States circuit court for the district of *Iowa.* The point was not squarely decided, but the court strongly advocated the opinion that the receiver was incompetent to sue outside of the jurisdiction of the court which appointed him. Holmes *v.* Sherwood, 3 McCrary (U. S.) 405; 16 Fed. Rep. 725.

A receiver appointed in *Rhode Island* brought suit in a federal court in *Massachusetts,* and it was held that he had no standing to sue outside of the jurisdiction of the court appointing him. Hazard *v.* Durant, 19 Fed. Rep. 471.

A receiver duly appointed in *Illinois,* brought suit in *Missouri* to recover on a promissory note payable to the corporation over which he was appointed. *Held,* on demurrer, that "a receiver cannot sue in a foreign jurisdiction." Farmers', etc., Ins. Co. *v.* Needles, 52 Mo. 17.

A receiver was appointed over B, a citizen of *Tennessee,* by a court of that State. Afterwards C, a citizen of *Kentucky,* attached a debt due to B, by a citizen of *Pennsylvania.* In a contest between the receiver and C, held that the receiver had no standing in the *Pennsylvania* court. Warren *v.* Union Bank, 7 Phila. (Pa.) 156. But this is practically overruled by the later case of Bagby *v.* Atlantic, etc., R. Co., 86 Pa. St. 291; Hope Mut. L. Ins. Co. *v.* Taylor, 2 Robt. (N. Y.) 278, was brought by a *Connecticut* receiver in New York. The action was brought in the name of the corporation, and was sustained by the court, on the ground that a suit in the name of the receiver could not have been maintained outside of the jurisdiction of the court which appointed him.

Leading Case.—The leading case in support of the rule that a receiver cannot sue in a foreign court is Booth *v.* Clark, 17 How. (U. S.), in which the court by Wayne, J., said: "A receiver has no extra territorial power of official action; none which the court appointing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property; none which can give him, upon the principle of comity a

appointed by United States court, brought suit in another federal court.[1] But citizens in the jurisdiction of the court appointing the receiver will not be aided by foreign courts in evading the effect of the appointment.[2]

(a) **Exception by Comity.**—While it is clear that, as a matter of right, a receiver cannot demand recognition outside of the jurisdiction of his appointment, yet it is now generally held that he may, as a matter of comity, maintain suits in foreign courts.[3]

privilege to sue in a foreign court or another jurisdiction, as the judgment creditor himself might have done, where his debtor may be amenable to the tribunal which the creditor may seek. . . . We think that a receiver could not be admitted to the comity extended to judgment creditors without an entire departure from chancery proceedings as to the manner of his appointment, the securities which are taken from him for the performance of his duties, and the direction which the court has over him in the collection of the estate of the debtor, and the application and distribution of them. If he seeks to be recognized in another jurisdiction it is to take the fund there out of it, without such court having any control of his subsequent action in respect to it, and without his having even official power to give security to the court, the aid of which he seeks, for his faithful conduct and official accountability."

1. Brigham *v.* Luddington, 12 Blatchf. (U. S.) 237.

2. A receiver was appointed over B by the United States circuit court for the eastern district of *Virginia*. Afterward a citizen of *Virginia* attached funds due B by a citizen of *Pennsylvania*. *Held*, that the attaching creditor had no right, as the fund should go to the receivers. Bagby *v.* Atlantic, etc., R. Co., 86 Pa. St. 291.

Property of a citizen of *Kentucky* was attached in *Ohio* by a *Kentucky* creditor. A receiver had been appointed in *Kentucky*, and according to the law of *Kentucky* he was entitled to the attached property. The receiver's right was upheld by the *Ohio* court. Bank *v.* McLeod, 38 Ohio St. 174. In Bagby *v.* Atlantic, etc., R. Co., 86 Pa. St. 291, the court by Agnew, C. J., said: "It is clear that as to these plaintiffs, who were citizens of *Virginia*, the appointment of a receiver was not extra-territorial, but was an act binding upon them, which the *Virginia* court would enforce as to them, had their action been brought in *Virginia* Then certainly they have no right, after the appointment of a receiver by a court within their own State, binding upon them there, to attempt to avoid its effect by escaping from its jurisdiction and coming here to ask us to infringe the comity we owe to the acts of their own courts within their jurisdiction."

Property Removed to Foreign Jurisdiction.—A receiver was appointed in *Missouri* and took possession by virtue of his appointment, of a barge, which he chartered to a steam boat. In the course of business the barge was within the State of *Illinois*, and was attached by creditors there of the party over whom the receiver was appointed. *Held*, that the attachment would not lie. "Where a receiver has once obtained rightful possession of personal property situated within the jurisdiction of his appointment, and in the performance of his duty takes it into a foreign jurisdiction, it cannot be taken while there by creditors who reside in that jurisdiction." Chicago, etc., R. Co. *v.* Keokuk Northern Line Packet Co., 108 Ill. 317; 48 Am. Rep. 557; Cagill *v.* Wooldridge, 8 Baxt. (Tenn.) 580; 35 Am. Rep. 716.

Receiver v. Assignee Bankruptcy.—A receiver appointed in New York, brought suit in the United States District Court to set aside, as fraudulent against creditors, a general assignment made by the debtor before the receiver was appointed. After the appointment of the receiver the debtor was adjudicated a bankrupt, and it was held that the right to proceed for setting aside the alleged fraudulent assignment was exclusively in the assignee in bankruptcy, and the receiver's suit would not lie. The case was decided on other grounds, and the right of the receiver to sue out of his jurisdiction was not considered. Olney *v.* Tanner, 21 Blatchf. (U. S.) 540.

3. Hurd *v.* Elizabeth, 41 N. J. L. 1;

Bidlack *v.* Mason, 26 N. J. Eq. 230; Metzner *v.* Bauer, 98 Ind. 427; Bank *v.* McLeod, 38 Ohio St. 174; Chicago, etc., R. Co. *v.* Keokuk Northern Line Packet Co., 108 Ill. 317; 48 Am. Rep. 557; Osgood *v.* Maguire, 61 N. Y. 524; Hoyt *v.* Thompson, 5 N. Y. 338; *reversing* Runk *v.* St. John, 29 Barb. (N. Y.) 585; Killmer *v.* Hobart, 58 How. Pr. (N. Y.) 452; Barclay *v.* Quicksilver Min. Co., 1 Lans. (N. Y.) 25; *Ex Parte* Norwood, 3 Biss. (U. S) 504; Lycoming F. Ins. Co. *v.* Wright, 55 Vt. 526; 4 Am. & Eng. Corp. Cas. 1; McAlpin *v.* Jones, 10 La. Ann. 552; Paradise *v.* Farmers', etc., Bank, 5 La. Ann. 710; Pond *v.* Cooke, 45 Conn. 126; 29 Am. Rep. 668; Cooke *v.* Orange, 48 Conn. 401.

This is also supported by implication in Bagby *v.* Atlantic, etc., R. Co., 86 Pa. St. 291; Taylor *v.* Columbian Ins. Co., 14 Allen (Mass.) 353; Hunt *v.* Columbian Ins. Co., 55 Me. 297; Chandler *v.* Siddle, 3 Dill. (U. S.) 477.

Ohio.—An application was made in *Kentucky* for a receiver over a railroad corporation of that State, in foreclosure proceedings. Pending the application, certain rolling stock of the corporation in *Ohio* was attached in that State by a *Kentucky* creditor. Under the laws of *Kentucky* the receiver was entitled to the rolling stock as against the attaching creditor. The receiver recovered possession in an action brought in *Ohio*, the court holding that a receiver, on principles of comity, would be recognized by foreign courts whenever the rights of domestic creditors did not intervene. Bank *v.* McLeod, 38 Ohio St. 174.

Indiana.—A receiver appointed in *Kentucky* brought suit in an *Indiana* court; demurrer on the ground that a receiver could not sue in a foreign jurisdiction. The demurrer was sustained in the lower court, but on appeal the decision was reversed, the court deciding that "as a matter of comity, receivers duly appointed and qualified in other States may, to the extent of their authority, maintain suits in the courts of this State." Metzner *v.* Bauer, 98 Ind. 427.

New Jersey.—A receiver appointed by a *New York* court over B, a citizen of *New York*, brought suit against a debtor of B's in *New Jersey*. *Held*, that, as no *New Jersey* creditors were affected, the *New Jersey* courts would, on principles of comity, allow the receiver to maintain his action. Hurd *v.* Elizabeth, 41 N. J. L. 1. A receiver was appointed in *New York* over a corporation of that State. All the property of the corporation was in its factory in *New Jersey*. A few months before the appointment of the receiver, F, one of the trustees of the corporation, recovered judgment in *New York* against the corporation on a note given to M, the president of the company, and by him indorsed to F. After the appointment of the receiver F brought suit in *New Jersey* on his *New York* judgment; the summons was served on M, who was in charge of the corporation's factory in *New Jersey*, and judgment obtained by default. The property was sold by the sheriff, and bought in by F. M continued to manage the factory and carry on the business as an employé of F. Before the sale but after the levy, the *New York* receiver came and demanded possession, but was refused by M. The receiver then filed his bill in *New Jersey*, and the court recognized his standing, and appointed a receiver over the property pending the litigation of the *New York* receiver against F and M to decide as to the fraudulent nature of the judgment. The court based the decision on the ground that where the rights of domestic creditors did not intervene, the principles of comity required the recognition of the receiver appointed by a foreign court. Bidlack *v.* Mason, 26 N. J. Eq. 230.

The receiver of a *New York* corporation was recognized and allowed to prove a debt against a bankrupt in the *United States* district court in *Illinois*. *Ex parte* Norwood, 3 Biss. (U. S.) 504.

In Killmer *v.* Hobart, 58 How. Pr. (N. Y.) 452, property belonging to a *New Jersey* railroad corporation was attached in *New York* in a suit against the receiver of the corporation. On motion the attachment was dissolved, on the ground that receivers could not be sued, but must be proceeded against in the court which appointed them.

Jurisdiction Not Presumed.—Where a receiver brought suit in another State, and the defendant pleaded to the jurisdiction of the court which appointed the receiver, and the receiver failed to produce proof of the power of the court by competent evidence of the laws of the State, or otherwise, and the record did not show whether the court which appointed him was of general or special jurisdiction, it was decided that

This comity will not be extended, however, to the detriment of creditors resident in such foreign jurisdiction.[1] The authorities supporting this exception are so numerous, and the language of the courts so favorable to its extension, that it seems certain the exception will soon, if it has not already, supersede the general rule.[2]

the power of the foreign court to appoint a receiver could not be presumed. Kronberg *v.* Elder, 18 Kan. 150.

1. Bartlett *v.* Wilbur, 53 Md. 485.

Money due a *New York* corporation was attached in the hands of a citizen of *Maine* by other citizens of *Maine*, A short time after this the corporation was dissolved by the decree of a *New York* court, and receivers appointed. *Held, inter alia*, that comity would not be extended to receivers to the detriment of domestic creditors. Hunt *v.* Columbian Ins. Co., 55 Me. 290. In an attachment in *Massachusetts* against the same company by a citizen of *Massachusetts* the point was decided the same way. Taylor *v.* Columbian Ins. Co., 14 Allen (Mass.) 353.

A debt due a *New York* corporation was attached in the hands of a citizen of *Maryland*, in January, 1876, by a citizen of *New York*. In October of the same year a receiver was appointed in *New York* over the corporation. The garnishee in *Maryland* filed an additional plea alleging the appointment of the receiver, and that thereby the indebtedness of the company was transferred, and became an indebtedness to the receiver. A demurrer to this plea was sustained, the court holding that even if, upon the principle of comity, a receiver should be recognized in a foreign jurisdiction, this would not be allowed to interfere with the jurisdiction of the court which had attached prior to his appointment. Bartlett *v.* Wilbur, 53 Md. 485. See also cases in preceding note.

Property Once Vested in Receiver.—The principle that foreign courts will not extend comity to the detriment of their own claimants is subject to an apparent exception, where the receiver's right has once vested. A receiver appointed in *Missouri* took possession of a vessel, and in the course of business the vessel was removed into *Illinois*. While there an *Illinois* creditor of the person over whom the receiver was appointed attached the vessel, but the court held that "where a receiver has once obtained rightful possession of personal property within the jurisdiction of his appointment, and, in the performance of his duty, takes it into a foreign jurisdiction, it cannot be taken while there by creditors who reside in that jurisdiction." Chicago, etc., R. Co. *v.* Keokuk Northern Line Packet Co., 108 Ill. 317; 48 Am. Rep. 557; Cagill *v.* Wooldridge, 8 Baxt. (Tenn.) 580; 35 Am. Rep. 716.

A receiver of a *New Jersey* corporation, in order to complete a bridge which the corporation had contracted for in *Connecticut*, bought iron with the funds of the estate and sent it to *Connecticut* where it was attached as the property of the corporation. *Held*, that the iron was not liable to attachment. Pond *v.* Cooke, 45 Conn. 126. In another case the same receiver, in building another bridge in *Connecticut*, purchased the material and paid for the work with the funds of the corporation which he held as receiver. After the completion of the bridge a *Connecticut* creditor of the corporation factorized the town for which the bridge was built. The town paid over the money on demand made by the officers on execution. The receiver was not a party to the suit, but had notice of it served upon him. He gave no notice to the town not to pay. The receiver afterward brought suit, and it was held that the town was not discharged by the payment to the factorizing creditor. Cooke *v.* Orange, 48 Conn. 401.

California.—In *California* the rule is different, and it is there held that while a receiver will be recognized on principles of comity, yet the comity will not in any case be extended to the detriment of a resident creditor, and a resident creditor is allowed to attach property which has been in the actual possession of a foreign receiver, and afterward brought into *California*. Humphreys *v.* Hopkins, 81 Cal. 551.

2. In Hurd *v.* Elizabeth, 41 N. J. L. 1, the court by Beasley, C. J., said: "The plaintiff's right to stand as the actor in this suit is derived wholly from the receivership that was conferred upon

When Receiver Has Title by Assignment.—Where the r has the legal title by assignment executed under order court, foreign courts will treat his character of receiver as *descriptio personæ*, and he will be allowed to sue in his y of assignee.[1]

he Supreme Court of the State York; and on the part of the nt, such right is contested on nd that it is contrary to stab- les for the courts here to lend istance in carrying into effect e created in the course of a ing before a foreign tribunal. ntenance this contention vari- horities are cited, and nota- ong them that of Booth *v.* 7 How. (U. S.) 322. But that ongs to a train of decisions ave undoubtedly been rightly . . . they are all cases g a controversy between the and the creditors of the person roperty has been placed under rol of such receiver. In such e of things it is manifest that t considerations should have om those that are to control e litigation does not involve ts of creditors in opposition to ms of the receiver. That the f a foreign court should not itted, as against the claims of s here, to remove from this e assets of the debtor is a ion that seems to be asserted the decisions, but that, simi- e should not be permitted to such assets when creditors are interested is quite a different . . . There are certainly at go even to that extent, so xt-writers seem to have felt ves warranted in declaring e powers of an officer of this e strictly circumscribed by the tional limits of the tribunal hich he derives his existence, t he will not be recognized as a utside of such limits. But I e more correct definition of l rule would be that a receiver sue, or otherwise exercise his s, in a foreign jurisdiction, er such acts, if sanctioned, nterfere with the policy estab- y law in such foreign jurisdic- There seems to be no reason s should not be the accepted le. When there are no persons ed but the litigants in a foreign jurisdiction, and it becomes expedient, in the progress of such suit, that the property of one of them, wherever it may be situated, should be brought in and subjected to such proceeding, I can think of no objection against allowing such a power to be exercised. It could not be exercised in a foreign jurisdiction to the disadvantage of creditor's resident there, because it is the policy of every government to retain in its own hands the property of a debtor until all domestic claims against it have been satisfied . . . after completely protecting its own citizens and laws, the dictates of international comity would seem to require that the officer of the foreign tribunal should be acknowledged and aided. The appointment of a receiver, with full powers to collect the property of a litigant, wherever the same might be found, should be deemed to operate as an assignment of such property to be enforced everywhere, subject to the exception just noted."

See also in general as by implication supporting this view, the language of the courts in the other cases cited in this section, and see in particular the facts in Chicago, etc., R. Co. *v.* Keokuk Northern Line Packet Co., 108 Ill. 317; 48 Am. Rep. 557; Bagley *v.* Atlantic, etc., R. Co., 86 Pa. St. 291; Killmer *v.* Hobart, 58 How. Pr. (N. Y.) 452.

1. A receiver was appointed in *New York*, and the debtor under order of court executed an assignment to him. Part of the assets was an interest in real estate in *Michigan*, and the receiver sued in that State to enforce his right. *Held*, that, since the assignment was in due form to pass an interest in real estate under the laws of *Michigan*, the receiver could maintain his suit; that his right, however, arose entirely from the assignment and not from his character as receiver; and held, further, that his designation as receiver might be treated as *descriptio personæ*, and would not bar his suit. Graydon *v.* Church, 7 Mich. 36. See the same principle in Iglehart *v.* Bierce, 36 Ill. 133; Hoyt *v.* Thompson, 5 N. Y. 320.

(3) *Statutory Receivers.*—Purely statutory receivers stand upon a different footing from ordinary receivers in chancery, and will be recognized in foreign courts as assignees vested with a legal title.[1]

Judgment.—A receiver appointed in *New Jersey* recovered a judgment in that State, and brought suit on the judgment in a Federal court in *New York*. The court held that he was entitled to recover on the judgment in his individual capacity, and that his averment of his character as receiver would be treated as *descriptio personæ*. Wilkinson *v.* Culver, 23 Blatchf. (U. S.) 416.

In Graydon *v.* Church, 7 Mich. 36, the court by Christiancy, J., said: "So far as the rights of the complainant, touching this property, depend upon the power of the courts of *New York* to operate directly upon the property, his rights could not be recognized in this State, and such must have been the result in this case, if the receiver's rights had been left to depend upon the decree or order of the court of chancery of *New York*, and no assignment had been made to complainant. But here is an assignment in due form to the complainant, duly executed and recorded in the proper register's office, and in all respects in full compliance with our laws, and sufficient to pass real estate here. And should we even reject entirely all that appears on the face of the assignment, touching the proceedings in the *New York* court, and the appointment of a receiver, still the assignment is sufficiently full and complete to transfer the property to the complainant; and such must be its effect, unless it can be held void for the single reason that, from the recitals and other parts of the instrument, it appears to have been made for the purpose of carrying into effect an order of the court of chancery of *New York*, appointing a receiver of the property and effects of the assignor. If it is to be treated as void for this reason, it must be on the ground that it was procured by wrongful duress or coercion, exercised by the court over the assignor. Whatever other grounds may be suggested will be found, upon analysis, to result in this. . . . It is to be hoped the time may never come when the courts of one of the States of the Union shall so far forget the comity due to a sister State, as to treat the acts of parties, done under the order of its courts, as void on any such grounds. . . . The courts of a sister State, in a cause and between parties within their jurisdiction, are entitled to so much respect at least, that we should not, without proof, presume them guilty of wrong and oppression. . . . If the acts and conveyances performed or executed by the party, under the order or decree of the court, were not to operate, *ex proprio vigore*, to the same extent as if done without the coercive action of the court, such acts and conveyances would be but an idle ceremony. . . . It is very true, that if a defendant in such a case, in spite of the coercive measures of the court, should wholly refuse to make the conveyance, the court would be powerless as to property out of the jurisdiction; but this does not alter the effect of the conveyance when the defendant submits and makes it. The result of these principles in the present case is, that the complainant may sue in this State, as he has done, not strictly in his official character as receiver . . . but as assignee; . . . that his designation as receiver may be treated as *descriptio personæ*."

1. The statutes of *Missouri* provided that when insolvent insurance companies should be dissolved by a decree of court, their entire assets should vest in the superintendent of the state insurance department as receiver, for the use of creditors and policy holders. *Held*, that such superintendent, on being admitted a party to a suit in *Louisiana*, was entitled to remove the cause into a federal court by reason of citizenship. Relfe *v.* Rundle, 103 U. S. 222.

The statutes of *Connecticut* provided for the appointment of receivers of insolvent life insurance companies; an insurance company of that State owned real estate in *Iowa*. A receiver was appointed over the company in *Connecticut*, subsequent to which a receiver over the property in *Iowa* was appointed by the court there upon the claim by *Iowa* creditors that a foreign receiver did not control assets outside of the State of his appointment. *Held*,

4. PLEADINGS AND PROOFS.—Since a receiver sues by virtue special authority, he must set forth such authority in his adings in traversable form, and must sustain it by proper of at the trial.[1] The defendant may be estopped by his own nduct and admissions from denying the authority of the eiver.[2] The omission of averments as to the time when and

t the *Connecticut* receiver was en-ed to exclusive control. Parsons Charter Oak L. Ins. Co., 31 Fed. 305. To the same effect see Fry Charter Oak L. Ins. Co., 31 Fed. 197; Weingartner *v.* Charter L. Ins. Co., 32 Fed. Rep. 314.

n Bockover *v.* Life Assoc. of Amer-77 Va. 85; 6 Am. & Eng. Corp. 603, a *Virginia* court abated at-nments by *Virginia* creditors upon perty in *Virginia* belonging to a *ssouri* insurance company over ch a statutory receiver had been viously appointed in *Missouri.*

White *v.* Low, 7 Barb. (N. Y.) Bangs *v.* McIntosh, 23 Barb. (N 591; Stewart *v.* Beebee, 28 Barb. Y.) 34; Coope *v.* Bowles, 42 Barb. Y) 87; 28 How. Pr. (N. Y.) 10; Abb. Pr. (N. Y.) 442; Rockwell *v.* rwin, 45 N. Y. 166; Potter *v.* rchants' Bank, 28 N. Y. 641; Hayes Brotzman, 46 Md. 519; Griesel *v.* nal, 55 Ind 475; Helme *v.* Little-n, 12 La. Ann. 298. See as to le of questioning the sufficiency of allegations under the *New York* e, Cheney *v.* Fiske, 22 How. Pr. Y.) 236.

eadings.—There is considerable di-ity in the cases as to the question ow much of the proceedings must et forth in the receiver's pleadings nake them traversable. The earlier in *New York* was stringent, and as held that the time, place and le of appointment must be set h. Dayton *v.* Connah, 18 How. (N. Y.) 326; White *v.* Low, 7 Barb. Y.) 204; Gillet *v.* Fairchild, 4 n. (N. Y.) 80. A general allega-that he was duly appointed re-er was not sufficient. Gillet *v.* rchild, 4 Den. (N. Y.) 80. This rule now greatly relaxed, and it is held an averment of the appointment general terms is sufficient, and that reunder the receiver may at trial ve all facts necessary to confer sdiction. Rockwell *v.* Merwin, 45 Y. 166; White *v.* Joy, 13 N. Y. 83; nley *v.* Rassiga, 13 Hun (N. Y.) Allegations that the receiver was duly appointed by a certain court, at a certain place and time, and that the required security had been filed were held sufficient on demurrer. Stewart *v.* Beebee, 28 Barb. (N. Y.) 34. See Donnelly *v.* West, 17 Hun (N. Y.) 564.

Proofs.—It is not necessary for the receiver to present a transcript of the proceedings in the suit in which he was appointed. A certified copy of the order of appointment is *prima facie* proof that the proper parties were before the court which made the appointment. Helme *v.* Littlejohn, 12 La. Ann. 298; Boland *v.* Whitman, 33 Ind. 64. Where the receiver at trial offered a copy of the order of appointment, and proof that he had filed the bond required, it was held that the recitals in the order were sufficient evidence of the pendency of the action in which it was made, if the appointing court was one of general jurisdiction. It is presumed that in such a court the requirements necessary to justify it in making the order have been complied with. Litchfield Bank *v.* Peck, 29 Conn 384; Moise *v.* Chapman, 24 Ga. 249; Devendorf *v.* Beardsley, 23 Barb. (N. Y.) 656. The other side has of course a right to rebut the presumption. Helme *v.* Littlejohn, 15 La. Ann. 298.

Jurisdiction.—Where the jurisdiction of the court which appointed him is directly put in issue, the receiver must prove that the court had jurisdiction and power to appoint a receiver. Where the jurisdiction of the court which appointed him was specially denied, and no testimony was offered to its jurisdiction, and the court was one whose jurisdiction was not determined by the constitution of the State in which it existed, and there was nothing to show whether it was a court of general or special jurisdiction, it was held that the action could not be maintained. Kronberg *v.* Elder, 18 Kan. 150.

2. Where defendant demurred to an action brought by a receiver, the demurrer was overruled, and the de-

the court by which the receiver was appointed will be cured by verdict.[1]

2. **Suits Against Receivers**—*a.* RECEIVER MAY NOT BE SUED WITHOUT LEAVE.—No suit may be brought against a receiver without leave of the court which appointed him.[2] Bringing such

fendant obtained leave to plead to the merits on condition of executing bond with sureties to abide the result of the action, the execution of the bond was regarded as an admission that the receiver was duly appointed and authorized to bring the action. And when the receiver obtained judgment in the original action, and then brought suit on such bond, it was held that he need not prove either his appointment or authority to sue. Scott *v.* Dudcombe, 49 Barb. (N. Y.) 73.

1. Griesel *v.* Schmal, 55 Ind. 475.

2. Davis *v.* Gray, 16 Wall. (U. S.) 203; Barton *v.* Barbour, 104 U. S. 126; 4 Am. & Eng. R. Cas. 1; *affirming* 3 McArthur (D. C.) 212; Thompson *v.* Scott, 4 Dill. (U. S.) 508; Kennedy *v.* Indianapolis, etc., R. Co., 2 Flip. (U. S.) 704; 3 Fed. Rep. 97; Parker *v.* Browning, 8 Paige (N. Y.) 388; 35 Am. Dec. 717; De Groot *v.* Jay, 30 Barb. (N. Y.) 483; 9 Abb. Pr. (N. Y.) 364; Taylor *v.* Baldwin, 14 Abb. Pr. (N. Y.) 166; Miller *v.* Loeb, 64 Barb. (N. Y.) 454; Keen *v.* Breckenridge, 96 Ind. 69; Melendy *v.* Barbour, 78 Va. 544; 25 Am. & Eng. R. Cas. 622; Graffenried *v.* Brunswick, etc., R. Co., 57 Ga. 22; Henderson *v.* Walker, 55 Ga. 481; Meredith Village Sav. Bank *v.* Simpson, 22 Kan. 414; Heath *v.* Missouri, etc., R. Co., 83 Mo. 617; Wray *v.* Hazlett, 6 Phila. (Pa.) 155; Payne *v.* Baxter, 2 Tenn. Ch. 517; Little *v.* Dusenberry, 46 N. J. L. 614; 50 Am. Rep. 445; Randfield *v.* Randfield, 3 De G. F. & J.; *reversing* 1 D. & S. 310; Angel *v.* Smith, 9 Ves. 335; Brooks *v.* Greathed, 3 J. & W. 176; Searle *v.* Choat, 25 Ch. Div. 723. *Contra*, Kinney *v.* Crocker, 18 Wis. 74; St. Joseph, etc., Co. *v.* Smith, 19 Kan. 225; Allen *v.* Central R. Co., 42 Iowa 683.

This rule is a necessary consequence of the nature of the receiver's functions. He is an executive officer of the court, and it follows that no interference with him in the discharge of his duties shall be permitted, either by suit or otherwise. For a detailed treatment of this principle see this title, *Management and Control of Property, Receiver's Possession.*

Leading Case.—A receiver was appointed in a Virginia court. Suit was brought against him in the District of Columbia, and he put in a plea to the jurisdiction, averring that the plaintiff had not obtained leave from the Virginia court to sue. A demurrer to the plea was overruled. The Supreme Court of the United States affirmed the decision in Barton *v.* Barbour, 104 U. S. 126, the court by Woods, J., saying: "It is a general rule that before suit is brought against a receiver leave of the court by which he was appointed must be obtained. . . . The evident purpose of a suitor who brings his action against a receiver without leave, is to obtain some advantage over the other claimants upon the assets in the receiver's hands. The judgment, if he recovered one, would be against the defendant in his capacity of receiver, and the execution would run against the property in his hands as such. If he has the right, in a distinct suit to prosecute his demand to judgment without leave of the court appointing the receiver, he would have the right to enforce satisfaction of it. By virtue of his judgment he could, unless restrained by injunction, seize upon the property of the trust or attach its credits. If his judgment were reserved outside the territorial jurisdiction of the court by which the receiver was appointed, he could do this, and the court which appointed the receiver, and was administering the trust assets, would be impotent to restrain him. The effect upon the property of the trust, of any attempt to enforce satisfaction of his judgment, would be precisely the same as if his suit had been brought for the purpose of taking property from the possession of the receiver. A suit, therefore, brought without leave, to receive a judgment against a receiver for a money demand, is virtually a suit the purpose of which is, and the effect of which may be, to take the property of the trust from his hands and apply it to the payment of the plaintiff's claim, without regard to the rights of other creditors or the orders of the court which is administering the trust prop-

thout leave first obtained is a contempt of the appointing
The exemption of a receiver from unauthorized suits

Ve think, therefore, that it is
ial whether the suit is brought
him to recover specific prop-
o obtain judgment for a money
. In either case leave should be
ained."

Applied in Appointing Court.—
e *v.* Baxter, 2 Tenn. Ch. 517, a
brought against a receiver in
court in which the receiver was
d, but without permission hav-
obtained. *Held*, that the suit
ot lie: that it was as much a con-
court to proceed without leave
ndependent suit in the court
appointed the receiver, as to so
in another court. A receiver
ed by the United States district
Iowa was sued in a State court
leave of the court which ap-
the receiver. The federal court
the plaintiff before it, and or-
at unless he would stipulate to
the suit in the State court an at-
t should be issued against him
tempt. Thompson *v.* Scott, 4
. S.) 508.

eredith Village Sav. Bank *v.*
, 22 Kan. 414, a citizen of *New*
ire applied to a *Kansas* court
nission to sue a receiver ap-
by it. Leave was granted,
e stipulation that the suit
e brought in the court which
ed the receiver. After the
ad been begun, the plaintiff
the ground of citizenship, be-
ceedings for removal to the
court. *Held*, that the *Kansas*
ould revoke the permission
nd dismiss the action against
iver. *Compare* this case with
oh, etc., R. Co. *v.* Smith, 19
.

Applied in Other Courts of Same
In Graffenried *v.* Brunswick,
Co., 57 Ga. 22, a bill in equity was
in a Georgia court against a
appointed by a court of an-
unty of the same State. *Held*,
rrer that the suit could not be
without leave of the appoint-
t.

Applied in Foreign Courts.—In
. Breckenridge, 96 Ind. 69,
as a suit brought against a re-
nd on demurrer held that the
uld not lie, because the complaint did not aver that permission to sue had been obtained.

A *Virginia* receiver was sued in the *District of Columbia*. He pleaded to the jurisdiction, averring that leave to sue had not been obtained from the *Virginia* court. *Held*, on demurrer to this plea that the action would not lie. Barton *v.* Barbour, 104 U. S. 126; 4 Am. & Eng. R. Cas. 1.

Contra.—It has been held in Kinney *v.* Crocker, 18 Wis. 74; St. Joseph, etc., R. Co. *v.* Smith, 19 Kan. 225; Allen *v.* Central R. Co., 42 Iowa 683, that one court is not deprived of jurisdiction by the appointment of a receiver by another court, and will entertain suits against the receiver, though leave to sue has not been granted. The decided weight of authority is against these decisions. See the cases cited previously in this note.

Leave Presumed After Verdict.—In Little *v.* Dusenberry, 46 N. J. L. 614; 50 Am. Rep. 445, which was an action at law against a receiver, appointed by the court of chancery, the court, on appeal, by Scudder J., said: "I do not find in the case returned, the specific exception taken that leave was not granted to bring the action. If this be so, it will be assumed, after verdict in a court having general common law jurisdiction, that whatever was necessary to sustain the case stated in the declaration, was proved on the trial, and that such leave was granted."

Waiver of Leave.—If the receiver appears to the action, such appearance is an admission that he has been regularly brought into court, and he cannot afterward move to dismiss on the ground that the plaintiff had not obtained leave to sue. Hubbell *v.* Dana, 9 How. Pr. (N. Y.) 424; *In re* Young, 7 Fed. Rep. 855.

Notice.—It is not necessary to give notice to the parties to the suit in which the receiver was appointed, of an application for leave to sue. Notice to the receiver of such application is sufficient. Potter *v.* Bunnell, 20 Ohio St. 150.

1. Thompson *v.* Scott, 4 Dill. (U. S.) 508; Taylor *v.* Ba win, 14 Abb. Pr. (N. Y.) 166; De Groot *v.* Jay, 30 Barb. (N. Y.) 483; 9 Abb. Pr. (N. Y.) 364.

will also be protected by injunction.[1] When such leave will be granted is fully treated elsewhere in this article.[2] By act of Congress receivers appointed by United States courts may be sued without leave.[3]

(1) *Application of Rule in Foreign Courts.*—The rule that a receiver cannot be sued without leave of the court which appointed him is universally recognized to the extent of holding that such action is a contempt of the appointing court, and that such court will, if it can reach the plaintiff's person, restrain him by injunction, or attach him for the contempt, or both. Where the suit is brought in a foreign court a different phase of the question is presented, and one on which there is some diversity of decision. The great weight of authority is in favor of the full application of the rule by foreign courts,[4] but there are a few

See this title, *Management and Control of Property; Receiver's Possession, Interference With.*

1. See this title, *Remedies Concerning; Injunctions.*

2. See this title, *Remedies Concerning; Suits Against Receivers; Adjudication of Claims Against Receiver.*

3. **U. S. Act of 1887.**—The act of March 3, 1887 (U. S. Statutes, 1886–1887, 552), provides that "every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice."

Dillingham *v.* Anthony, 37 Am. & Eng. R. Cas. 1, was an action in a Texan court brought without leave against a receiver appointed by the United States circuit court. The jurisdiction of the court was denied, on the ground that no court other than the one appointing the receiver could exercise jurisdiction. This was overruled. The court, by Stayton, C. J., said: "Whatever may be the true rule in suits brought against the receivers as to the necessity for leave to sue them in other courts, under the act of Congress of March 3, 1887, receivers appointed by the courts of the *United States* are subject to suit without leave in any court having jurisdiction over the subject-matter. No court can interfere with the custody of property held by another court through a receiver, but may establish by its judgment a debt against the receivership, which must be recognized even by the court appointing the receiver, and not open to review by it if the court rendering the judgment had jurisdiction of the subject-matter and the parties. The order in which a judgment so recovered shall be paid, and the adjustment of equities between all persons having claims on the property and effects in the hands of a receiver, must necessarily be under the control of the court having custody through its receiver, but it does not affect the jurisdiction of other courts conclusively to establish by judgment the existence and extent of the claim."

In Missouri Pacific R. Co. *v.* Texas Pacific R. Co., 42 Am. & Eng. R. Cas. 34, the United States circuit court for the eastern district of Louisiana held that the act of March 3, 1887, authorizing suits in such courts against receivers appointed by courts of the *United States* without the previous leave of the court appointing him, does not affect the jurisdiction over or disposition of, any suit commenced in any court of the *United States* before the passage thereof. It was therefore held in this case that a judgment against a receiver appointed in a suit commenced prior to the passage of said act, is not conclusive as against the receiver, when such action in the State court was commenced without the consent of the appointing court; but the judgment is subject to the equity jurisdiction of the appointing court.

4. Barton *v.* Barbour, 104 U. S. 126; 4 Am. & Eng. R. Cas. 1, *affirming* 3 McArthur (D. C.) 212; Thompson *v.*

tes which take the view that want of leave to sue the receiver ot a jurisdictional defect. They hold that such suit may be ntained, the plaintiff taking the risk of the appointing court ng able to effectively reach him by attachment or injunction.[1]

. ADJUDICATION OF CLAIMS AGAINST RECEIVER.—The rt will not refuse an application for leave to contest a right inst its receiver, unless it is apparent that there is no founda- for the demand.[2] But such petition must show possible und for recovery, or leave will not be granted.[3] The more mon practice is for the court to decide all claims and de- nds against its receiver by petition in the original action in ch he was appointed, rather than to authorize an independent .[4] Whether they will dispose of the controversy in that

t, 4 Dill. (U. S.) 508; Kennedy *v.* anapolis, etc., R. Co., 2 Flip. (U. 04; 3 Fed. Rep. 97; Keen *v.* Breck- dge, 96 Ind. 69; Melendy *v.* Bar- , 78 Va. 544; 25 Am. & Eng. R. 622; Heath *v.* Missouri, etc., R. 83 Mo. 617.

Wisconsin.—Kinney *v.* Crocker, 18 . 74, was an action in a *Wisconsin* t against a receiver appointed by a eral court. The court below was d to instruct the jury that unless should find that the plaintiff had e from the Federal court to sue, he d not recover. This instruction refused, and the refusal was sus- d on appeal, the court, by Paine, ying: "A court of equity will, on per application, protect its own re- r where the possession which he s under the authority of the court ught to be disturbed, or where he ed for any act done by the order or etion of the court. In such cases ll sometimes punish, as for a con- t, any attempt to disturb the pos- on of its officer; it will sometimes ain suits at law, and draw to itself lisputed claims in respect to the ect-matter; and sometimes it will v suits at law to proceed. But in ese cases it is not a question of diction in the courts of law, but a question whether equity will ex- e its own acknowledged jurisdic- of restraining suits at law under e circumstances, and itself dispose e matter involved. It follows that ough a plaintiff in such a case, de- g to prosecute a legal claim for ages against a receiver, might, in r to relieve himself from the liabil- o have his proceedings arrested by xercise of this equitable jurisdiction, properly obtain leave to prosecute, yet his failure to do so is no bar to the jurisdiction of the court of law, and no defense to an otherwise legal action on the trial."

Kansas.—In St. Joseph, etc., R. Co. *v.* Smith, 19 Kan. 225, where there was an action brought in a *Kansas* court against a receiver appointed by a Federal court, it was held that an allegation that the defendant was duly appointed receiver by another court, raises no question as to jurisdiction. In this case the question was not squarely presented on the record, there being neither specific allegation nor denial of granting of leave by the appointing court. The opinion, however, supported the view that the want of leave was no bar to a suit, the court, by Brewer, J., saying: "The question always is, not one of jurisdiction, but of contempt; the ordinary jurisdiction of other courts is in no manner taken away or affected by the appointment of a receiver; while the court making the appointment may draw to itself all controversies to which the receiver is a party, it does so by acting directly upon the parties, and not by challenging the jurisdiction of other tribunals."

Iowa.—Allen *v.* Central R. Co., 42 Iowa 683, was an action against a railroad company, of which a receiver had been previously appointed by a *United States* court. The court held that the suit would lie; that suit might have been brought against the receiver without leave of the court which appointed him, and *a fortiori* when the suit is brought against the corporation itself.

2. Randfield *v.* Randfield, 3 De G. F. & J. 766; *reversing* 1 D. & S. 310.

3. Jordan *v.* Wells, 3 Woods (U. S.) 527.

4. This is done, whenever the rights

manner or will permit a new suit, is entirely within the discretion of the court.[1]

c. RECEIVER'S DEFENSES.—In the matter of defenses to actions against him, a receiver stands upon the same footing as the party over whom he has been appointed. He may interpose the same defenses which such party might have pleaded, and, *vice versa*, no others are available.[2] But where the receiver also

can be fully determined and secured in that way, in order to avoid a multiplicity of suits, and secure equality among the creditors. First Nat. Bank *v.* E. T. Barnum Wire, etc., Works, 58 Mich. 315; People *v.* Bank of Dansville, 39 Hun (N. Y.) 187; Melendy *v.* Barbour, 78 Va. 544; 25 Am. & Eng. R. Cas. 622; Kennedy *v.* Indianapolis, etc., Co., 2 Flip. (U. S.) 704; 3 Fed. Rep. 97; Lehigh Coal, etc., Co. *v.* Central R. Co., 38 N. J. Eq. 175; Porter *v.* Kingman, 126 Mass. 141; Olds *v.* Tucker, 35 Ohio St. 581.

Thus where one purchased an estate subject to a mortgage given by a former owner to a bank, he cannot maintain a bill in equity against receivers of the bank, to have the mortgage canceled on the ground of fraud, but he must proceed by petition in the cause in which the receiver was appointed. Porter *v.* Kingman, 126 Mass. 141.

Any creditor who has a claim upon the fund, but who is not a party to the suit, will be admitted as a party thereto by coming in by petition and submitting himself to the jurisdiction of the court for the settlement of the claim. *In re* City Bank, 10 Paige (N. Y.) 378.

When Separate Suit Allowed.—The remedy by motion in the original suit is not exclusive, and a separate suit will be authorized in a proper case. Thus where one entered into a contract with a receiver, who afterwards refused to allow him to perform it, and a successor to such receiver was subsequently appointed, it was held that a suit in equity would lie against the successor to recover damages; on the ground that since the contract was made with a former receiver a suit at law would not lie against the successor, and because the claim was against the trust funds of the company. Kerr *v.* Little, 39 N. J. Eq. 83.

Tort.—Where the cause of action is a tort, a separate proceeding is the more appropriate remedy. Palys *v.* Jewett, 32 N. J. Eq. 302.

1. The court may decide the controversy on petition in the original action, directing an issue to a jury, if necessary, to try issues of fact. Melendy *v.* Barbour, 78 Va. 544; 25 Am. & Eng. R. Cas. 622; Kennedy *v.* Indianapolis, etc., R. Co., 2 Flip. (U. S.) 704; 3 Fed. Rep. 97. Or at its discretion, the court may refer such issues of fact to a master. Kennedy *v.* Indianapolis, etc., R. Co., 2 Flip. (U. S.) 704; 3 Fed. Rep. 97; or if the case appears free from difficulty may itself decide it on the petition. Lehigh Coal, etc., Co. *v.* Central R. Co., 38 N. J. Eq. 175.

2. See this title, *Remedies Concerning Receivers; Suits by Receivers; Receiver's Position Co-extensive with that of Party Over Whom Appointed.*

Davis *v.* Duncan, 19 Fed. Rep. 477; 17 Am. & Eng. R. Cas. 295; Honegger *v.* Wettstein, 94 N. Y. 252. In this last case the court by Miller, J., said: "The receiver, who represents the defendants, should not be permitted to occupy any better position in the defense than the defendants themselves. His whole title is derived from the defendants, who do not claim to defend the action upon any such ground as is set up in the answer of the receiver."

Technical Defense.—A receiver cannot, either expressly or by implication, waive any technical defense which may be available to him. McEvers *v.* Lawrence, 1 Hoffm. Ch. (N. Y.) 173.

Execution.—Property in the possession of a receiver is not liable to attachment nor to execution. See this title, *Management and Control of Property; Receiver's Possession; Effect.* Adams *v.* Haskell, 6 Cal. 113; 65 Am. Dec. 491; Jackson *v.* Lahee, 114 Ill. 287; Robinson *v.* Atlantic, etc., R. Co., 66 Pa. St. 160; Wiswall *v.* Sampson, 14 How. (U. S.) 52. If the holder of a lien against real estate believes the land should not have gone into the receiver's hands, he may apply to the appointing court for an order discharging the land from the receiver's custody, so that he can levy upon it. Robinson *v.* Atlantic, etc., R. Co., 66

sents creditors his right of defense may rise superior to that : party over whom he was appointed.[1]

JUDGMENTS AGAINST RECEIVER.—In an action against a er in his official capacity, judgment cannot be rendered st him personally. It must be entered against him as er, and so as to be payable out of funds held by him in that ity, and enforceable only against property in his custody.[2]

PARTIES TO ACTIONS.—The appointment of a receiver not abate pending actions against the person over whom he ointed.[3] At most it will only render the suit defective so

160. If the title to real estate receiver's possession be con- and be finally vested in one of ties by decree of the court, it is o execution, though not formal- harged from the receiver's cus- Very *v.* Watkins, 23 How. (U.

erty in Custody of National Bank. eceiver has no title to property mere custody of the bank, and re § 5242 U. S. Rev. Stat., pro- that "no attachment, injunction ution shall be executed against ch association or its property, final judgment," does not pro- e sheriff from taking such prop- to his possession, and the re- can retain possession only by the required security. Corn ge Bank *v.* Blye, 101 N. Y.

.—Where a statute allows a d to follow and distrain goods t, it does not entitle him to a lien proceeds of goods sold by a re- for rent becoming due after the Gaither *v.* Stockbridge, 67 Md.

actions.—As a general rule the vill not hear applications for an ion against its receiver. The course is to apply for leave to uit, or for immediate relief by rcise of the court's supervisory Smith *v.* Earl of Effingham, 2 32; Winfield *v.* Bacon, 24 Barb.) 154.

pleader.—Where different par- im the same fund in a receiver's he may compel them to inter- Winfield *v.* Bacon, 24 Barb. (N. 4.

als by Receiver.—A receiver has ne right of appeal as a party ant, from a judgment affecting ate he represents, that the party hom he is appointed would have Melendy *v.* Barbour, 78 Va. 544; 25 Am. & Eng. R. Cas. 622; First Nat. Bank *v.* E. T. Barnum Wire, etc., Works, 58 Mich. 315.

Miscellaneous. — Where a receiver was appointed by a master in chancery, who had no power to make appointments, but the papers had been issued regularly, under the seal of the court, as if the appointment had been regular, it was held the receiver could nevertheless defend an action for trespass of goods. Brush *v.* Blanchard, 19 Ill. 31.

After the receiver has taken possession under his appointment, he cannot defend an action to recover the property by setting up that the order had been rescinded without prejudice. Peacock *v.* Pittsburg Locomotive, etc., Works, 52 Ga. 417; Miller *v.* Loeb, 64 Barb. (N. Y.) 454.

1. See this title, *Suits by Receivers; Defenses Available Against*, p. 239, n. 1.

2. Woodruff *v.* Jewett, 37 Hun (N. Y.) 205; Com. *v.* Runk, 26 Pa. St. 235. If a receiver has been discharged, and, under order of court, has transferred all assets held by him, it is not improper to subsequently enter judgment against him as receiver, when it is made payable out of funds which may thereafter come into the receiver's hands or under the direction of the court. Woodruff *v.* Jewett, 37 Hun (N. Y.) 205.

A judgment against a corporation over which a receiver has been appointed in another State is not binding on the receiver in the State of his appointment, when he was not made a party to the action. McCullouch *v.* Norwood, 58 N. Y. 562.

3. Mercantile Ins. Co. *v.* Jaynes, 87 Ill. 199; People *v.* Barnett, 91 Ill. 422; Willink *v.* Morris Canal, etc., Co., 4 N. J. Eq. 377; Tracy *v.* First Nat. Bank, 37 N. Y. 523; Knauer *v.* Globe Mut. L. Ins. Co., 46 N. Y. Super. Ct. 370; South Carolina R. Co. *v.* People's Sav. Inst., 64 Ga. 18; 12 Am. & Eng. R. Cas.

as to make it irregular for the plaintiff to proceed until the

432; Second Nat. Bank *v.* New York Silk Mfg. Co., 11 Fed. Rep. 532.

Effect of Judgment.—A judgment recovered in such a case is not a lien, entitling the plaintiff recovering it to a preference. It simply determines the amount due him. Attorney Gen'l *v.* Continental L. Ins. Co., 93 N. Y. 630, *affirming* 28 Hun (N. Y.) 360.

Corporations.—So long as the corporation over whom the receiver is appointed has not been dissolved, and no order or injunction exists restraining suits against it, it may still be sued and defend in its own name. Pringle *v.* Woodworth, 90 N. Y. 502; Bedell *v.* North America L. Ins. Co., 7 Daly (N. Y.) 273; Allen *v.* Central R. Co., 42 Iowa 683; St. Joseph, etc., R. Co. *v.* Smith, 19 Kan. 225; Boston Glass Manufactory *v.* Langdon, 24 Pick. (Mass.) 49; 35 Am. Dec. 292; Revere *v.* Boston Copper Co., 15 Pick. (Mass.) 357; Ohio, etc., R. Co. *v.* Nickless, 71 Ind. 271; Wyatt *v.* Ohio, etc., R. Co., 10 Ill. App. 289; Life Assoc. of America *v.* Goode, 71 Tex. 90; Bank of Bethel *v.* Pahquioque Bank, 14 Wall. (U. S.) 383; 36 Conn. 325. Statutes have changed this rule in *Maine*, Leathers *v.* Shipbuilders' Bank, 40 Me. 386, and in *Ohio*, Stetson *v.* City Bank, 2 Ohio St. 167.

When Corporation Dissolved.—But when a corporation is dissolved and a receiver is appointed, unless some statutory remedy provides for their revival, all suits pending absolutely abate, and all further proceedings for or against it are void. Merchants' L. & T. Co. *v.* Clair, 107 N. Y. 663; Hollingshead *v.* Woodward, 107 N. Y. 96; Sturges *v.* Vanderbilt, 73 N. Y. 384; People *v.* Walker, 17 N. Y. 502; Remington *v.* Samana Bay Co., 140 Mass. 494; 12 Am. & Eng. Corp. Cas. 97; Thornton *v.* Marginal Freight R. Co., 123 Mass. 32; Merrill *v.* Suffolk Bank, 31 Me. 57; 50 Am. Dec. 649; May *v.* State Bank, 2 Rob. (Va.) 56; 40 Am. Dec. 726; Saltmarsh *v.* Planters', etc., Bank, 17 Ala. 761; Ingraham *v.* Terry, 11 Humph. (Tenn.) 572; Farmers', etc., Bank *v.* Little, 8 W. & S. (Pa.) 207; Greeley *v.* Smith, 3 Story (U. S.) 657. A judgment recovered in an action pending in another State after the dissolution of a corporation and appointment of a receiver, without the receiver having been made a party, is void in the State in which the corporation was dissolved. McCullouch *v.* Norwood, 58 N. Y. 562. The fact that the receiver by order of court prosecuted an appeal from a former judgment recovered against the corporation before its dissolution, in the same action in which the judgment was rendered, does not bind him. People *v.* Knickerbocker L. Ins. Co., 106 N. Y. 619; 20 Am. & Eng. Corp. Cas. 571.

An insurance company was attached as garnishee. Subsequently the insurance was dissolved and a receiver appointed in the manner provided by statute. A motion was made by the receiver to dissolve the attachment, on the ground that by the dissolution of the corporation all suits against it abated. *Held*, that under the *Pennsylvania* statute, the receiver stood in the place of the corporation, and that the attachment should not be dissolved; that the proper course was for the plaintiff to move for the substitution of the receiver as defendant, and then prosecute the suit to judgment. Pickersgill *v.* Myers, 99 Pa. St. 602; Hays *v.* Lycoming F. Ins. Co., 99 Pa. St. 621.

In People *v.* Knickerbocker L. Ins. Co., 7 N. Y. St. Rep. 287, it was held that actions pending against a corporation at the time of its dissolution must be revived in the name of the receiver, but that this was not necessary if the receiver voluntarily made himself a party. See also cases cited at the beginning of the immediately preceding note.

Quasi Dissolution—The dissolution of a corporation for insolvency or non-user, misuser, or some other cause of forfeiture is not such a dissolution, until it has been judicially declared, as to make the corporation extinct. It may still sue and be sued, notwithstanding the appointment of a receiver, and a judgment so obtained is conclusive, as against the receiver and other creditors, of the validity and amount of the plaintiff's claim. Kincaid *v.* Dwinelle, 59 N. Y. 548; Pringle *v.* Woodworth, 90 N. Y. 502; Bank of Niagara *v.* Johnson, 8 Wend. (N. Y.) 645; Mickles *v.* Rochester City Bank, 11 Paige (N. Y.) 118; 42 Am. Dec. 103; Revere *v.* Boston Copper Co., 15 Pick. (Mass.) 351; Boston Glass Manufactory *v.* Langdon, 24 Pick. (Mass.)

r has been brought in as a party,[1] and if the effect of the ent will not go beyond the person of the defendant, the r should not be made a party.[2] The receiver has tus whatever in such pending suit until he has been ly made a party thereto.[3] The plaintiff in such g action is not bound to bring in the receiver. It is for eiver to intervene and make defense if it be to the inter- the parties he represents that he should do so.[4] Whether ver shall be permitted to defend in a pending action is ionary with the court.

CTIONS ARISING OUT OF RECEIVERSHIP.—It is quite n in the *United States* for receivers to be authorized to n the business of the parties or corporation over whom e appointed. This is especially frequent in the case of rships over railroads. The liability of such managing

Am. Dec. 292; Hunt *v.* Co- ns. Co., 55 Me. 290.

son *v.* Wilson, 1 Barb. Ch. (N. In this case it was decided ending suit was neither barred ed by the appointment of a of the defendant; that at most only render the suit defective make it irregular for the to proceed further until he ght in the receiver, which, in equity, should be done by a ental bill in the nature of a vivor.

ere one brought suit against a a mere money demand, and at the receiver of the bank be party, it was held that tiff had no right to make the a party defendant, the court t, J., saying: "The complaint ask any judgment against the o., or show any reason for it a party to the suit, beyond statement that it has been d receiver of the Suffolk Bank. e that the rights and obliga- wing from this make it proper sary to sue the receiver with, or f the bank, but there must be ht to relief from the receiver nd some relief prayed. The t that A is the assignee or re- B, whether these be natural ial persons, will not justify a of B in bringing in A as a every suit against B, or where ts and the remedies of the so far as appears, end with B, assignee or receiver is not to ed by the suit, nor to be ad- r compelled to do anything for the relief of the plaintiff." Arnold *v.* Suffolk Bank, 27 Barb. (N. Y.) 424.

3. An action was begun against a bank, and certain money in the hands of a third person was attached. A receiver was subsequently appointed over the bank, and he moved to have the attachment vacated. *Held*, that he had no status whatever until he should be made a party to the action. Tracy *v.* First Nat. Bank, 37 N. Y. 523. In this case the court, by Hunt, C. J., said: "The objection that the receiver has no *status* in court I regard as fatal. The action was commenced against the bank before the appointment of a receiver, and, so far as the papers show, is still in progress under that title. There is no objection to its continuance in that form until final judgment is obtained, and such is the common practice in the *United States*. . . . It was competent for the receiver to apply to make himself a party, either on the ground that all the interest of the defendant had vested in him, or that the rights of all parties could not be properly settled unless he should be made a party to the action. . . . In neither case can he appear or move until such order is obtained. He is a stranger to the proceedings."

4. The appointment of receivers of a railroad company, pending proceedings in another court against the company for construction damages, does not interfere with the prosecution of such proceedings, and the plaintiff is not bound to bring in the receiver. It is the receiver's business to intervene and make defense if the interests of those whom he represents require that he

receiver, in his official capacity, may be said, in general, to be the same as that of a person or corporation carrying on a like business as owner.[1]

3. Injunctions in Connection with Receivers—*a.* APPOINTMENT OF RECEIVER OPERATING AS INJUNCTION.—It has been held that the appointment of a receiver operates as an injunction, and that an order for an injunction is always more or less included in an order for a receiver.[2]

b. POINTS OF RESEMBLANCE BETWEEN INJUNCTIONS AND RECEIVERS.—There is a marked similarity in the results obtained by a court of equity in the granting of interlocutory injunctions and the appointment of receivers. Both are extraordinary remedies[3] as distinguished from the more usual methods of procedure at law and in equity, and are used, in the discretion of

should do so. Mercantile Trust Co. *v.* Pittsburg, etc., R. Co., 29 Fed. Rep. 732.

1. The questions arising out of such receiverships are principally considered in railroad cases, and will be found fully treated elsewhere. See RECEIVERS OF RAILROADS.

2. In Evans *v.* Coventry, 3 Drew. 82, the vice-chancellor in his opinion, says: "Having prayed. . . . that a receiver shall be appointed until a winding up shall take place, the sixth paragraph of the prayer is for an injunction to restrain the defendants from getting in any of the assets of the concern. That is connected in fact with the appointment of a receiver, and I may observe with respect to that, that of course the appointment of a receiver (if a receiver were appointed), would of itself operate as an injunction; and it would not be necessary, if a receiver were appointed, to go on and grant an injunction in terms; but where trustees or persons in a fiduciary character have misconducted themselves, then the court will often grant an injunction as well as a receiver, not because an injunction is necessary to prevent a party from receiving when a receiver is once appointed, but for the purpose of marking its sense of the conduct of the parties who have so misconducted themselves. See Kerr on Receivers 13.

Illustration in Partnership Cases.—On the ground that the appointment of a receiver operates as an injunction, it would seem, that in partnership cases, where there are a number of partners, and the object of the court is to exclude some or one only, from intermeddling in the partnership affairs, the more appropriate remedy would be by injunction. Hall *v.* Hall, 3 M. & G. 79.

See *contra*, Boyd *v.* Murray, 3 Johns. Ch. (N. Y.) 47, in which case the bill charged that A, by will, appointed B one of his executors, and who alone acted. That he left a large real and personal estate, and gave the executors powers and directions relative to the distribution of the estate. That the executor confounded the estate with his own, and made no dividend or distribution. That he died leaving the defendant his executor, who is acting in the same manner, and is in failing circumstances, and makes no dividend, etc., and abuses his trust, etc.

The plaintiffs are assignees of some of the legatees. Prayer for an injunction prohibiting the defendant from intermeddling with the estate of A. or the rents, etc., by collecting, etc.

The chancellor in the opinion of the court says: "The appointment of a receiver is quite a distinct question from that of an injunction. A receiver can act. He is a substituted trustee. But after injunction no person can act and what are to become of the rights of other legatees, and of debtors and creditors? They cannot demand or receive or pay, for there is no representative of the estate. The power of the executor is wholly suspended. Such an extraordinary measure as an injunction in the first instance, going to the whole power of the executor, seems not to be conformable to precedents, and might be very injurious."

3. In McCarthy *v.* Peake, 18 How. Pr. (N. Y.) 139, the court by Ingraham, J., observes: "Both the appointment of a receiver and the allowance of an injunction are provisional remedies of

rt,[1] to accomplish the same purpose—that of the preserva- the fund or property pending litigation. They are provi- or auxiliary to the main purpose of the action, and are esorted to for a final determination of the rights of the the object of the court being simply to preserve the property *in statu quo* until the rendering of a final de- In order to determine the right to an injunction or a r, it is sometimes necessary for the court to go into the of the cause, but their investigations are not made with a final adjudication. On the other hand, cases often arise an injunction or receivership may be granted without any gation, as, for instance, where the plaintiff shows an appa- le and the court is satisfied that there is sufficient danger to warrant them in extending their aid by one or both of xtraordinary remedies.[3]

eight, and either would give on of the case to the court in e action was brought."

retion in Granting Injunctions. ght to an injunction lies in the nscience of the chancellor act- all the circumstances belong- ch particular case. Reddall *v.* 4 Md. 444; 74 Am. Dec. 550; d Sav. Inst. *v.* Schroder, 8 Gill l.) 93; Tide Water Canal Co. r, 9 Gill & J. (Md.) 479; Ro- Strauss, 10 Md. 89; Nusbaum 12 Md. 315; Wilson *v.* Mayor, Baltimore, 5 Gill (Md.) 391; ey *v.* Hartford, etc., R. Co., 23 1; Capner *v.* Flemington Iron . J. Eq. 467; Perkins *v.* Collins, q. 482.

les Governing Discretion, see d *v.* Cope, 25 Beav. 140.

tion in Appointing Receiver.— nting of a receiver is a matter tion to be governed by a view of e circumstances of the case, one circumstances being the prob- of the plaintiff being ultimately to a decree. Thus, a receiver sed in a case where important rose upon the construction of at construction being attended siderable doubt and difficulty. Homan, 3 M. & G. 378; Pul- Cincinnati, etc., R. Co., 4 Biss. 17.

Vhelpley *v.* Erie R. Co., 6 (U. S.) 271, the court by Nel- observes: "Indeed, I am not l to admit that an order for an n, or a receiver, can be made proper case, even with the con- both parties, more especially where the rights of third parties may be concerned."

Title Not Affected by Injunction or Receiver.—The granting of an injunction or receivership does not in any way affect the title to, or create any special lien upon the property: Ellis *v.* Boston, etc., R. Co., 107 Mass. 1.

2. Murdock's Case, 2 Bland (Md.) 469; 20 Am. Dec. 381; Duvall *v.* Waters, 1 Bland (Md.) 569; 18 Am. Dec. 350; Mays *v.* Rose, Freem. Ch. (Miss.) 703; Bosley *v.* Susquehanna Canal, 3 Bland (Md.) 63; Leavitt *v.* Yates, 4 Edw. Ch. (N. Y.) 162; Ellicott *v.* Warford, 4 Md. 80; Brown *v.* Northrup, 15 Abb. Pr. N. S. (N. Y.) 333; Ellis *v.* Boston, etc., R. Co., 107 Mass. 1; Hottenstein *v.* Conrad, 9 Kan. 435; Huguenin *v.* Baseley, 13 Ves. 105.

A receiver may be granted on motion, notwithstanding the reservation of all matters under the decree, for this is a mere provisional order. Cooke *v.* Gwyn, 3 Atk. 690.

3. In Leavitt *v.* Yates, 4 Edw. Ch. (N. Y.) 134, the Vice-Chancellor, observes: "The argument (on motion for granting an injunction and receiver) has embraced all the points which the pleadings are calculated to present when the cause shall be brought to a hearing for a final decree; but it does not follow that a decisive opinion is to be expressed in this stage of the cause upon the rights of all the parties; for, whatever may be the result of a motion of this kind, the general understanding is that it is without prejudice to the ultimate decision to which the court may be called upon to make. Insolvency and danger to the fund pending the

c. POINTS OF DIFFERENCE BETWEEN THESE REMEDIES—(1) *Effect on Possession of Property.*—The most noticeable difference between the equitable remedies by injunction and receivership is the effect they each have on the possession of the fund or property in litigation. The appointment of a receiver invariably necessitates a change of possession, and frequently changes the status of the fund or property, or entirely disposes of it, while the granting of an injunction never affects the possession, or in any way changes the attitude or relations of any of the parties concerned. Thus, it will be seen, that where the object is to dispossess the defendant and vest the possession and control of the fund or property in the officer of the court, the appointment of a receiver is the proper remedy, and where the necessities of the case merely require a preservation of the fund or property pending litigation, the proper remedy is by injunction.[1]

(2) *Distinct and Separate Remedies.*—While a court of equity may deem it expedient to resort to both of these extraordinary remedies in the same cause,[2] they are, nevertheless, distinct and separate remedies, often used for the attainment of different results; and it does not necessarily follow that an injunction will always be granted after the appointment of a receiver, or that a receiver is a necessary incident to an injunction. Cases may arise, however, where an injunction accompanies the appointment of a receiver almost as of course,[3] or where a receiver is considered a

litigation with a *prima facie* case and probable cause for sustaining the bill are, or ought to be sufficient in the first instance to found an injunction and a receivership upon, without going minutely into the merits. My own observation has taught me to believe that, in general, it is most prudent and best promotes the ends of justice to go no further upon a motion. A decision of the cause is not, therefore, to be expected now. I am only about to look into it for the purpose of seeing whether a proper case for an injunction and a receiver is presented."

The court will in many cases interfere to preserve property *in statu quo* during the pendency of a suit in which the rights to it are to be decided; and that without expressing, and often without having the means of forming any opinion as to such rights. And in order to support an injunction for such purpose, it is not necessary for the court to decide upon the merits in favor of the plaintiff. If, therefore, the bill states a substantial question between the parties, the title to the injunction may be good, and yet the title to the relief prayed may ultimately fail. Great Western R. Co. *v.* Oxford Junction R. Co., 2 Phill. Ch. 597. See also Blakeney *v.* Dufaur, 15 Beav. 40.

In interlocutory applications for injunctions or receivers, the court will confine itself strictly to the immediate object sought, and, as far as possible, abstain from prejudging the question in the cause. Skinners Co. *v.* Irish Soc., 1 M. & C. 162.

1. Murdock's Case, 2 Bland (Md.) 461; 20 Am. Dec. 381; Bosley *v.* Susquehanna Canal, 3 Bland (Md.) 63.

2. A court may, in its discretion, grant one of these remedies or both. Whitney *v.* Buckman, 26 Cal. 447; Nichols *v.* Perry Patent Arm Co., 11 N. J. Eq. 126; Rawnsley *v.* Trenton Mut. L., etc., Ins. Co., 9 N. J. Eq. 347.

3. In Sieghortner *v.* Weissenborn, 20 N. J. Eq. 172, the chancellor observes: "In suits between partners to dissolve a partnership, a receiver will not be appointed, or an injunction granted or continued to restrain a partner from acting, unless the facts shown are such as would, upon the final hearing, entitle the complainant to a decree of dissolution; and when such facts are estab-

ry incident to an injunction.[1] Upon motion for an in-
n, the court may properly appoint a receiver instead of
g the injunction, if, in their opinion, the facts make out a
case for a receiver;[2] and so, on the other hand, a receiver-
ay be refused where the facts show to the satisfaction of
urt that the interests of all parties concerned would be
properly protected by an injunction.[3] In all such cases
of equity will employ the remedy best adapted to the
stances and requirements of each particular case.

'HEN NEITHER REMEDY APPLICABLE—(1) *When Relief
Had at Law.*—The familiar maxim that equity will not
aid where there is a full, adequate and complete remedy
applies in cases of injunctions and receiverships, and unless
uliar circumstances of the case warrant the interference of
of equity by injunction or the appointment of a receiver,
ties will be left to their remedy at law.[4] The mere fact

n general, a receiver will be
d and the defendant enjoined
posing of or meddling with the
nip property. The injunction
the appointment of a receiver
s a matter of course." See
lsall *v.* Colie, 10 N. J. Eq. 63;
eters, 13 N. J. Eq. 40; Good-
Whitcomb, 1 J. & W. 569;
Jeyes, 4 Beav. 503; Morgan *v.*
rk, etc., R. Co., 10 Paige (N.
40 Am. Dec. 244; Graven-
ppeal, 49 Pa. St. 310; Rose *v.*
o Md. 466; Miller *v.* Jones, 39

Penn *v.* Whiteheads, 12 Gratt.
the court by Moncure, J., ob-
"The power to appoint a
where one is necessary for the
n, preservation or sale of prop-
ding an injunction suit, is inci-
he power to grant an injunc-
. . The necessity for the
nent of a receiver in this case
purposes before mentioned, is
y the answers of the appellees;
hich it appears that when
by the injunction they were
in winding up their business,
ng their property, collecting
edits, and paying their debts,
ir interests required that the
d collections should be made
ittle delay as possible. Indeed,
nsel of the appellees, in their
t of this case, did not question,
ned to admit. the propriety of
ng a receiver, if it was proper
nue the injunction." See also
. Bull, 44 Ill. 97; Dunn *v.* Mc-
38 Ga. 179; Dumbville *v.*

Ashebrook, 3 Russ. 99; Oakley *v.* Paterson Bank, 2 N. J. Eq. 178.

Where an Injunction Is a Bar to Receivership in a Later Suit in Another Court.—It has been held in *New York*, where the remedies by injunction and appointment of receiver are of equal importance, that where an injunction is properly granted by a competent court it will prove a bar to a receivership in a later suit in another court between the same parties, on the ground that one court will not interfere with the proceedings of another which has already acquired jurisdiction of the parties and the *res*. McCarthy *v.* Peake, 9 Abb. Pr. (N. Y.) 164; 18 How. Pr. (N. Y.) 138. See Beach on Receivers, § 737.

2. Whitney *v.* Buckman, 26 Cal. 447.

3. Rawnsley *v.* Trenton Mut. L., etc., Ins. Co., 9 N. J. Eq. 347; Oakley *v.* Paterson Bank, 2 N. J. Eq. 173.

Reversal of Receivership Operates as Reversal of Injunction.—Where the injunction is a mere adjunct to the receivership, the reversal of the latter carries away the injunction also. Merrell *v.* Pemberton, 62 Ga. 29.

4. Wooden *v.* Wooden, 2 N. J. Eq. 429; Mullen *v.* Jennings, 9 N. J. Eq. 192; Parmley *v.* Tenth Ward Bank, 3 Edw. Ch. (N. Y.) 395; Corey *v.* Long, 43 How. Pr. (N. Y.) 497; Akrill *v.* Selden, 1 Barb. (N. Y.) 316; Coughron *v.* Swift, 18 Ill. 414; Winkler *v.* Winkler, 40 Ill. 179; Hart *v.* Marshall, 4 Minn. 294; Webster *v.* Couch, 6 Rand. (Va.) 519; Poage *v.* Bell, 3 Rand. (Va.) 586; Sollory *v.* Leaver, L. R., 9 Eq. 22; Cremen *v.* Hawkes, 2 J. & L. 674.

that the remedy at law has been overlooked,[1] or has been lost by the laches of the aggrieved party,[2] is no excuse for the application to a court of equity for either of the equitable remedies.

(2) *When Barred by Long Acquiescence.*—Long and continued acquiescence in a particular grievance is an effectual bar to relief in a court of equity. And a plaintiff who has slept upon his rights cannot afterwards seek redress through the medium of an injunction or a receiver.[3]

(3) *When Title to Public Office in Dispute.*—All disputes concerning the title to public offices are properly determined by proceedings in *quo warranto* or other appropriate remedies in courts of law. Consequently, a court of equity, not being the proper forum for the consideration of such controversies, will not lend its aid by injunction or receivership.[4] But when the dispute is confined to the fees and emoluments of a public office, considered as contract rights or property merely, it seems that the appropriate remedy then is in equity and both the remedies by injunction and receiver may be properly granted.[5]

1. Although it may be manifest that great injustice has been done a defendant at law, by the verdict and judgment against him there, yet if this injustice has not been produced by any fraud or surprise on the part of the plaintiff, but is the result either of the defendant's own negligence, or of his counsel's ignorance or bad management, a court of equity can give him no relief. Tapp *v.* Rankin, 9 Leigh (Va.) 478. See also Faulkner *v.* Harwood, 6 Rand. (Va.) 125; Auditor *v.* Nicholas, 2 Munf.(Va.) 31; Arthur *v.* Chavis, 6 Rand. (Va.) 142.

2. Drewry *v.* Barnes, 3 Russ. 94.

3. **Long Acquiescence.** — Gray *v.* Chaplin, 2 Russ. 126; Maythorn *v.* Palmer, 11 Jur. N. S. 230; Wood *v.* Sutcliffe, 2 Sim. N. S. 163.

Where A had stood by, without objecting, and allowed B to go on and expend a considerable amount of money in the erection of a mill, in violation of the terms of a grant made by A, in consideration of the erection of the mill, of the right to use the water of a creek in a particular manner, it was held, that, by his silence, he had waived all right to relief in equity, by injunction against diverting the water. Jacox *v.* Clark, Walk. (Mich.) 249. See also Payne *v.* Paddock, Walk. (Mich.) 487.

By articles of partnership, the partnership, which was for twenty-one years, was to be carried on for the first fourteen years under the style of A. & Co., and for the last seven years under the style of A. & B. During the first fourteen years, and for rather more than a year afterwards, the name of A. alone was stamped upon certain manufactures of the partnership. An injunction, restraining the use of the name A. upon the goods, or of any other name than that of A. & B., for the remainder of the term, was refused. Powell *v.* Allarton, 4 L. J. Ch. N. S. 91.

4. Tappan *v.* Gray, 9 Paige (N. Y.) 507; 7 Hill (N. Y.) 259; Stone *v.* Wetmore, 42 Ga. 601.

In People *v.* Draper, 24 Barb. (N. Y.) 265, the court held that an injunction would not be granted for the purpose of restraining the defendants, generally, from exercising any of the functions of an office, during the pendency of a suit brought by the attorney general to determine their right to the office, and until the decision of the question as to the validity of the law under which they claim to hold.

5. Palmer *v.* Vaughan, 3 Swanst. 173.

In Cheek *v.* Tilley, 31 Ind. 121, the court held that a county clerk may contract with his deputy that the latter for his compensation shall have a certain share of the fees taxed and collectible in the clerk's office during his deputyship, and in a suit by such deputy against his principal to recover the former's share of such fees, an injunction may be granted, pending the

HEN EITHER OR BOTH MAY BE GRANTED—(1) *When y in a Foreign Country.*—It is no bar to relief in equity nction or receivership, that the property or subject-mat- ispute, is without the jurisdiction of the court granting lief, provided the parties are within its control and sub- ts process.[1] It has been held that a court of equity in ntry may grant an injunction and appoint a receiver in ne enforcement of a decree, rendered in a foreign country.[2] ch remedies should not be granted, where the record doubt as to whether the plaintiff will be entitled to a n the second action.[3]

Vhen Conflict of Jurisdiction Between State and Federal —When there is conflict of jurisdiction between State and

training the clerk from col- r transferring such fees yet nd the sheriff from paying collected by him to the d a receiver may be ap-

bury *v.* Bunbury, 1 Beav. 320; n *v.* Johnson, 3 Ves. 182; *v.* Kemble, 1 S. & S. 7; Por- *v.* Soulby, 3 M. & K. 104; Carteret, 2 Vern. 494; Penn Baltimore, 1 Ves. Sen. 444; *v.* May, 5 Ves. 71; Bushby y, 5 Madd. 297; MacLaren *v.* 15 L. & Eq. 500; Langford ord, 5 L. J., N. S. Ch. 60; *v.* Oxenford, 1 K. & J.

on *v.* Foster, 4 Allen (Mass.) court held that equity had on upon a proper case being enjoin a citizen of *Massachu-* availing himself of an at- of personal property in an- ate in an action against a who is insolvent under the *Massachusetts.* See also in nection, Massie *v.* Watts, 6 U. S.) 158; Angus *v.* Angus, . 23; Mitchell *v.* Bunch, 2 Y.) 615; 22 Am. Dec. 669; *v.* Fowler, 9 Paige (N. Y.) t Falls Mfg. Co. *v.* Worster, 462.

mont, etc., R. Co. *v.* Ver- nt. R. Co., 46 Vt. 792, the Royce, Chancellor, observes: of equity has the right to re- rties within its jurisdiction, osecuting suits in foreign ounded upon the fact that the n whom the order is made, is e jurisdiction of the court. t is not grounded upon the to the exercise of judicial and administrative rights abroad, but upon the fact of the party upon whom the order is made, being within the jurisdiction of the court. And while the courts of one country have no authority to exercise any control over the courts of another country, they have authority where the parties are resident within their jurisdiction, to act *in personam* upon them, and direct them by injunction to proceed no further." See also Calkin *v.* Cocke, 14 How. (U. S.) 228.

2. High on Receivers (2d ed.), § 745. In Houlditch *v.* Lord Donegal, 8 Bligh N. S. 301, upon a bill filed in the court of chancery in *England*, by creditors, a decree was made to execute the trusts of a deed by which lands in *Ireland* were vested in trustees for the payment of debts. The debtor, a peer of the realm, did not answer the bill nor appear at the hearing of the original suit; but filed an answer to a supplemental suit, and by a cross-bill impeached the debts as fraudulent, and opposed the proceedings by counsel in various stages of the supplemental suits. By decrees in these suits, an injunction and a receiver were appointed. But it being found impracticable to execute the decree, a bill was filed in the court of chancery in *Ireland*, to carry the former decree into execution. *Held*, reversing the judgment of the court below, that, under the circumstances, the court had jurisdiction; that the propriety of the *English* decree might be examined in *Ireland;* but that if part of it was sustainable, it might so far be executed by the aid of the *Irish* court, although other parts might be erroneous.

3. Houlditch *v.* Lord Donegal, Beat. 146.

Federal courts, with a prospect of extended litigation, equity will lend its aid for the protection of the interests of all parties concerned, by granting an injunction and appointing a receiver.[1]

f. INJUNCTIONS TO PROTECT RECEIVER'S POSSESSION.--In order to protect a receiver in his possession of and control over the fund or property, the court appointing him will grant an injunction restraining adverse claimants from unauthorized interference by suit or otherwise, and compel them to assert their rights in the forum in which the receiver was appointed.[2] And no matter what right to the property such adverse claimants may have, they cannot disturb the receiver's possession until they have by lawful and legal proceedings established their rights.[3]

1. In Crane *v.* McCoy, 1 Bond (U. S.) 422, the court held that it was not enough to defeat jurisdiction in equity that there was a remedy at law; the remedy must be complete, prompt and efficient; and a chancellor in the exercise of a just discretion upon an application for an injunction, may properly take into consideration the existence of an actual conflict or imminent danger of a violent collision between two authorities, in determining the expediency of awarding this preventive process; and if the rights of a party can only be enforced at law by long continued, strenuous, and expensive litigation, and those rights can be more promptly and efficiently asserted in equity, a stringent reason is offered for the application of its power, both by injunction and receivership.

2. Tink *v.* Rundle, 10 Beav. 318; Johnes *v.* Claughton, Jac. 573; Davis *v.* Gray, 16 Wall. (U. S.) 203; *In re* Persse, 8 Ir. Eq. 111; Parr *v.* Bell, 9 Ir. Eq. 55; Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 46 Vt. 792; Grant *v.* Davenport, 18 Iowa 179; Damville *v.* Ashbrooke, 3 Russ. 99, note c; Mangle *v.* Lord Fingall, 1 Hog. 142; Mason *v.* Mason, F. & K. 429; Cronin *v.* McCarthy, F. & K. 49; Angel *v.* Smith, 9 Ves. 335; Brooks *v.* Greathed, 1 J. & W. 178.

3. In Attorney-Gen'l *v.* St. Cross Hospital, 18 Beav. 601, 605, the master of the rolls says: "I must observe that where this court has exercised a jurisdiction over the subject-matter of a suit, and has taken control over it by appointing an officer of its own, to preserve the rights of all persons interested in it (and such is the effect of appointing a receiver), it prevents any person from disturbing that possession, even though he may have a clear and undoubted right to the property until, by lawful and legal proceedings, in the regular and constituted tribunals, he has established his alleged right.

"In Evelyn *v.* Lewis, 3 Hare 471, the vice-chancellor said that the court did not allow the possession of the receiver to be interfered with or disturbed by any party whether claiming paramount or under the right which the receiver was appointed to protect. If a party claiming a right in the same subject-matter was in possession of the rights which he claimed at the time the receiver was appointed, the appointment of the receiver left him in such possession; if, on the other hand, the claimant was out of possession, he must apply for the leave of this court before he instituted any legal proceedings affecting the possession which the receiver had acquired. The court had then an opportunity of considering, and, in a sense, of trying, the right of the applicant to proceed at law, before it sanctioned the proceeding. How far that preliminary trial in this court should go might depend upon the circumstances of the case. Whether the party proceeding at law did or did not know that a receiver had been appointed over the property, or however clear the right of the claimant might be, the court would restrain the prosecution of the claim, if it were instituted without the leave of this court. The court had the power of indemnifying a party who applied in a regular manner for the protection of his rights, or to have them put in a train for adjudication. The injunction in this case must be granted."

An action against a receiver should not be restrained on the ground that a former judgment has disposed of the

INJUNCTIONS FOR AND AGAINST RECEIVERS.—A court of y has jurisdiction to protect its receivers in the discharge of duties, and may grant an injunction restraining proceedings against them for acts done by them under the direction e court; although such proceedings at law are instituted st them by persons who are not parties to the suit in y.[1] It has also jurisdiction, and will as readily exercise it, otect such third persons against an abuse of power, on the of a receiver, attempted to be exercised under pretense of thority derived from the court,[2] or to secure a proper com- ce by the receiver with its orders.[3]

THE REMEDIES AS APPLIED TO CORPORATIONS—(See also NCTIONS, vol. 10, p. 953; also *infra*, this title, *In Particular , Corporations*)—(1) *Where Injunction Preferred to Receiver*—While in many of the States the power to appoint receivers the affairs of corporations has been expressly conferred by te, in the absence of such legislation a court of equity will tantly assume the power of dissolving a corporation and g possession of its property through the medium of a ver, when by an injunction the interests of all parties con- d may be properly protected, as, where a shareholder s fraud and mismanagement on the part of the officers of orporation.[4] Cases may often arise where the same protec-

s involved in the action; but the er should be left to set that up efense. Jay's Case, 6 Abb. Pr.) 293.

x parte Clark, 1 R. & M. 563; lor *v.* Blake, 1 Hog. 98; Nu- . Nugent, 2 Moll. 372; Asten *v.* , 8 Leg. Obs. 218; Wardell *v.* 2 Moll. 388.

Vynne *v.* Lord Newborough, 1 64, the court held, that a re- erman, who was a tenant of real ty in the possession of a re- could not have an injunction to n the receiver from evicting him.

a Receiver Authorized to Sue.— iver who has obtained authority he court to sue, is not only ized, but bound to proceed with tion, and he is not to be re- d by injunction out of another or by making him a party to a tion and obtaining an injunc- gainst him. Winfield *v.* Bacon, b. (N. Y.) 154.

proper method of restraining n officer when engaged in the rge of his official trust, is by ap- on to the court whose officer he instructions. Van Rensselaer ery, 9 How. Pr. (N. Y.) 138.

In re Merritt, 5 Paige Ch. (N. 31, the chancellor says: "The possession of a receiver or a sequestrator is considered as the possession of the court by whom he is appointed. And if a third person claims adversely, he must apply here for leave to bring a suit at law to try his title; or he may ask to come in and be examined *pro interesse suo* to establish his title in this court. For the same reason, a suit brought by a receiver is to be considered as brought under the authority of this court; and if brought in the name of a third person, without his authority and without any foundation or pretence of right, the parties to such suit may apply here for protection against the unjust and unauthorized proceedings of the receiver." See also Lehigh Coal, etc., Co. *v.* Central R. Co., 42 N. J. Eq. 591; 35 Am. & Eng. R. Cas. 2.

3. Green *v.* Hanbury, 2 Brock (U. S.) 419.

4. The infidelity or misconduct of some or even of all of the trustees or managers of a joint stock association, affords no ground for taking away the rights of the shareholders who constitute the company, either by dissolving it, or taking away its management, and placing it in the hands of an officer of the court. In such a case, the principles of remedial or preventive justice go no

tion may be afforded the shareholders or creditors by the granting of an injunction as by the appointment of a receiver, and it would be a great injustice to resort to the latter remedy and thereby appoint a stranger to take possession and wind up the affairs of a corporation when the officers of such corporation are not in fault.[1]

(2) *Injunction as Adjunct to Receivership.*—Where it has been found necessary to appoint a receiver over the affairs of a corporation, it may also be necessary to grant an injunction at the same time as a necessary adjunct to the receivership,[2] although a receivership often implies, not only a suspension of the functions of a corporation, but a restraint upon its officers as well.[3]

further than to enjoin or forbid the misconduct, or to remove the unfaithful officer. Waterbury *v.* Merchants' Union Express Co., 50 Barb. (N. Y.) 157. See also Neall *v.* Hill, 16 Cal. 145; 76 Am. Dec. 508; Belmont *v.* Erie R. Co., 52 Barb. (N. Y.) 637; Latimer *v.* Eddy, 46 Barb. (N. Y.) 61.

In Howe *v.* Denel, 43 Barb. (N. Y.) 504, the court by Ingraham, P. J., observes: "While I am of the opinion that a receiver should not be appointed to take possession of the property of a corporation on the application of a shareholder charging fraud against some of the trustees or directors, I see no reason why such directors may not be restrained by injunction from committing any such fraudulent acts, on the application of a stockholder; but such injunction should not apply to the general business of the corporation, but to the particular acts complained of. The acts alleged in the complaint, if true charged against the defendants, show gross violations of duty on their part, and an injunction prohibiting any such use of the corporate property might well be granted; but I see no ground on which the injunction against carrying on the general business of the company can be sustained. See also Smith *v.* Metropolitan Gas Light Co., 12 How. Pr. (N. Y.) 187; Robinson *v.* Smith, 3 Paige (N. Y.) 222; 24 Am. Dec. 212.

To enable a stockholder in a corporation to maintain an action to restrain the directors from the exercise of their corporate powers, and for the appointment of a receiver, the risk and responsibility must be upon him, so as to afford a guaranty that he is acting for the benefit, or what he believes to be for the benefit, of the company. If it appears that other persons whose interests are hostile to those of the company, have agreed with the plaintiff to bear and pay the expenses of the litigation, any relief, especially upon an interlocutory motion, will be refused. Belmont *v.* Erie R. Co., 52 Barb. (N. Y.) 637.

1. Rawnsley *v.* Trenton Mut. L., etc., Ins. Co., 9 N. J. Eq. 347; Oakley *v.* Paterson Bank, 2 N. J. Eq. 173.

The appointment of receivers is not a matter of course following upon a decree of the court declaring the corporation insolvent. It is a matter resting in the discretion of the chancellor. But as a general rule, where there is a decree of insolvency, receivers will be appointed. The management of the affairs of the corporation will not be left in the hands of the directors, unless it is shown to be for the interest of the creditors and stockholders that this should be done. Nichols *v.* Perry Patent Arm Co., 11 N. J. Eq. 126.

2. **Injunction as Necessary Adjunct to Receivership.**—Upon the appointment of a receiver of all the property and effects of a corporation, for the purpose of closing up its affairs, it is proper to restrain its directors and officers from collecting any debts or demands due to the company, and from paying out, assigning, or delivering any of the property, moneys, or effects of the corporation to any other person, and from incumbering the same. Morgan *v.* New York, etc., R. Co., 10 Paige (N. Y.) 290; 40 Am. Dec. 244.

3. See High on Receivers (2d ed.), § 750.

Where one who had been a stockholder, and had, under a resolution, voted for by him as such, sold to the company his stock, taking the company's note therefor, less expenses, it was held that he could not claim as a stockholder; nor as a creditor could he ask an injunction to restrain another creditor, whose debt was of the same nature in creation and consideration, from obtaining satisfaction by means of a prior

ctions by Receivers of Insolvent Corporations.—Where it is y of a receiver of an insolvent corporation to collect from ent stockholders the amount due upon the shares of stock them, for unpaid subscriptions to the capital stock, the act that the whole amount due from any particular stock- may not ultimately be wanted for the payment of credit- the corporation, if all the other solvent stockholders pay their ratable proportions, will not authorize the par- stockholder to enjoin the receiver by injunction from pro- to enforce the payment of the balance due from such lder in the first instance.[1]

re a receiver represents the creditors in a suit against the lders to recover back illegal dividends paid said stock- while the corporation was insolvent, such stockholders itled to an injunction to restrain similar actions against y individual creditors.[2] And so, too, equity will enter- action brought by the receiver of an insolvent corpora- ainst its stockholders and creditors to enforce the liability stockholders, as such, to the creditors, and to restrain the rs from prosecuting the stockholders upon such liability.[3]

on the corporation effects. a stockholder of a corpora- interfere in equity for the pro- f the company, yet something nore than what is allowed by ns of the charter must have e by the managers or directors, rize such an interference, and debt authorized by the com- reated by and with the con- e stockholders and directors, ment confessed therefor, a con- tockholder is not entitled to tion against an execution is- reon. Gravenstine's Appeal, .310.

h defense should be set up in n by the receiver to enforce the . Pentz *v.* Hawley, 1 Barb. Y.) 122.

action may be maintained by vers of an insolvent corpora- nst individuals, some of whom holders, and some of whom are of the company, to recover stockholders a dividend de- its capital stock and received ; where it is averred in the t that such dividend impaired tal, that some of the defend- reditors, are suing the stock- to recover from them such s, and that the funds so mis- ated are required to pay the the corporation. Osgood *v.* Keyes (N. Y.) 521; *affirming* (N. Y.) 464.

3. Calkins *v.* Atkinson, 2 Lans. (N. Y.) 12.

It seems a receiver's action to recover from stockholders their unpaid subscriptions to the stock of an insolvent corporation, must be brought against each stockholder separately. Rankine *v.* Elliott, 16 N. Y. 377.

In Eames *v.* Doris, 102 Ill. 350, the court held that: "Where the personal liability of stockholders of a corporation is made, by statute, a common fund for the benefit of depositors of trust and savings funds, and the debts due such depositors greatly exceed the assets and such personal liability combined, so that the funds will be insufficient to discharge all the claims upon it, a court of equity, may, at the suit of a part of the creditors on their own behalf, and that of all other such creditors, take jurisdiction and bring before it all the stockholders and depositors, and determine the several rights and liabilities, and adjust equities, marshal the fund and distribute it *pro rata*, and in such case enjoin the prosecution of suits at law by individual creditors against stockholders seeking to appropriate the entire and unequal benefit of such security. The securing of a ratable distribution of such funds, among all the creditors entitled to share, is a proper ground for equitable jurisdiction." See Merchants' Bank *v.* Stevenson, 5 Allen (Mass.) 401; Crease *v.* Babcock,

(4) *In Proceedings to Dissolve a Corporation.*—It has been held under the code of procedure in *New York* in proceedings by the attorney-general in the nature of a *quo warranto*, for the dissolution of a corporation, that the court has no power to appoint a receiver before judgment, except in cases of insolvency. But the court may in such a case issue an injunction.[1]

i. THE REMEDIES AS APPLIED TO PARTNERSHIPS—(See INJUNCTIONS, vol. 10, p. 950; also *infra*, this title, *In Particular Cases; Partnerships*)—(1) *Actual Partnership Must be Shown.*—A court of equity will not lend its aid in partnership cases, unless there is an actual partnership between the parties.[2]

(2) *Prerequisites to Injunctions and Receivership.*—The subject, Injunctions Between Partners, has been treated elsewhere,[3] and it is only necessary to incidentally mention a few general principles of the application of this equitable remedy in connection with the remedy by receivership.

While substantially the same conditions must exist in partnership cases to warrant the aid of a court of equity by injunction, as by receivership,[4] the principles upon which the court acts can hardly be said to be the same.

By the appointment of a receiver the court takes the affairs of the partnership out of the hands of the partners, and places them in the hands of its own officer, thereby excluding all the partners from taking any part in the management of the business; on the other hand, the granting of an injunction merely restrains one or

10 Met. (Mass.) 532; Briggs *v.* Penniman, 8 Cow. (N. Y.) 387; Hornor *v.* Henning, 93 U. S. 228; Low *v.* Buchanan, 94 Ill. 81; Harper *v.* Union Mfg. Co., 100 U. S. 225.

And so is the avoidance of a multiplicity of suits. Eames *v.* Doris, 102 Ill. 350.

See Wincock *v.* Turpin, 96 Ill. 135.

1. In People *v.* Washington Ice Co., 18 Abb. Pr. (N. Y.) 382, the court by Ingraham, J., observes: "The appointment of a receiver is not to be confounded with the issuing of an injunction to prevent a corporation from doing illegal acts or improperly disposing of the funds of the corporation, whether the action is brought by a creditor or the attorney general. In either case, the court may interfere by a preliminary injunction to prevent any such acts during the pendency of the suit, and it may even suspend the ordinary business of the corporation."

2. An agreement between parties by which one employs the other in the capacity of a clerk or salesman, allowing him an interest in the net profits of the business, in lieu of, or in addition to a stipulated salary, and expressly declaring in the agreement that they were not partners, will not give the party employed any of the rights and equities of a partner as against his employer, even though he may have rendered himself liable as a partner to third persons. And he has no more of a lien entitling him to the aid of a court of equity than any creditor of his employer. Kerr *v.* Potter, 6 Gill (Md.) 404; Nutting *v.* Colt, 7 N. J. Eq. 539.

Security Given by Defendant in Lieu of Injunction and Receiver.—Where there was a positive denial of the partnership by defendant, in an action for the settlement of partnership affairs, and it was shown that a very small proportion, if any, of the capital was contributed by the plaintiff, and that the injunction or receivership would greatly embarrass if not ruin a flourishing business, the court dissolved the injunction and receivership granted in the first instance, upon the defendant giving adequate security to pay plaintiff any sum that may be found due him on final settlement. Popper *v.* Scheider, 7 Abb. Pr. N. S. (N. Y.) 56.

3. See INJUNCTIONS, vol. 10, p. 950.

4. Henn *v.* Walsh, 2 Edw. Ch. (N. Y.) 129.

of the partners from doing certain acts complained of.[1] It be stated generally, that equity will not interfere, either by ction or receivership, when the facts as presented do not y a decree for the dissolution of the partnership,[2] though

[1] Kerr on Receivers (2nd ed.) 91. Hall v. Hall, 3 M. & G. 86; 12 414, a partner having excluded partner from interfering in the ership affairs, an injunction was d to restrain him from obstruct- s copartner in the exercise and nent of his rights under the ership articles. The master of lls, in his opinion, says: "It is o me, that it is not proper for state of things to exist between rs, and I am of opinion that aintiff has a plain right to the tion of this court. Having such t, the court ought not to inter- ore than is absolutely necessary protection of these parties. I I may interfere to the extent of nting the defendant from ob- ing or interfering with the plain- the exercise of his right under greement. Though it is clear he defendant ought not to do hich he has done, I will not go reater extent than prevent him pplying any portion of the part- p funds for any than the pur- of the partnership, and from cting the plaintiff in the legal se of his rights under the deed tnership."

In Henn v. Walsh, 2 Edw. Ch. .) 129, the vice-chancellor, in inion, says: "Here there was a ears' partnership, with the privi- f dissolving it at the end of two The complainant has become sfied; and he makes various es in his bill, showing *prima* cause enough for a dissolution the stipulated time. But his tions are positively and fully de- n the answer. As the matter stands, the complainant's case and he would not be entitled, on earing, to a decree for a dissolu- consequently, not to an injunc- r receiver in the meantime. If be any breach of covenants by rtner which, in its consequences, be so important as to authorize rty complaining to call for a ution before the co-partnership be dissolved by the efflux of the complainant may then have unction. There must be some actual abuse of the partnership property or of the rights of a copartner and not a mere temptation to such abuse which will induce this court to interfere."

See also Glassington v. Thwaites, 1 S. & S. 124.

The same rules apply in respect to the appointment of a receiver. It must appear to be such a case as would authorize a decree for a dissolution. Goodman v. Whitcomb, 1 J. & W. 569.

Where there is a positive denial on the part of the defendant of all the allegations of a bill upon which an injunction has been granted, the court will dissolve the injunction and refuse to appoint a receiver. Rhodes v. Lee, 32 Ga. 470.

In Garretson v. Weaver, 3 Edw. Ch. (N. Y.) 385, a motion for a receiver had been made and denied, and an injunction had been granted. The vice-chancellor says in his opinion: "The affidavits read in opposition to the motion show that there is no just cause of complaint against the defendant. He has done nothing to warrant the complainant proceeding to have the partnership dissolved. In general this court will not interfere by injunction and receiver, with a subsisting and continuing partnership, unless it satisfactorily appears that the complainant will be entitled to have the partnership dissolved and its concerns wound up. Such appears not to be the case at present; and although an injunction granted *ex parte* is outstanding, it does not follow that a receiver must be appointed. The injunction in due time, and upon a proper application, may be dissolved."

In Low v. Holmes, 17 N. J. Eq. 148, a receiver was refused, but security was required to be given, and an injunction was granted to restrain the defendant from waste or destruction of the goods, or removing them out of the jurisdiction of the court.

The apprehension of one partner, that the other will misapply the partnership funds, is not a ground for an injunction to restrain him from interfering with the partnership accounts and effects. Woodward v. Schatzell, 3

instances may occur where the court may properly extend its aid by injunction without contemplating a dissolution.[1]

j. THE REMEDIES IN CREDITORS' SUITS—(See also *infra*, this title, *In Particular Cases; After Judgment*)—(1) *Confined to Judgment Creditors.*—Creditors at large, or before judgment, are not entitled to the interference of a court of equity, either by injunction or receivership, to prevent the debtor from disposing of his property in fraud of such creditors. Until the creditor has established his title, he has no right to interfere, and it would lead to an unnecessary and perhaps fruitless and oppressive interruption of the exercise of the debtor's rights. Unless the creditor has a certain claim upon the property of the debtor, he has no concern with his frauds.[2] But after a creditor has obtained

Johns. Ch. (N. Y.) 412. See Harding *v.* Glover, 18 Ves. 281; Charlton *v.* Poulter, 19 Ves. 148; Marshall *v.* Coleman, 2 J. & W. 266.

The mere fact of a dissolution of a partnership will not warrant the interference of a court of equity. There must be some breach of the duty of a partner, or of the contract of partnership. Renton *v.* Chaplain, 9 N. J. Eq. 62; Harding *v.* Glover, 18 Ves. 281; Lawson *v.* Morgan, 1 Price 303.

1. See INJUNCTIONS, vol. 10, p. 950.

An injunction was granted, but a receiver refused, where the object was to restrain a surviving partner from disposing of the joint stock, and receiving outstanding debts. Hartz *v.* Schrader, 8 Ves. Jr. 317.

2. Wiggins *v.* Armstrong, 2 Johns. Ch. (N. Y.) 144; Williams *v.* Brown, 4 Johns. Ch. (N. Y.) 681; Bayand *v.* Fellows, 28 Barb. (N. Y.) 451; Uhl *v.* Dillon, 10 Md. 500; 69 Am. Dec. 172; Rich *v.* Levy, 16 Md. 74; Phelps *v.* Foster, 18 Ill. 309; Bigelow *v.* Andress, 31 Ill. 322; Angell *v.* Draper, 1 Vern. 399; Bennet *v.* Musgrove, 2 Ves. 51; Shirley *v.* Watts, 3 Atk. 200.

The allegations of a bill for an injunction and receiver, that the complainants are informed of certain matters, without stating when or whence the information was obtained, do not make such a case of fraud and imminent danger as to justify the granting of the injunction, or the appointment of a receiver, without notice to the defendants. Blondheim *v.* Moore, 11 Md. 365.

And so a bill filed by a creditor against his debtor, alleging, in substance that the complainant fears and believes that it is the purpose of the defendant to perpetrate a fraud upon him, by placing his effects beyond his reach before the complainant can obtain a judgment on his claims, does not authorize the granting of an injunction or the appointment of a receiver. Hubbard *v.* Hubbard, 14 Md. 356.

A court of equity, will not, at the suit of a creditor, restrain the alienation of property alleged to be held in trust for the widow, if the party applying is a creditor at large, without any judgment or claim that would be a lien on the property if it was held by the debtor in his own name. Holdrege *v.* Gwynne, 8 N. J. Eq. 26.

"Where the claim is on a written instrument in the complainant's possession, it should be exhibited with the bill, or a satisfactory reason assigned for its non-production, and a bill stating the complainant's claim to be founded on promissory notes, none of which are exhibited, and no reason or excuse given therefor, will not warrant the granting of an injunction, though the bill be sworn to." Nusbaum *v.* Stein, 12 Md. 315.

See also New York Printing, etc., Establishment *v.* Fitch, 1 Paige (N. Y.) 98; Union Bank of Maryland *v.* Poultney, 8 G. & J. (Md.) 332.

In Young *v.* Frier, 9 N. J. Eq. 465, the court held, that, where a creditor seeks the aid of a court of equity against the real estate of his debtor, he must show a judgment at law creating a lien on such estate; and where he seeks aid in regard to personal estate, he must show an execution giving him a legal preference or lien on the goods and chattels, which he has pursued to every available extent at law, before he can resort to equity for relief. See also Brinkerhoff *v.* Brown, 4 Johns. Ch. (N. Y.) 671.

See *contra*, Haggarty *v.* Pittman, 1

nt he may properly apply to a court of equity for an in-
n and receivership to enforce payment of his judgment,
restrain the debtor from wasting or disposing of his assets
e judgment is satisfied.[1]

Otherwise in Partnership Cases in New York—In cases of insolvency, under the New York Code of Procedure, a contract creditor on a claim not disputed, before resorting exhausting his remedy by judgment and execution, may e with and arrest a disposal of his debtor's property nction or receiver, and call him to account, and with assignee, for any alleged fraud or illegality in its trans-us effecting in one suit what formerly required two to do.[2]

Another Exception Where There Is a Special or Equitable Another exception to the general rule, that injunctions

N. Y.) 298; 19 Am. Dec. 434. se, the defendants, Strong and ere indebted to the complain- others on various notes, on e defendant, Pittman, was the They also owed him $680, for l money. Strong and Bovee d to secure Pittman as their and pay the money lent, they to him a great number of de-gainst different individuals to a ount. The complainants filed in behalf of themselves and s, standing in the same situa-reditors of Strong and Bovee, ng Pittman as security; alleg-ng other things, that Pittman vent, and praying an account sfaction of their respective of the demands so assigned, an injunction and receiver. t held that where a debtor, in rcumstances, assigns his prop-a person who is insolvent, in his creditors, a receiver will be d upon the application of such to take charge of the property ned. See also Thompson *v.* fer, 1 Md. Ch. 489; Rosen-Moore, 11 Md. 376; Cohen *v.* 42 Ga. 46.

the assignment is to a surety demnity, the creditor has an claim upon the fund for the of his debt; and the surety ight to divert it to any other Bank of Auburn *v.* Throop, 18 N. Y.) 505.

Rose *v.* Bevan, 10 Md. 466, 69 . 170, the court held that a ing that the complainants had d judgments against one of the ts, on which executions had ued and levied upon certain goods in a store, and that the other defendant interposes a prior mortgage of these goods to prevent a sale thereof to satisfy the judgments, and that the property so mortgaged and levied upon is more than sufficient to pay the mortgage, and that the mortgagor has no other property out of which the judgments can be satisfied, and has, since the execution of the mortgage, been permitted to use and dispose of the goods, and that part of the goods levied on are not the same as those mortgaged, but others, and that unless the goods levied on be taken from the possession of the mortgagor they will be disposed of and the complainants subjected to an entire loss of their claims, makes a good case for an injunction restraining the mortgagor from selling the goods, and the appointment of a receiver.

Where injunctions and receivers allowed on return of execution unsatisfied, see Osborn *v.* Heyer, 2 Paige (N. Y.) 342; Bank of Monroe *v.* Schermerhorn, Clarke Ch. (N. Y.) 214.

It is the duty of a complainant, who has obtained an injunction restraining the defendant from collecting his debts, or disposing of property which might be liable to waste or deterioration, to apply to the court and have a receiver appointed without any unreasonable delay. Bloodgood *v.* Clark, 4 Paige (N. Y.) 577.

2. Mott *v.* Dunn, 10 How. Pr. (N. Y.) 225; Levy *v.* Ely, 15 How. Pr. (N. Y.) 395; Innes *v.* Lansing, 7 Paige (N. Y.) 583; Haggerty *v.* Taylor, 10 Paige (N. Y.) 261; Whitewright *v.* Stimpson, 2 Barb. (N. Y.) 379; La Chaise *v.* Lord, 10 How. Pr. (N. Y.) 461; Jackson *v.* Sheldon, 9 Abb. Pr. (N. Y.) 127.

are granted only to judgment creditors is where the creditor has acquired some special or equitable lien on the debtor's property.[1]

k. THE REMEDIES AS APPLIED TO REAL PROPERTY—(See INJUNCTION, vol. 10, p. 804; also *infra*, this title, *In Particular Cases; Real Property*).—It may be stated, generally, that equity will never interfere, by the exercise of either of its extraordinary remedies, in contests concerning the title to real property, where the plaintiff sets up a legal title in himself, in opposition to a defendant in possession under color of title, the reason for the rule being founded on the established doctrine that equity will not lend its aid where there is a full, adequate and complete remedy at law.[2] There are, however, exceptions to the rule, but in such cases the plaintiff must show a clear right in himself, or a *prima facie* right with such attending circumstances of fraud, danger or probable loss as will move the conscience of a chancellor to interfere.[3]

VIII. IN PARTICULAR CASES — 1. Receivers of Corporations—*a.* JURISDICTION TO APPOINT.—In the absence of statutory provisions, a court of equity will not usually assume jurisdiction to take the property of a corporation out of the hands of its officers, and to intrust it to a receiver. If the officers or trustees of a corporation misconduct themselves, they may be enjoined from doing the acts complained of, or they may be removed.[4]

1. In Sorley *v.* Brewer, 18 How. Pr. (N. Y.) 276, the plaintiffs made advances to the master of a vessel for repairs, supplies and expenses incurred in a foreign port to enable the vessel to obtain a cargo on her homeward voyage, and took an assignment from the master in writing dated April 8th, 1859, of all his lien and interest to the freight, money and earnings of the vessel as security for such advances. The owners of the vessel being insolvent, the plaintiffs claimed a lien upon the earnings by virtue of the advances made to the master and applied to the court for the appointment of a receiver to collect the freight, etc. In opposition to this claim, the defendants claim that they are entitled to the freight earned by virtue of a charter party dated December 10, 1858, entered into between them and the owners, by which the vessel was chartered to them for the voyage in question. The court granted an injunction restraining defendants from collecting the freight pending litigation and appointed a receiver to collect same.

See also where an injunction and receivership were granted in favor of creditors of a married woman doing business as a trader where the creditors sought to charge her individual property with the payment of her debts. Todd *v.* Lee, 15 Wis. 365.

Where a debtor makes a voluntary assignment for the benefit of creditors, a receiver in a creditor's suit to recover the property transferred by the debtor, will not be entitled to an injunction and receivership as to the assigned property, unless he can prove an attempt to defraud creditors. Bostwick *v.* Elton, 25 How. Pr. (N. Y.) 362.

2. Lloyd *v.* Passingham, 16 Ves. 59; Schlecht's Appeal, 60 Pa. St. 172; Willis *v.* Corlies, 2 Edw. Ch. (N. Y.) 281; Pfeltz *v.* Pfeltz, 14 Md. 376.

3. Corcoran *v.* Doll, 35 Cal. 476; Knighton *v.* Young, 22 Md. 359; Rogers *v.* Marshall, 6 Abb. Pr. N. S. (N. Y.) 457.

4. Waterbury *v.* Merchants' Union Express Co., 50 Barb. (N.Y.) 157, the court denied the application for a receiver, Barnard, J., said: "The remaining grounds for the relief which the plaintiff demands resolve themselves into the alleged personal misconduct of the executive or managing committee. This has, I think, nothing to do with the present motion for a re-

nost States, the equitable powers of courts have been ed by statutes conferring express jurisdiction to appoint re- over incorporated companies.[1] Such statutes are strictly ued, and the appointment of a receiver usually rests within und discretion of the court.[2]

The infidelity or misconduct , or even of all the trustees or rs of such an association, af- o ground for taking away the f the shareholders who consti- company, either by dissolving king away its management and it in the hands of an officer of rt. In such a case, the prin- f remedial or preventive justice urther than to enjoin or forbid sconduct, or remove the un- officer. I am not aware of hority for dissolving a corpora- an unincorporated stock as- n, or for taking its manage- rom its proprietors or share- , on the mere ground that one, all of its trustees are unfaith- he court may enjoin the trus- suspend and remove him, and sary may order a new election, not substitute its own officer." lso Verplanck *v.* Mercantile , 1 Edw. Ch. (N. Y.) 84; Neall 16 Cal. 145; 76 Am. Dec. 508; *v.* Gifford, 30 Iowa 148; Ham- Accessory Transit Co., 3 Abb. Y.) 255; Converse *v.* Dimock, Rep. 573; 6 Am. & Eng. Corp. 8; Briarfield Iron Works Co. er, 54 Ala. 622; Hard *v.* Dexter, 454.

ewett *v.* Adams, 54 Me. 206; Erie etc. R. Bank, Harr. (Mich.) alwey *v.* U. S. Steam Sugar g Co., 36 Barb. (N. Y.) 256; Slubley, 33 Barb. (N. Y.) 614; ey-Gen'l. *v.* Bank of Columbia, (N. Y.) 511; Ward *v.* Sea Ins. Paige (N. Y.) 294; Nichols *v.* Patent Arms Co., 11 N. J. Eq. nerican Ice Mach. Co. *v.* Pater- eam etc. Co., 22 N. J. Eq. 72; an *v.* Trenton, Delaware Falls N. J. Eq. 489; Kelley *v.* Ne- Min. Co., 7 N. J. Eq. 579; Re- *v.* Paterson Gas Light Co., 23 . 292; Hager *v.* Stevens, 6 N. J. ; Parsons *v.* Mon.oe Mfg. Co., Eq. 187; Brundred *v.* Paterson Co., 4 N. J. Eq. 294; Oakley *v.* n Bank, 2 N. J. Eq. 173; U. S. Co. *v.* New York etc. R. Co., Y. 478; Baker *v.* Backus, 32 Ill. 79; Stark *v.* Burke, 5 La. Ann. 740; People *v.* Security L. Ins. Co., 71 N. Y. 222.

2. Oakley *v.* Paterson Bank, 2 N. J. Eq. 173; Bangs *v.* McIntosh, 23 Barb. (N. Y.) 591; *In re* Pyrolusite Manganese Co., 29 Hun (N. Y.) 429; Morgan *v.* New York etc. R. Co., 10 Paige (N. Y.) 290; 40 Am. Dec. 244; People *v.* Washington Ice Co., 18 Abb. Pr. (N. Y.) 382.

The appointment of a receiver by a court of equity being a matter of judicial discretion, it may be refused in favor of a corporation which is attempting to accumulate in its hands the business of supplying bread to a large portion of the people of the United States. American Biscuit & Mfg. Co. *v.* Klotz, 44 Fed. Rep. 721.

An appointment or refusal of a receiver is within the sound discretion of the court to which the application is made. Simmons Hardware Co. *v.* Waibel (S. Dak. 1891), 47 N. W. Rep. 814.

The mere fact that a corporation has been dissolved does not in every instance give the minority stockholders the right to have a receiver appointed, and the assets sold, as there may be circumstances which will justify a court of equity in ascertaining the value of the assets without a sale, and in making a distribution to the members on that basis. Baltimore etc. R. Co. *v.* Cannon, 72 Md. 493.

A voluntary relief association formed by the employés of a railroad company was subsequently incorporated; the charter declaring the object of the association to be the extension of relief to the employés in case of death, sickness, etc. In accordance with charter provisions, the railroad company guaranteed all the obligations of the association. Some years afterwards, when the association numbered 21,000 members, the legislature passed an act dissolving it, and the railroad company also repealed its guaranty. Before the taking effect of the act of dissolution, however, the association transferred all its assets to the railroad company, and the latter covenanted to apply them to

b. WHEN APPOINTED.—(1) *To Protect Shareholders.*—Where the directors or officers of a corporation are mismanaging the business and jeopardizing the rights of the stockholders and creditors, the court may appoint a receiver upon the application of a stockholder.[1]

the liabilities of the association, and thereafter to the benefit of a new association that was to take the place of the old, and also to pay to the members of the old association, not desiring to become members of the new, the value of their respective interests. *Held*, that though it be conceded that the transfer of the assets to the railroad company and the agreement between it and the old association are void, yet, as ninety-five per cent. of the members of the old association, who had joined the new, depended upon the latter for the continuance of their life insurance and sick benefits, and as the railroad company was able and willing to perform its covenants, equity would not appoint a receiver of the old association to take possession of its assets, wind up its affairs, and in effect destroy the new association, at the instance of the member of the old who had refused to join the new, and whose interests were amply protected by the covenant of the railroad company to pay all such members the value of their respective interests. Baltimore etc. R. Co. *v.* Cannon, 72 Md. 493.

The appointment of a receiver without any good or legal reason for such appointment set out in the petition, will be set aside on motion of a lien holder who intervenes after such appointment. Mercantile Trust Co. *v.* Ætna Iron Works, 4 Ohio C. C. 579.

A receiver may be appointed only in an adversary action. The court is without authority to make the appointment on the application of a corporation which avers itself insolvent and seeks a dissolution. Jones *v.* Bank of Leadville, 10 Colo. 464; 20 Am. & Eng. Corp. Cas. 554.

In some States receivers are appointed by the Governor. Carey *v.* Giles, 9 Ga. 253; *Louisiana* Act of March 15, 1855; but see People *v.* Ridgley, 21 Ill. 65.

1. Thus where the president and the principal stockholders are appropriating the corporate property to their own use, and the president has made an assignment of such property, a receiver is properly appointed. Conro *v.* Gray, 4 How. Pr. (N. Y.) 166.

In Haywood *v.* Lincoln Lumber Co., 64 Wis. 639, the president and secretary of a corporation mortgaged its property, when the company was in an insolvent condition, to secure their own antecedent claim in fraud of creditors. They also threatened to sell out all the property of the corporation without notice. On the application of a stockholder the court appointed a receiver.

In Warren *v.* Fake, 49 How. Pr. (N. Y.) 430, a bank went into liquidation and closed up its business, leaving its assets and property in the hands of its former directors for some three years, without any account with the stockholders during that time; in an action by a stockholder against those directors individually, charging them with abusing and neglecting their trust, and wasting the effects of the corporation, it was held that a proper case appeared for the appointment of a receiver.

A receiver of a turnpike company is properly appointed at the suit of a stockholder, when those owning the majority of stock and controlling the road have been derelict in the matter of repairs, and have thereby endangered the rights of other interested parties and rendered the property unproductive. Wayne Pike Co. *v.* Hammons (Ind. 1891), 27 N. E. Rep. 487.

Where the executive committee of a corporation vote to themselves large sums of money in addition to their regular compensation, a receiver may be appointed. Blatchford *v.* Ross, 54 Barb. (N. Y.) 42.

For other cases where receivers have been appointed on account of misconduct of the officers of the corporation, see Evans *v.* Coventry, 5 DeG. M. & G. 911; Redmund *v.* Enfield Mfg. Co., 13 Abb. Pr., N. S. (N. Y.) 332; Featherstone *v.* Cooke, L. R. 16 Eq. 301; Trade Auxiliary Co. *v.* Vicker, L. R. 16 Eq. 303; People *v.* Bruff, 9 Abb. N. Cas. (N. Y.) 153; Keeler *v.* Brooklyn El. R. Co., 9 Abb. N. Cas. (N. Y.) 166; St. Louis etc. Coal and Min. Co. *v.* Edwards, 103 Ill. 472; Leavitt *v.* Yates, 4 Edw. Ch. (N. Y.) 173.

o Protect Creditors.—In most of the States, courts of are empowered to appoint receivers of the property of tions, at the suit of judgment creditors, after execution n returned unsatisfied.[1]

w York the court has no on a petition of all the stock- nd some or all of the cred- e corporation, to make an solving the corporation and g a receiver of its assets; one er of the remedies given by of Civil Procedure must be An order dissolving the on and appointing a receiver h petition, will be vacated on f the attorney general, not- ling that he consented to such the hearing of the petition. rt, 22 Abb. N. Cas. (N. Y.)

Covington Drawbridge Co. *v.* l, 21 How. (U. S.) 112, a judg- litor applied to the court for the ent of a receiver to collect the bridge and apply them to the of the unsatisfied judgments dge company. The court by J., said: "The tolls of ge being a franchise, and t in the corporation, and ge a mere easement, the on not owning the fee in the ther bank of the river, or un- ater, it is difficult to say how tion could attach to either the or the structure of the bridge personal property. This is a that this court may well leave bunals of Indiana to decide on laws, should it become nec- One thing, however, is plainly that the remedy at law of cution creditors is exceedingly sed, and we do not see how obtain satisfaction of their s from this corporation (own- corporate property but this nless equity can afford relief. we are called on to decide in is that the court below had cause possession to be taken dge, to appoint a receiver to lls and pay them into court, to f discharging the judgments at our opinion is that the power xists, and that it was properly ."

gland a judgment creditor of a railway company, after suing *egit* and getting extended the land owned by the company, can go into possession of the land and take the profits of it; and in aid of the enjoyment of this right he may have a receiver of the tolls appointed. Potts *v.* Warwick etc. Canal Co., Kay 145; Kerr on Receivers 72.

In Adler *v.* Milwaukee etc. Mfg. Co., 13 Wis. 57, it was held that after a judgment creditor of a corporation has issued execution and had a return of *nulla bona*, he may on behalf of himself and other creditors who may elect to become parties, file a bill against the corporation and its delinquent stockholders, upon which he may have a decree for an account and the appointment of a receiver.

See also to the same effect, Turnhill *v.* Prentiss Lumber Co., 55 Mich. 387; Furness *v.* Chaterham R. Co., 25 Beav. 614; Palmer *v.* Clark, 4 Abb. N. Cas. (N. Y.) 25; Thau *v.* Bankers, etc. Tel. Co., 56 N. Y. Super. Ct. 588; Dobson *v.* Simonton, 78 N. Car. 63; Evans *v.* Coventry, 5 De G. M. & G. 911; Buck *v.* Piedmont etc. L. Ins. Co., 4 Fed. Rep. 849.

It is not indispensably necessary that execution should have been issued and returned unsatisfied before a receiver will be appointed. Conro *v.* Gray, 4 How. Pr. (N. Y.) 166. In Memphis etc. R. Co., 125 U. S. 361, the bill alleged that the property was so heavily mortgaged, that if a sale on execution were attempted, there would be no bidders at more than a nominal amount, whereas if a receiver were appointed the property could be held together, and a large amount realized every year for the payment of debts. The court under these circumstances appointed a receiver.

A bill may be maintained by a judgment creditor of a corporation for the appointment of a receiver to collect unpaid stock subscriptions for the payment of his judgment. Bailey *v.* Pittsburgh Coal R. Co. (Pa. 1891), 21 Atl. Rep. 72.

Where defendant corporation, in a bill filed by creditors alleging its insolvency and praying the appointment of a receiver, suffers the bill to be taken *pro confesso*, it is too late, nine months after the receiver has taken

If a statute provides that the receiver of a corporation whose charter has expired shall divide the assets of the company among creditors *pro rata*, attaching creditors can acquire no lien, so as to prevent the receiver from selling the assets and dividing the fund among all the creditors.[1]

A creditor who has not reduced his claim to judgment has no standing to demand the appointment of a receiver.[2]

(3) *To Protect Mortgagees and Bondholders.*—The appointment of the receiver to protect mortgagees and bondholders of corporations is within the sound discretion of the court.[3] If the trustee

possession of the property, and undertaken to carry on the business for the benefit of creditors, to object that plaintiffs had an adequate remedy at law. Brown *v.* Lake Superior Iron Co., 134 U. S. 530.

A judgment creditor's bill against a corporation and certain of its stockholders, which is dismissed as to all the defendants except the corporation, because of an omission to make all the stockholders parties, will stand as a judgment creditor's bill as to it, and upon proper proceedings the complainant may have the right to the appointment of a receiver. Dunston *v.* Hoptonic Co., 83 Mich. 872.

The Acts *Georgia* 1880–81, p. 125 (Code, §§ 3149 *a*, 3149 *g*) provide that, where a private corporation fails to pay a debt at maturity on demand, and where the corporation is insolvent, a court of equity may, under a creditor's bill, to which one or more of the creditors having unpaid matured debts shall be a necessary party proceed to collect the assets, and the chancellor may grant injunctions and appoint receivers for the collection and preservation of the assets, and may at any time take steps to bring the matter to a final hearing. *Held*, that there was no abuse of discretion in enjoining a corporation, and in appointing its president receiver, where the allegations of the bill that the corporation has failed and refused to pay an overdue note, payable to complainant's intestate, and that the corporation is insolvent, and proposes to issue bonds, are denied, and on the issue of the validity of the debt and the insolvency of the corporation the evidence was conflicting. Wilcoxon Mfg. Co. *v.* Atkinson, 78 Ga. 838.

1. Atlas Bank *v.* Nahant Bank, 23 Pick. (Mass.) 480.

2. Galney *v.* U. S. Steam Sugar Refinery Co., 13 Abb. Pr. (N. Y.) 211.

In *England* a statutory bond or debenture holder who has not recovered judgment is not entitled to a receiver. Preston *v.* Corporation of Great Yarmouth, L. R., 7 Ch. App. 655; Imperial Mercantile Credit Assoc. *v.* Newry etc. R. Co., Ir. R., 2 Eq. 539.

3. In Haas *v.* Chicago Building Soc., 89 Ill. 498, the court, by Baker, J., said: "We find the decided weight of American authority to be in favor of the proposition that the court may, even when the mortgage does not by express words give a lien upon the income derived from such property, appoint a receiver to take charge of it and collect the rents, issues and profits arising therefrom. Such action will not be taken, however, unless it be made to appear that the mortgaged premises are insufficient security for the debt, and the person liable personally for the debt is insolvent, or at least of very questionable responsibility. A combination of these two things seems to be required in all the cases we have examined, and in one or more of the States it is held necessary still other elements should be conjoined to these before such procedure is justified." In support of this conclusion the court cited Myers *v.* Estell, 48 Miss. 372; Hyman *v.* Kelley, 1 Nev. 179; Sea Ins. Co. *v.* Stebbins, 8 Paige (N. Y.) 565; Astor *v.* Turner, 11 Paige (N. Y.) 436; 43 Am. Dec. 766; Warner *v.* Gouverneur, 1 Barb. (N. Y.) 38; Cheever *v.* Rutland etc. R. Co., 39 Vt. 654; Brown *v.* Chase, Walker (Mich.) 43; Finch *v.* Houghton, 19 Wis. 150; Callanan *v.* Show, 19 Iowa 183; Henshaw *v.* Wells, 9 Humph. (Tenn.) 568; Carlelyen *v.* Hathaway, 11 N. J. Eq. 41; Guy *v.* Ide, 6 Cal. 99; 65 Am. Dec. 490; Bowman *v.* Bell, 14 Sims 392.

Where a debenture creates a charge on the property and assets of a limited company, the court will appoint a receiver at the instance of a debenture

corporation mortgage fails to perform his duty, a receiver appointed in his stead.[1] When the mortgaged property equate to protect the mortgagee, and the officers of the ny are appropriating the property to the use of themselves shareholders, a receiver will be appointed *pendente lite*, e mortgage can be foreclosed.[2]

To Protect Creditors of Foreign Corporations.—Courts of have power to appoint receivers of the property of foreign tions found within the jurisdiction of the court. This is exercised in aid of domestic creditors.[3]

f the security is in jeopardy the insolvency of the company, ough the principal is not im- y payable and there has been lt in the payment of interest. on *v.* North Kent Iron Works 1), L. R., 2 Ch. Div. 148.

e a corporation carrying on a er and printing-office is greatly ssed by its debts, and there are ns between its officers likely to ly injure the value of its prop- eceiver may be appointed, in an a mortgagee for the foreclosure attel mortgage and sale of the ed property, where the con- f the mortgage has not been ed. State Journal Co. *v* Com., 93.

Warner *v.* Rising Fawn Iron Woods (U. S.) 514, a mortgage e the issue of bonds, provided er a default continuing for six in the payment of the interest attached to the bonds, the trus- ned in the mortgage might, request of any holder of bonds, ssession of the mortgaged pro- d sell the same. The trustees after default to take possession the property. The court held to foreclose the mortgage that usal was sufficient ground for intment of a receiver.

Moines Gas Co. *v.* West, 44 ; Haas *v.* Chicago Building Ill. 498.

s is illustrated by the case of d *v.* Hoge, 3 Hun (N. Y.) 171, corporation of Connecticut ssets in New York in posses- its officers who were resident York, was in process of volun- olution. The court held that er should be appointed to pro- stockholders, it appearing that ers were insolvent and the jeopardy. Davis, P. J., said: hole scope and story of this action may be stated almost in a sentence. The officers who have complete control of a foreign corporation, now in process of voluntary dissolution, being all residents of this city and having in their possession here certain funds of the corporation, which their own insolvency has put in jeopardy, and neither they nor the funds being amenable to the jurisdiction of the State under whose laws the corporation was created and exists, refuse to make application of such funds to the creditors and stockholders in conformity to the proceedings for dissolution, or to put the same in a place of safety. They possess, being all the executive and a majority of the administrative officers of the corporation, such power of control, that no suit can be commenced by the corporation itself to protect the fund. Is a court of equity of the State powerless, at the suit of a minority of the officers who are stockholders and personally interested in the application and distribution of the fund, to appoint a receivership of the particular fund and apply it, first to the creditors of the corporation, and secondly to the stockholders, in accordance with the proceedings for dissolution in the home State of the corporation? We have clearly jurisdiction of the persons of the officers in the State. We have jurisdiction of the property because it is within our territory. The plaintiffs are also citizens of our State and show themselves to be remediless both in Connecticut and in the Federal courts. We are not prepared to say until some higher tribunal shall admonish us to the contrary that this court has not under such circumstances, power to intervene, so far as relates to the property actually within the State. The court is not powerless in such a case, to enforce any judgment it may render, so long as it is

(5) *When Corporation is Insolvent.*—If a corporation is insolvent, the court may in its discretion appoint a receiver to protect the interests of both creditors and stockholders.[1]

(6) *When Corporation is Dissolved.*—When a corporation is dissolved and has no office or place of business, and no officers to attend to its affairs, a receiver may be appointed, upon a bill by a stockholder, to preserve the effects for the benefit of the stockholders and creditors.[2]

c. WHEN NOT APPOINTED—(1) *Upon Ex parte Application.*—Except in extreme cases a receiver will not be appointed on a mere *ex parte* application.[3]

In cases where it is proper to appoint a receiver on an *ex parte* application, the particular circumstances, which render necessary

limited to the particular fund which it finds here and takes from the hands of persons over whom its jurisdiction is complete and puts into the safekeeping of its own officers; and we are aware of no authority which denies to us jurisdiction in a case containing all the elements of that before us. It is idle to answer that the courts of Connecticut have jurisdiction over the corporation; for such jurisdiction, so far as it affects the question and remedies here, is futile. Its impotency was illustrated in the proceeding commenced in the superior court of that State in which Eaton was appointed receiver, and in which he was forced, in substance, to report that all the assets of the corporation were detained in the city of New York, and that he never has had, nor permitted to have, possession of any of the assets of the said corporation. A receiver, if appointed there, must resort to our courts to reach the appellants and the fund in their hands, by an action similar to the present, and become substantially the receiver of this court, in order to acquire possession of the fund. But while no such officer exists in Connecticut, there seems to us no sound reason why the jurisdiction of this court may not be invoked to preserve a fund now in the hands of persons in our jurisdiction and in danger of being lost by their own insolvency or improper use."

In *New York*, where the creditor of a foreign corporation has obtained judgment against the company in the State where it was incorporated, and the company has transferred all of its assets to a company in New York upon no other consideration than the shares of stock of the new company, the creditor may enforce his judgment in New York against the new company, and may have a receiver to aid his recovery. Barclay *v.* Quicksilver Min. Co., 9 Abb. Pr., N. S. (N. Y.) 283.

For other cases involving the appointment of a receiver over foreign corporations, see Hamilton *v.* Accessory Transit Co., 26 Barb. (N. Y.) 46; Murray *v.* Vanderbilt, 39 Barb. (N. Y.) 140; DeBemer *v.* Drew, 57 Barb. (N. Y.) 438; Williams *v.* Hintermeister, 26 Fed. Rep. 889; National Trust Co. *v.* Miller, 33 N. J. Eq. 155.

1. Nichols *v.* Perry Patent Arm Co., 11 N. J. Eq. 126; Meyer *v.* Johnston, 53 Ala. 240; Buck *v.* Piedmont etc. L. Co., 4 Hughes (U. S.) 415; Attorney Gen'l *v.* Bank of Columbia, 1 Paige (N. Y.) 511.

2. Stark *v.* Burke, 5 La. Ann. 740. *In re* Louisiana Sav. Bank etc. Co., 35 La. Ann. 196; Smith *v.* Danzig, 64 How. Pr. (N. Y.) 320; Dobson *v.* Simonton, 78 N. Car. 63; Lawrence *v.* Greenwich F. Ins. Co., 1 Paige (N. Y.) 587.

3. Where no officer of a corporation can be found upon whom service can be made, the court may appoint a receiver without notice to the corporation. Dayton *v.* Borst, 7 Bosw. (N. Y.) 115; Maish *v.* Bird, 59 Iowa 307.

In Gravenstine's Appeal, 49 Pa. St. 310, it was held that where a company is not a party to the bill, nor in court upon notice for a preliminary injunction, it is error to appoint a receiver. See also Baker *v.* Backus, 32 Ill. 79. See also Mickles *v.* Rochester City Bank, 11 Paige (N. Y.) 118; Wheeler *v.* Clinton Canal Bank, Harr. (Mich.) 449.

summary proceeding should be distinctly stated in the petition on which the application is founded.[1]

Where Adequate Remedy at Law Exists.—Where a creditor rporation has a complete, prompt and efficient remedy at receiver will not be appointed. Thus where there is a de- n a mortgage, but it is clear that a foreclosure and sale alize enough to pay the debt, a creditor will be left to his dings at law without the intervention of a receiver.[2]

At Instance of General Creditors.—A receiver of a corpora- ll not be appointed at the instance of a general creditor judgment.[3]

Where There Are No Assets.—If a corporation is without receiver will not be appointed.[4]

Upon Dissolution of Corporation.—Where, upon dissolution rporation, it is provided by statute that the officers of the ny shall be trustees for the creditors and stockholders, a re- should not be appointed unless it appears that the trustees conducting themselves and jeopardizing the property.[5]

s an averment that the plain- isfied of the necessity of such ding, is not sufficient. Ver- . Mercantile Ins. Co., 2 Paige 438; Livingston *v.* Bank of N. Barb. (N. Y.) 304; Attorney Bank of Columbia, 1 Paige 511; Oakley *v.* Paterson Bank, q. 173.

egation "that if notice of this on be given to the defendants, s, records and papers of said l be so falsified or spirited t they cannot ascertain the ds," is not sufficient to justify ntment without notice. French d. 30 Iowa 148. See also *v.* Peters etc. Co., 21 Fla. 254.

may be stated as a general ion, founded upon established es of equity, that a creditor of ation is not entitled to the ex- ary aid of equity in the en- nt of his demand, when he can ll and adequate relief at law." Receivers, § 301.

rmly *v.* Tenth Ward Bank, 3 . (N. Y.) 395, it was held that tinuance of business, reported cy, large amount of notes out- and unpaid, notes protested ands of the comptroller and ment of rent, were not on which chancery could in- nd grant a receiver of a bank- ciation, at the instance of a ontract creditor; and that his was at law.

To the same effect are Ramsay *v.* Erie R. Co., 38 How. Pr. (N. Y.) 193; French Bank Case, 53 Cal. 495.

3. Galway *v.* U. S. Steam Sugar Refinery Co., 36 Barb. (N. Y.) 256; Varnum *v.* Hart, 119 N. Y. 101.

4. In Barton *v.* Enterprise Loan etc. Assoc., 114 Ind. 226, it appeared that the shareholders all agreed that the members who took the money advanced to them in full for their stock and paid dues and interest thereon, should not be required to pay back the money advanced. The court held that the association had no assets and that a receiver should not be appointed.

5. People *v.* O'Brien, 111 N. Y. 1; Parsons *v.* Charter Oak, L. Ins. Co., 31 Fed. Rep. 305.

The Civil Code of *California*, § 399, refers to both the voluntary and involuntary dissolutions of corporations, and § 400 declares that, "unless other persons are appointed by the court, the directors or managers . . . of such corporation, at the time of its dissolution, are trustees of the creditors and stockholders . . . of the corporation dissolved, and have full power to settle the affairs of the corporation." By Code Civ. Proc., § 565, on the dissolution of any corporation, the superior court, on application of any creditor of the corporation, or of any stockholder or member thereof, may appoint one or more persons to be receivers or trustees thereof, etc. *Held*, that on an involuntary as well as a

(6) *Misconduct of Officers.*—The mere misconduct of officers is not sufficient ground for the appointment of a receiver. If officers misbehave themselves a court of equity may forbid the misconduct or remove the officer from his position.[1]

(7) *Where Security is Entered in Lieu of Appointment of Receiver.*—Under certain circumstances the court will give a corporation a reasonable time in which to enter security to protect a judgment creditor who has applied for a receiver.[2]

d. EFFECT OF APPOINTMENT—(1) *As Regards Dissolution of Corporation.*—A corporation is not dissolved *ipso facto* by the appointment of a receiver. The corporate existence may continue, although the corporate functions are suspended. It is usual in the decree appointing the receiver, to enjoin the corporation from exercising any of the corporate powers; but such a decree does not end the corporate life, and as soon as the receivership is ended, the officers of the company may again resume the exercise of their usual powers.[3]

voluntary dissolution, the directors are the proper persons to wind up the corporation's affairs, unless a receiver is appointed on the application of a creditor or stockholder; and where the charter of a corporation had been declared forfeited because the company had entered into an illegal combination, known as a "trust" to control production and sustain prices, the State had no interest in its affairs whereby to sustain an application for a receiver, either as a punishment for the illegal use of its corporate privileges, or to see that its assets were properly distributed. Havemeyer *v.* Superior Ct., 84 Cal. 327.

1. Waterbury *v.* Merchants' Union Express Co., 50 Barb. (N. Y.) 157; Howe *v.* Deuel, 43 Barb. (N. Y.) 504; Neall *v.* Hill, 16 Cal. 145; 76 Am. Dec. 508; City Pottery Co. *v.* Yates, 37 N. J. Eq. 543; Einstein *v.* Rosenfeld, 38 N. J. Eq. 309; Bank Com'rs *v.* Rhode Island etc. Bank, 5 R. I. 12; Ogden *v.* Kip, 6 Johns. Ch. (N. Y.) 160.

2. Barclay *v.* Quicksilver Min. Co., 9 Abb. Pr., N. S. (N. Y.) 283. In Harrison *v.* Cotton States L. Ins. Co., 78 Ga. 716, however, on application by creditors and policy holders of an insurance company for an injunction and the appointment of a receiver, the offering by defendant, after hearing and before decision, of a voluntary bond, was held no reason for denying the application.

3. In Jones *v.* Bank of Leadville, 11 Colo. 464; 20 Am. & Eng. Corp. Cas. 554, it was held that the appointment of a receiver does not dissolve a corporation either in law or in fact. In Kincaid *v.* Dwinelle, 59 N. Y. 548, it was held that a decree appointing a receiver and enjoining a corporation from the exercise of its corporate franchises, did not thereby actually dissolve the corporation.

In Bank Com'rs *v.* Bank of Buffalo, 6 Paige (N. Y.) 497, the chancellor distinguished between a final order for the appointment of a receiver of a corporation and a decree dissolving the corporation. He regarded such final order or decree for the appointment of a receiver as "a virtual dissolution of the corporation," and he was therefore of the opinion that the court had jurisdiction to decree a dissolution in fact. In Kincaid *v.* Dwinelle, 59 N. Y. 548, Allen, J., in commenting upon Bank Com'rs *v.* Bank of Buffalo, 6 Paige (N. Y.) 497, said: "If the appointment of a receiver was a dissolution in fact, no other or further decree in that direction would have been necessary. When this learned jurist used the term virtual, in the connection referred to, it was a declaration that the corporation was not in fact dissolved. Virtual is being in essence or effect, and not in fact. A corporation enjoined from the exercise of corporate franchises and deprived of its property is as if it did not exist, for the practical purpose of its creation. It may be dormant, its vitality suspended as respects the exercise of its corporate powers, but it may, nevertheless, be liable to be proceeded against, by

) *As Regards Corporate Functions and Liabilities.*—A corpora- is deprived of the right to exercise its corporate powers by the ointment of a receiver, only so far as the statute or the decree he court transfers such powers to the receiver. If the corpora- is enjoined from exercising any of its franchises, then of se its corporate activity at once ceases, and it can transact no ness whatever; but if the receiver has conferred upon him a portion of the corporate powers, then, if not otherwise eed, the corporation may exercise all its remaining powers erred upon it by its charter.[1]

the absence of statutory provision to the contrary, a cor- tion is not liable for the contracts or acts of the receiver or agents or subordinates, in the management of the company's ness.[2]

n, for any purpose for which an n would be available to any one ng a right to sue."

Pringle *v.* Woolworth, 90 N. Y. the defendant was appointed re- r of an insurance corporation be- the commencement of a suit. It not appear that the corporation been dissolved. The court held the plaintiff was not debarred by appointment of a receiver from taining an action against the cor- tion. See also Taylor *v.* Colum- Ins. Co., 14 Allen (Mass.) 353; s *v.* Gray, 16 Wall. (U. S.) 203; t *v.* Columbian Ins. Co., 55 Me. 92 Am. Dec. 592; Mosely *v.* Bur- 52 Tex. 396; State *v.* Merchant, hio St. 251.

t a corporation may be so far dis- ed by the appointment of a re- er as to relieve it of some of its es as prescribed by statute. Thus uguenot Nat. Bank *v.* Studwell, . Y. 621, it was held that by the pointment of a receiver, a duty no er devolved upon the trustees or ctors to make the annual report ired by statute.

quiescence by a corporation for a ber of years in the action of a nanent receiver in distributing all ssets of the company, has been trued as equivalent to a surrender ts franchises. Hollingshead *v.* dward, 107 N. Y. 96; Bradt *v.* edict, 17 N. Y. 93; Verplanck *v.* cantile Ins. Co., 2 Paige (N. Y.)

Gluck & Becker on Receivers, 14); Cardot *v.* Barney, 63 N. Y. 20 Am. Dec. 533; Kain *v.* Smith, . Y. 458; Rochester *v.* Bronson, 41 How. Pr. (N. Y.) 82; Ferry *v.* Bank of Central New York, 15 How. Pr. (N. Y.) 445; Ohio etc. R. Co. *v.* Russell, 115 Ill. 52; Mickles *v.* Rochester City Bank, 11 Paige (N. Y.) 118; State *v.* Wabash etc. R. Co., 115 Ind. 466; 35 Am. & Eng. R. Cas. 1.

2. In Metz *v.* Buffalo etc. R. Co., 58 N. Y. 61; 17 Am. Rep. 201, the court by Grover, J., said: "In reference to the position that the receiver and assignee was the agent and servant of the defendant, which were therefore liable for his acts, it must be borne in mind that the defendant was not a voluntary bankrupt. The appointment of Barney as receiver was by the court, against its will. It had nothing to do with his appointment, or any control over his employés. Upon what principle can the defendant be held responsible for their negligence? A master or employer is held liable for the negligence of those in his service for the reason that it is his duty to enforce the observance of care by them. He is held liable to those injured by the failure by him to perform this duty. But this has no application to the present case. Here the defendant, by the act of the law, has been deprived of the possession of the road and of all control over those engaged in operating it; and by like act, the possession and control have been given to others. The defendant had not, thereafter, anything to do with operating the road. True, if profits were earned thereby, they would inure to the benefit of the defendant by becoming assets for the payment of debts. But this did not make it liable for the conduct of those in no sense its employés or servants. The employés must look to

(3) *Upon Corporate Property.*—Prior to the dissolution of a corporation, a decree appointing a receiver, vests in him the personal property of the company; and the court, by an appropriate order, may compel the corporation to convey to the receiver the legal title to its real estate.[1]

those who employed them for compensation; and those who contracted with the receiver or assignee must also look to him. He was liable for the breach of contracts made by him, and for injuries sustained by his negligence or that of his employés in their performance. (Rogers *v.* Wheeler, 45 N. Y. 598.)" See also Meara *v.* Holbrook, 20 Ohio St. 137.

Where a receiver of a corporation employed plaintiff to take charge of the company's property and pay such sums as were necessary for its protection, and there was no express agreement that plaintiff should exonerate the receiver and look alone to the trust estate for his compensation, the receiver is individually liable for plaintiff's services and disbursements. Rogers *v.* Wendell, 54 Hun (N. Y.) 540.

Where a mining company operates its various mines under one system, and the proceeds of the ore extracted from each are used indiscriminately, for the common benefit of all, a receiver appointed on the foreclosure of mortgages covering a part only of the company's property, with power to take possession of the mortgaged premises and to carry on the mines, who is permitted by the company to take possession of its entire property, and to work all its mines, render them more valuable and capable of paying creditors, cannot be considered a trespasser, and is not personally liable to a general creditor of the company for sums realized by him from a mine not covered by the mortgage. Staples *v.* May (Cal. 1890), 23 Pac. Rep. 710.

The 2 *New York* Rev. Stat. marg. p. 470, § 73, as amended by Laws *New York* 1852, ch. 71, and Laws 1860, ch. 403, provides that the receiver of an insolvent corporation may settle any controversy arising between him and creditors of the corporation by having the matter tried before a referee, and that the report of the referee "shall be conclusive on the rights of the parties" if not set aside by the court. The court held, that, though there is no express provision allowing the corporation to be made a party to the proceeding, yet when it consents to the reference, and appears before the referee, and takes part in the proceedings, the referee's report, which has never been set aside, is conclusive on the corporation, as well as on the receiver and on the creditor. Del Valle *v.* Navarro, 21 Abb. N. Cas. (N. Y.) 136.

1. "The personal estate becomes vested in the receiver from the time and by virtue of his appointment; the real estate only by virtue of the conveyance to him which the court has power to compel." Chautauqua Co. Bank *v.* Risley, 19 N. Y. 374; 75 Am. Dec. 347.

In *Michigan*, it has been held that the appointment of a receiver does not divest the title of the corporation to its real estate, and when no conveyance has been made by the corporation to the receiver, the real estate of the corporation is subject to the lien of a judgment, as if no receiver had been appointed. Montgomery *v.* Merrill, 18 Mich. 338.

In Gordon *v.* Anthony, 16 Blatchf. (U. S.) 234, it was held that a receiver cannot convey title to a patent unless the owner of the legal title joins. But in Adams *v.* Howard, 22 Fed. Rep. 656, it was held that this rule did not apply to the transfer of a mere equitable title to a patent. In a *New York* case it was held that a patent right vests in the receiver as one of the assets of the corporation. *In re* Woven Tape Skirt Co., 12 Hun (N. Y.) 111.

For other cases illustrating the principle stated in the text see Scott *v.* Elmore, 10 Hun (N. Y.) 68; Noyes *v.* Rich, 52 Me. 115; Union Trust Co. *v.* Weber, 96 *Ill.* 348.

Even if no conveyance is made of the legal title, the receiver still has the equitable title, and the right to the possession of the property. Adams *v.* Howard, 22 Fed. Rep. 656; Attorney Genl. *v.* Atlantic Mut. L. Ins. Co., 100 N. Y. 279.

In many of the States it is provided by statute that the title of both real and personal property shall vest in the

er the dissolution of a corporation, all of its property is, in rn times, considered a trust fund to be held for the benefit editors and shareholders. When, therefore, a receiver is ap- ed after dissolution, all of the property vests in him as e for all persons entitled to share in its distribution.[1]

Upon Lien of Judgment Creditors.—The appointment of a ver does not affect the liens of judgment or attaching creditors n have been created prior to the appointment of the receiver. xecution may issue, or the attachment proceedings may be nued until the debt is realized from the corporate property, ithstanding the fact that the title of the property has ne vested in the receiver.[2]

er without any formal convey-

New York it seems that the "assets," as used in the act of Laws of 1869, ch. 902, §17) author- the appointment of a "receiver the assets and credits" of a life nce company, means all the rty, real and personal, of such ny, and the receiver upon his ntment becomes vested with the o all of the property real and al, without any formal convey- by the company to him. Attor- enl. *v.* Atlantic Mut. L. Ins. Co., Y. 279. In this case a judg- was obtained against the corpo- after the appointment of a re- and the real estate was there- sold on execution. The court hat the title of the receiver was or to the lien of the judgment. Wing *v.* Disse, 15 Hun (N. Y.) was held that a receiver ap- d under § 292 of the code is with real estate by virtue of his ntment. See also Osgood *v.* ire, 61 N. Y. 524; Atlas Bank *v.* nt Bank, 23 Pick. (Mass.) 480. Owen *v.* Smith, 31 Barb. (N. Y.)

where a statute provides that directors or managers of the of such a corporation at the of its dissolution," shall be the es of the creditors and stock- rs, the trustees become vested title of the corporate property, receiver takes no title. In Peo- O'Brien, 111 N. Y. 1 (Broad- Surface Road Case), the court by r, C. J., said: "As we have seen, roperty of this corporation vested persons who were its directors time of its dissolution. They t as trustees for stockholders and creditors, and were not made parties to the action in which the receiver was appointed. No legislation can authorize the appointment of a receiver of the property of A in an action against C, without violating the provisions of the constitution in relation to the taking of property without due process of law. That the legislature might amend the provisions of the Revised Statutes in relation to the devolution of property of dissolved corporations is indisputable, and if it had done so in the act of dissolution, or previously, it would undoubtedly have prevented the vesting of the property in trustees; but this it did not do, and it had no authority, by mere force of legislative enactment, to take vested property from one individual or trustee and give it to another."

2. Thus in Hubbard *v.* Hamilton Bank, 7 Met. (Mass.) 340, it was held that an attachment of the property of a bank, was not dissolved by the subsequent appointment of receivers to take possession of the property and effects of the bank. In this case the court by Dewey, J., said: "We think that there is a manifest distinction between the case of attachment before, and one made after proceedings instituted, praying for an injunction and the appointment of receivers. In the latter case, the attachment is effectual, the property is in other hands and beyond the process of an attachment. But in the former a valid attachment has been made, and hence it will bind the property; and though the assets pass into the hands of the receivers, they take them with all the liens thereon; and an existing attachment is a lien. . . . It seems therefore quite clear, that there is nothing in the nature of the

process by injunction against the Phoenix Bank, and the appointment of receivers, which necessarily dissolves an attachment of the assets of the bank previously made. There is nothing in the principle of equal distribution among all creditors *pro rata*, which has been considered powerful enough to set aside the priority already acquired by a vigilant creditor. There is nothing in our statutes declaring such previous attachments to be dissolved by force and effect of the appointment of receivers. The result must be, therefore, that the lien acquired by attachment continues, notwithstanding such proceedings under the St. of 1838, ch. 14, to be available, if the party prevails in his action, and levies his execution within the time prescribed by law. The attachment, as such, is good and effectual; and the property attached must, in the language of the Revised Statutes, "be held as security to satisfy such judgment as the plaintiff may recover.'"

In Hays *v.* Lycoming F. Ins. Co., 99 Pa. St. 621, the judgment creditor of a mutual fire insurance company issued an attachment execution, and summoned a member of a company as garnishee. It appeared that the garnishee was indebted to the company on his premium note for his proportion of losses sustained, but the amount of his indebtedness was not, however, at the time fixed by assessment. Subsequently, the company was dissolved by decree of the court, and a receiver appointed who proceeded to levy an assessment on all the premium notes to meet outstanding liabilities at the time of the dissolution The court held that the attaching creditor by virtue of his attachment was entitled to the amount thus assessed by the receiver on the garnishee.

In Pickersgill *v.* Myers, 99 Pa. St. 602 it was held that where an attachment is issued against an insurance company, and subsequently said company dissolves under the provisions of the Act of May 1st, 1876, Pamph. L. 66, a receiver being appointed, this circumstance does not afford sufficient ground for dissolving the attachment. Although the corporation as a legal entity is extinguished, the receiver has, under the provisions of § 49 of the above Act, ample power to prosecute and defend suits.

Setting Apart a Fund.—An insurance company declared a dividend out of its surplus profits, and set apart a fund for the payment of it to the stockholders, and checks on a bank were signed by the president and made payable to the order of the secretary of the company, and placed in the hands of the latter to be indorsed by him and delivered to the stockholders as they should call; but before all of the checks were called for, the corporation became insolvent and passed into the hands of a receiver. It was decided that the setting apart of the surplus fund, and the drawing of the checks upon the fund was a specific appropriation of so much of the fund for the payment of the dividends, and gave to the several stockholders an equitable lien thereon *pro tanto*, which could not be swept away by the transfer of the property of the corporation to the receiver. Leroy *v.* Globe Ins. Co., 2 Edw. Ch. (N. Y.) 657. See also on the effect of setting apart a fund, *In re* La Blanc, 14 Hun (N. Y.) 8; 75 N. Y. 598; Lowene *v.* American F. Ins. Co., 6 Paige (N. Y.) 482; Scott *v.* Eagle Fire Co., 7 Paige (N. Y.) 198.

A few hours before a national bank closed its doors, and at a time when its officers knew that it was hopelessly insolvent, it received from G, who acted as W's agent, W's check on another bank as a deposit from G, and gave in exchange for such check its draft on a New York bank where it had no funds; and the bank then passed into the hands of a receiver. *Held*, that W could maintain an action against the receiver to procure his check to be delivered up in exchange for the dishonored draft; and that it was no defense to the action that it was brought in a jurisdiction wherein the receiver could not make G's assignee in insolvency a party; but that under U. S. Rev. Stat., § 5242, the State court was without jurisdiction to issue a temporary injunction against the receiver before final decree. Warner *v.* Armstrong, 21 Week. L. Bul. 124.

Wages.—*New York* Laws 1885, ch. 376, declares that when a receiver of a corporation is appointed, "the wages of the employés, operatives, and laborers" shall be preferred. *Held*, that wages earned before the passage of the act were not entitled to the preference; that the superintendent and attorney of a corporation were not within the protection of the act; nor persons employing laborers for the purpose of

;) *Upon Pending Suits.*—The mere appointment of a receiver s not necessarily abate suits pending by or against a corpora-. Such suits may either be continued in the name of the rinal party, or the receiver may be substituted as a party of ord.[1] This rule applies, however, only to cases where the

ufacturing for the corporation; nor erson employed on a salary and mission to sell goods. People *v.* iington, 45 Hun (N. Y.) 329.

plication of Earnings.—The earn- of a railroad in possession of a re- er, may be applied to the payment laims having superior equities to of the bondholder. Hale *v.* t, 99 U. S. 389.

hen Receivers Not Entitled to Pos- on.—The receivers of an insolvent nsurance company are not entitled e possession and control of secu- s deposited by the company, before solvency, with the State treasurer, ompliance with the *Connecticut* ute providing that when any State l require insurance companies of r States to deposit therein securi- in trust for policy holders as a pre- isite to doing business in such e, the treasurer of this State may ive such securities from any in- nce company of this State and l them in trust for its policy hold- the company to receive the interest dividends thereon (Gen. Stat. 1888, 14); but, by the terms of the statute, receivers are entitled to the income dividends from the securities while remain in the hands of the treas- . Cook *v.* Warner, 56 Conn. 234; m. & Eng. Corp. Cas. 662.

efore an insolvent corporation ed into the hands of a receiver, ain goods already manufactured by d been paid for, nothing remain- to be done but to ship them ac- ling to the direction of the buyer. *d*, that the receiver should be or- d to deliver the goods. Bates *v.* er Glass Mfg. Co. (N. J. 1888), 14 Rep. 273.

'here, in an action by the people to ul the charter of a corporation, a iver is appointed, a stay of pro- ings will not be granted where it ears that defendant's interest will be jeopardized or injured, the order ointing the receiver directing him ake no sale or distribution of the orate property until further order e court. People *v.* North River Sugar Refining Co., 23 Abb. N. Cas. (N. Y.) 311.

Knowledge of Insolvency Does Not Affect Lien.—An attaching creditor will not be deprived of his lien because at the time the writ was issued he knew that the corporation was insolvent. White *v.* Pettes Importing Co., 30 Fed. Rep. 864.

Miscellaneous Cases.—For other cases illustrating the effect of the appointment of a receiver upon existing liens, see Second Nat. Bank *v.* New York Silk Mfg. Co., 11 Fed. Rep. 535; Woerishoffer *v.* North River Construction Co., 99 N. Y. 398; Wilcox *v.* Continental L. Ins. Co., 56 Conn. 468; Frayser *v.* Richmond etc. R. Co., 81 Va. 388; Gilbert *v.* Washington City etc. R. Co., 33 Gratt. (Va.) 645; Georgia *v.* Atlantic etc. R. Co., 3 Wood (U. S.) 434; South Carolina R. Co. *v.* People's Sav. Institution, 64 Ga. 18; Minchin *v.* Second Nat. Bank, 36 N. J. Eq. 436; Union Trust Co. *v.* Weber, 96 Ill. 346; Snow *v.* Winslow, 54 Iowa 200; Wiswall *v.* Sampson, 14 How. (U. S.) 64.

1. In Phoenix Warehouse Co. *v.* Badger, 67 N. Y. 294, it was held that an action brought by a corporation before the appointment of a receiver to collect subscriptions to the stock, could be continued in the name of the original party for the benefit of a receiver.

In Glenville Woolen Co. *v.* Ripley, 43 N. Y. 206, the plaintiff, a foreign corporation, brought an action against one of its stockholders to recover an installment due on stock. The only defense relied on was, that a creditor of the plaintiff had obtained a judgment against it; and on proceedings supplementary to the execution thereon, an order had been made restraining the defendant from paying the debt, a receiver had been appointed and had duly qualified in such proceedings, though no demand was ever made by such receiver upon the defendant for the said debt. The court held that the plaintiff was entitled to recover, saying: "If it should be conceded that the appointment of the receiver was valid

corporation is not dissolved at the time of the appointment of the receiver. If there has been a prior decree of dissolution, or if there has been a legislative declaration of forfeiture of the corporate franchises, or if the corporate existence has in any way come to an end, then all suits abate, and new proceedings must be begun by or against the receiver instead of the corporation.[1]

it did not defeat the action, nor did the order restraining the defendant from paying the debt to the plaintiff stay proceedings in it. There was no difficulty in the way of the defendant, whenever he should concede that he was indebted, taking the order of the court for such a payment of the amount as would protect him from twice paying it.

In Second Nat. Bank *v.* New York Silk Mfg. Co., 11 Fed. Rep. 532, it was held that there was nothing to prevent an insolvent corporation, whose property is in the hands of a receiver, from appealing from attachments and removing the controversy to the Federal court. The court by Nixon, J., said: "The case, in our judgment, turns upon the question, what power to act remains in a corporation after a decree of insolvency, an injunction, and the appointment of a receiver? This officer doubtless becomes the custodian of the property, but the corporate entity still exists, and the fair implication from the provisions of section 83 of the title 'Corporations,' in the Revised Statutes of *New Jersey*, is that until the injunction continues four months, may use and exercise its franchises and transact ordinary business in its own name, subject, of course, to the right of the receiver to the possession and control of the property."

In Talmadge *v.* Pell, 9 Paige (N. Y.) 410, it was held that under the *New York* Act of 1832, relative to the abatement of suits by or against corporations, a suit which has been brought by a corporation may be continued by the receiver of such corporation, either in his own name as such receiver or in the name of the corporation, under an order of the court, made upon a summary application.

But the receiver of an insolvent corporation cannot interfere, as by giving notice of a motion, or conducting an appeal in his own name, until he has been made a party to the action by an order of the court. Tracy *v.* First Nat. Bank, 37 N. Y. 523.

For other cases illustrating the effect of the appointment of a receiver upon suits pending by or against a corporation prior to dissolution, see People *v.* Barnett, 91 Ill. 422; Mercantile Ins. Co. *v.* Jaynes, 87 Ill. 199; Knauer *v.* Globe Mut. L. Ins. Co., 46 N.Y. Super. Ct. 370; South Carolina R. Co. *v.* People's Sav. Institution, 64 Ga. 18; Willink *v.* Morris Canal etc. Co., 4 N. J. Eq. 377; Pringle *v.* Woolworth, 90 N. Y. 502; Revere *v.* Boston Copper Co., 15 Pick. (Mass.) 351; Boston Glass Manufactory *v.* Langdon, 24 Pick. (Mass.) 49; 35 Am. Dec. 292; Bedell *v.* North America L. Ins. Co., 7 Daly (N. Y.) 273; Life Assoc. *v.* Goode, 71 Tex. 90; Bank of Bethel *v.* Pahquioque Bank, 14 Wall. (U. S.) 383; Kincaid *v.* Dwinelle, 59 N. Y. 548; Bank of Niagara *v.* Johnson, 8 Wend. (N. Y.) 645; Mickleg *v.* Rochester City Bank, 11 Paige (N. Y.) 118; Folger *v.* Columbian Ins. Co., 99 Mass. 267.

A statute may authorize pending suits to be continued in the name of the receiver. Leathers *v.* Shipbuilders' Bank, 40 Me. 386; Stetson *v.* City Bank, 2 Ohio St. 167.

Where a receiver has been appointed on the dissolution of a corporation, against whom an action is pending, a motion to substitute him as party defendant, in its stead, comes too late after he has distributed the assets, under order of the court, among provided claims duly advertised for under the statute. Owen *v.* Homeopathic Mut. L. Ins. Co. (Owen *v.* Kellogg), 56 Hun (N. Y.) 455.

Where a judgment has been recovered against a corporation, after the appointment of a receiver, it does not give the creditor who has obtained it a preference over other creditors in the distribution of corporate assets. Attorney-Gen'l *v.* Continental L. Ins. Co., 28 Hun (N. Y.) 360. See Ellicott *v.* U. S. Ins. Co., 7 Gill (Md.) 307; Jackson *v.* Lahee, 114 Ill. 287; *Ex parte* Brown, 18 S. Car. 87.

1. A leading case on this subject is

e. RECEIVER'S POWERS AND FUNCTIONS—(1) *Functions in Gen-al.*—Receivers whose powers are not defined by statute, derive eir authority solely from the order of the court by which they re appointed, and have only such powers as the court may deem oper to bestow upon them. They are the officers of the court, d are subject to its orders, and must account in such way as e court may direct.[1] As regards the parties in interest, they

eeley *v.* Smith, 3 Story (U. S.) 657, which Story, J., said: "The ques-n comes shortly to this, that during pendency of the suit, the corpora-n became extinct by a voluntary render of its charter, and an ac-tance of the surrender by the legis-ure. Under such circumstances it asked, what is to be done, the cor-ation being defunct by operation law. It was certainly a very unwise for the legislature to accept a sur-der of the charter, and not at the e time to save the rights of action third persons against the corpora-n, and to continue the existence of corporation *quoad* such rights. t the same case would have oc-red, if upon a *quo warranto* a final gment had passed against the cor-ation, declaring its franchises and vileges forfeited, and decreeing a zure and resumption of the same the government. Many of our ks are, by law, limited to a term of rs for their corporate existence, l if there is no saving when the m expires, the corporation is *de to* dead. Now I cannot distinguish ween the case of a corporation and case of a private person, dying *dente lite.* In the latter case, the t is abated at law, unless it is ca-le of being revived by the enactment some statute, as in the case as to ts pending in the courts of the *ited States*, where, if the right of ion survives, the personal repre-tative of the deceased party may ap-r and prosecute or defend the suit. such provision exists as to corpora-ns; nor, indeed, could exist, with-reviving the corporation *pro hac e;* and therefore, any suit pending inst it at its death abates by mere ration of law."

n Sturges *v.* Vanderbilt, 73 N. Y. , an attempt was made to compel defendant to apply certain moneys eived by them as stockholders of a poration out of the assets of the npany, to the payment of a judgment recovered, after the corporation had been dissolved, by the expiration of a term of its charter, while the action against it was pending. The court held that the judgment upon which the action was brought was void, and that the action could not be maintained.

In McCullough *v.* Norwood, 58 N. Y. 562, an action was brought against the receiver of the Lorillard Fire Insurance Company to recover the amount of the judgment rendered in favor of the plaintiff, after the dissolution of the corporation and the appointment of a receiver, and without the receiver having been made a party. The court held that the judgment could not be sustained, as it had been recovered in an action continued against the corporation after its death.

At the time of the appointment of a receiver in proceedings to dissolve a corporation, it had taken a suit against it to the United States Supreme Court. The receiver was not made a party to the suit, but, under directions from the court appointing him, employed counsel therein. The plaintiff took judgment by default after the corporation was dissolved. *Held*, that the receiver was not estopped from denying the right of the judgment plaintiff to share in the distribution of assets. (*Reversing* 43 Hun (N. Y.) 574); People *v.* Knickerbocker L. Ins. Co., 106 N. Y. 619.

Under *Georgia* Code, § 1688, providing that upon the dissolution of a corporation the court may appoint a receiver to administer its assets, the receiver is entitled to be made party plaintiff in an action instituted by the treasurer of the corporation which was pending when the receiver was appointed. Houston *v.* Redwine, 85 Ga. 130.

1. New York etc. Tel. Co. *v.* Jewett, 115 N. Y. 168; Karn *v.* Rorer Iron Co., 86 Va. 754; Thompson *v.* Phenix Ins. Co., 136 U. S. 287; Staples *v.* May (Cal. 1890), 23 Pac. Rep. 710; Attorney

represent both the creditors of the corporation and its shareholders, and may be said to be trustees for both. In all matters relating to corporate property, however, the receiver represents only the corporation, and not its creditors or shareholders.[1]

(2) *Receiver Succeeds to Corporate Rights of Action.*—As a general rule the receiver succeeds to all the rights of action which had accrued to the corporation, before his appointment, and he may enforce such rights by the same remedies which were open to the corporation.[2] In such cases, however any defense which

Gen'l *v.* North American L. Ins. Co., 89 N. Y. 103; Booth *v.* Clark, 17 How. (U. S.) 322. Hills *v.* Parker, 111 Mass. 510; 50 Am. Rep. 63; Union Nat. Bank *v.* Kansas City Bank, 136 U. S. 223; First Nat. Bank *v.* Barnum Wire etc. Works, 60 Mich. 487; Runyon *v.* Farmers' etc. Bank, 4 N. J. Eq. 480.

1. In Curtis *v.* Leavitt, 15 N. Y. 44, the court by Comstock, J., said: "The appellant as receiver has no interest in or power over the property affected by the trusts in question, except such as he derives under the statutes which have been mentioned. It has been said in this, as in other cases, that he represents the creditors and the stockholders, but for all the purposes of inquiring into this title, he really represents the corporation. He is by law vested with the estate of the corporate body, and takes his title under and through it. It is true, indeed, that he is declared to be a trustee for creditors and stockholders; but this only proves that they are the beneficiaries of the funds in his hands, without indicating the sources of his title or the extent of his powers. If, then, in a controversy between the receiver and third parties, in respect to the corporate estate, it is possible to form a conception of rights, legal or equitable, belonging to the shareholders as individuals, which the corporation itself could not assert in its own name, the receiver does not represent those rights. So far as shareholders are concerned, he can litigate respecting the fund upon precisely the grounds which would be available to the corporation, if it were still in existence, solvent, and no receivership had been constituted. In regard to creditors, I should certainly incline to take the same view of his rights and powers under the statutes referred to. It has, however, been uniformly assumed, and was not denied on the argument, that he succeeds to the rights of creditors, and takes his title under them, where conveyances have been made in fraud of their rights, but otherwise valid. In such cases, he held adversely to the debtor corporation. For all the purposes of the present controversy, I shall proceed upon this assumption. In general, then, a receiver of this description takes merely the rights of the corporation, such as could be asserted in its own name, and on that basis only can he litigate for the benefit of either stockholders or creditors, except when acts have been done in fraud of the rights of the latter, but valid as to the corporation itself."

In Atchison *v.* Davidson, 2 Pin. (Wis.) 48, it was held that receivers of corporations are appointed for the benefit of creditors, with power and authority to collect and pay over to them the assets of the company.

In Attorney-Gen'l *v.* Guardian Mut. L. Ins. Co., 77 N. Y. 272, it was held that the receiver represents both the corporation and creditors and stockholders, and that in his character as trustee for the stockholders, he may disaffirm and maintain an action as receiver to set aside illegal or fraudulent transfers of the property of the corporation made by its officers or agents, or to recover its funds or securities invested or misapplied. The court cited Gillett *v.* Moody, 3 N. Y. 479; Talmage *v.* Pell, 7 N. Y. 328. See also to the same effect Porter *v.* Williams, 9 N. Y. 150; 57 Am. Dec. 519; Gray *v.* Davis, 1 Wood (U. S.) 420; Morris *v.* Thomas, 17 Ill. 112; Skiddy *v.* Atlantic etc. R. Co., 3 Hughes (U. S.) 334.

2. In White *v.* Haight, 16 N. Y. 310, it was held that a promissory note given upon an agreement for insurance, may be indorsed and transferred by the corporation at its pleasure, and upon the insolvency of the company may be collected by its receiver.

In Terry *v.* Bamberger, 14 Blatchf. (U. S.) 234, it was held that a receiver had a right to institute a suit against the defendant for a conversion of cor-

ebtor might have set up in an action against him by the ration, may still be made use of in the action by the er.[1]

Right to Compel Restitution of Corporate Property.—A re- appointed by a court of equity is authorized to compel the ation of all property of the corporation improperly disposed abstracted from the corporation previous to the appointment eceiver. Thus, an officer of the company who has appro- d its funds to his own use may be compelled, in an action e receiver, to restore them;[2] so where the directors of an ent corporation have appropriated the funds of the com- to the payment of a debt due to one of the directors, without ling for payment of the other creditors, the receiver may er from the director the amount thus paid to him.[3] In such the receiver may either recover the property or securities propriated, or damages in lieu thereof; and may institute r proceedings to annul wrongful transfers or to set aside ibrances upon the corporate property.[4]

property happening prior to the ff's appointment. In Brouwer , 1 Sandf. (N. Y.) 629, it was at a receiver may maintain an of trover to recover the value of issory note due the corporation, nverted by defendant, the right on accruing before the plain- ppointment. To the same effect llink v. Morris Canal etc. Co., 4 Eq. 377; Gillet v. Fairchild, 4 N. Y.) 80; Osgood v. Laytin, b. (N. Y.) 464; Gaslight etc. Co. nes, 7 La. Ann. 114; New Or- Gas Light Co. v. Bennett, 6 La. 57.

n Devendorf v. Beardsley, 23 N. Y.) 656, the court by James, : The plaintiff, as receiver of nerican Mutual Insurance Com- akes its notes and assets subject the conditions and legal disa- with which they were tram- in the hands of the corporation he cannot impeach or disaffirm horized acts, nor the authorized f its agents. If a note in the of the corporation was void, or ble of enforcement, by reason ad or illegality in its procure- or inception, passing it into the of a receiver does not purge it e defects."

ere, in an action on a premium t appears that notice of assess- was necessary, but that it was not a receiver's action on the note e defeated. Williams v. Babcock, 25 Barb. (N. Y.) 109; Thomas v. Whallon, 31 Barb. (N. Y.) 172.

A receiver appointed to take charge of the property and assets of a corporation cannot maintain an action against the stockholders to enforce an alleged liability which could not have been enforced by the corporation itself. Republic L. Ins. Co. v. Swigert (Ill. 1890), 25 N. E. Rep. 680.

In a suit by the receiver of an insolvent national bank against the indorser of a note which matured in the hands of the receiver, defendant cannot set off his deposit in the bank, as the claim therefor existed before the receiver's rights accrued, and the Federal banking act does not appear to contemplate such a set-off. Stephens v. Schuchmann, 32 Mo. App. 333.

2. Hayes v. Kenyon, 7 R. I. 136.

3. Bradley v. Converse, 4 Cliff. (U. S.) 375; Rudd v. Robinson, 54 Hun (N. Y.) 339.

4. In Haywood v. Lincoln Lumber Co., 64 Wis. 639, a fraudulent mortgage was declared invalid in an action by the receiver In Alexander v. Relfe, 74 Mo. 495, a wrongful redemption of shares of stock was impeached and set aside. In Holden v. Upton, 134 Mass. 177, the receivers of a savings bank by a bill in equity set aside an irregular transfer by the treasurer of the bank of certain promissory notes. In Osgood v. Laytin, 3 Abb. App. Dec. (N. Y.) 418, it was held that a receiver was entitled to recover

(4) *Right to Recover Unpaid Subscriptions.*—Where a receiver is appointed over an insolvent corporation, a right of action vests in him to recover from the shareholders the amounts due upon their subscriptions to the capital stock of the company. If the company has not assets sufficient to pay its debts, the receiver may levy an assessment upon the unpaid stock subscription, and collect it by process of law.[1] If some of the stockholders have paid for their stock in full, and others have not paid in full, or have only paid in stock notes, those who have paid in full can require the receiver to collect the amounts due upon the stock which has not been paid up;[2] and such payments may be

back portions of the capital stock of an insolvent corporation fraudulently distributed amongst the stockholders. In Gill *v.* Balis, 72 Mo. 424, a similar attempt to defeat the rights of the creditors of an insurance company was prevented. In Atkinson *v.* Rochester Printing Co., 114 N. Y. 168, a bank's transfer of certain bills of exchange was set aside.

For other examples of the right of a receiver to compel a restitution of corporate property, see Bradley *v.* Farwell, 1 Holmes (U. S.) 433; Nathan *v.* Whitlock, 9 Paige (N. Y.) 152; Robinson *v.* Bank of Attica, 21 N. Y. 406; Brandt *v.* Allen, 76 Iowa 50; Gillett *v.* Moody, 3 N. Y. 479; U. S. *v.* Late Corporation of Church of Jesus Christ of Latter Day Saints (Utah), 18 Pac. Rep. 35; Gillett *v.* Phillips, 13 N. Y. 114; Lawrence *v.* McCready, 6 Bosw. (N. Y.) 329; Berry *v.* Brett, 6 Bosw. (N. Y.) 627; Butterworth *v.* O'Brien, 24 How. Pr. (N. Y.) 438.

Upon an adjudication of the insolvency of a corporation, and the appointment of a receiver of its property and effects under *Minnesota* Gen. St., ch. 76, the right to recover capital withdrawn in the guise of unearned dividends paid to the stockholders, passes to the receiver as representing all the creditors, and the right of the creditors under chapter 34, § 139, to maintain such an action, is suspended during the receivership. Minnesota Thresher Mfg. Co. *v.* Langdon. 44 Minn. 37.

A petition filed by the receiver of an insurance company alleged that officers of the company were about to convert to their own use a promissory note belonging to the company. *Held*, that equity had jurisdiction to enjoin the negotiation of the note, and to compel its surrender, or the proceeds of it, to the court, pending the final determination of the right thereto; and it was immaterial that the petition was entitled and drawn as though it were a part of the original action brought to secure the appointment of a receiver to which action defendants were not parties. Brandt *v.* Allen, 76 Iowa 50.

If the officers or directors of a corporation have suffered the corporate funds to be lost or wasted by gross negligence, the receiver has a right to bring an action against them for damages. Brinckerhoff *v.* Bostwick, 88 N. Y. 52; Patterson *v.* Stewart, 41 Minn. 84; Bank *v.* Bossieux, 4 Hughes (U. S.) 387.

1. In Nathan *v.* Whitlock, 9 Paige (N. Y.) 152 which was an action by a receiver to collect an unpaid balance upon a subscription to capital stock, the chancellor said that it was a suit to collect their debt which was still due from the defendant to the corporation. See also Dayton *v.* Borst, 31 N. Y. 435; Whittlesey *v.* Frantz, 74 N. Y. 456; Pentz *v.* Hawley, 1 Barb. Ch. (N. Y.) 122; Calkins *v.* Atkinson, 2 Lans. (N. Y.) 12; Rankine *v.* Elliott, 16 N. Y. 377; Dean *v.* Biggs, 25 Hun (N. Y.) 122; Mann *v.* Pentz, 3 N. Y. 415; Stark *v.* Burke, 5 La. Ann. 740; New Orleans Gaslight Co. *v.* Bennett, 6 La. Ann. 457; Gaslight etc. Co. *v.* Haynes, 7 La. Ann. 114; Clarke *v.* Thomas, 34 Ohio St. 46; Frank *v.* Morrison, 58 Md. 423; Stillman *v.* Dougherty, 44 Md. 380; Chandler *v.* Brown, 77 Ill. 333; Tobey *v.* Russell, 9 R. I. 58.

2. In Nathan *v.* Whitlock, 9 Paige (N. Y.) 152, the directors of an insurance company agreed among themselves to take a majority of the stock, and to give their stock notes for the same, secured by the stock as collat-

d, although there has been no vote of the directors or a y of the stockholders.[1] But a call or an assessment seems al to impose a liability under the contract of subscription.[2] ockholder is not relieved from the payment of unpaid sub- ns by the fact that he is a creditor, and he cannot set off t in an action by the receiver to recover the stock sub- n;[3] nor will the stockholders be permitted to allege as a to such an action, that they have conducted the business tion of the charter of the company.[4]

receiver may bring a separate action against each stock-

fter the company had become t, one of the directors agreed president to give him $6,000 ld take his stock and substi- own note in lieu of the stock the director. This arrange- s carried out. The court held, was a fraud upon the credit- he company, and the other ders who had paid for their nd that the receiver who had sequently appointed, was en- recover the amount of the te of the director, less the f it which had actually been he president to the company. ncellor said: "The receiver oper person to bring suit, as e legal title to all the prop- he company, being vested, by ed statutes, with all the rights law to trustees or assignees ent debtors. (See *New York* 464, §§ 42; 469, §§ 67, 68.) He fore expressly authorized to is own name for this debt; bt is still due to the corpora- twithstanding the note was without authority. (2 *New* v. Sts. 42, § 7.) This is not a ng to charge the defendant as or or stockholder of the ion on the ground that he such director or stockholder, imself personally liable to litors, so as to make it nec- or Webb & Co. to proceed him under the provisions of , 44th, and 45th sections of le of the revised statutes rela- proceedings against corpora- equity. (2 *New York* Rev.) But it is a suit to collect a ich is still due to him from oration, notwithstanding the nt and unauthorized agree- nder which the note, which the evidence of such indebt- edness, had been given up. It is therefore a case in which the innocent stockholders of the corporation would have an interest in the recovery of the amount of the note, even if there were other funds of the corporation sufficient to pay its debts. For where there is a loss upon the stock, such of the stockholders as have paid for their stock have a right to insist that those who have given stock notes only shall pay such notes to the receiver, so that all may share ratably in the loss which has fallen upon the stockholders generally."

See also Clarke *v.* Thomas, 34 Ohio St. 46; Dayton *v.* Borst, 31 N. Y. 435. The liability, however, of one stockholder is not limited by the amount which can be collected from the other stockholders. Stewart *v.* Lay, 45 Iowa 604.

1. Sagory *v.* Dubois, 3 Sandf. Ch. (N. Y.) 466; Upton *v.* Hansbrough, 3 Biss. (U. S.) 417.

2. Chandler *v.* Siddle, 3 Dill. (U. S.) 477.

3. Williams *v.* Traphagen, 38 N. J. Eq. 57; *In re* Empire City Bank, 18 N. Y. 199; Farmers' etc. Bank *v.* Jenks, 7 Met. (Mass.) 592.

4. Voorhees *v.* Receivers, 19 Ohio 463. The stockholders cannot allege as a defense that there was fraud in securing the appointment of the receiver. Schoonover *v.* Hinckley, 48 Iowa 83; nor can stockholders deny the validity of their subscriptions if they have recognized them in any way prior to the appointment of the receiver. Ruggles *v.* Brock, 6 Hun (N. Y.) 164; Litchfield Bank *v.* Church, 29 Conn. 137; Stillman *v.* Doughterty, 44 Md. 380; nor can a stockholder allege as a defense to such an action that the company was not legally incorporated. Phoenix Warehousing Co. *v.* Badger, 67 N. Y. 294.

holder. He is not bound to bring one action making all the stockholders parties defendant thereto.[1]

(5) *Recovery of Assessments on Insurance Premium Notes.*—A receiver has authority to make assessments on insurance premium notes, and to collect the same for the purpose of adjusting losses and paying the debts of the corporation.[2] The receiver is bound by the terms of the original contract between the insurance company and the policy holder. If the contract provided for an assessment and notice as an essential condition of payment, the receiver is bound to make such assessment and give such notice. The receiver is also bound in an action of such notes to show that some loss has occurred;[4] but he need not show the particular loss for which the assessment has been made.[5]

(6) *Right to Allow Set-offs.*—Where a debt is due to and from the same person, and in the same capacity, the receiver may allow a set-off, but not otherwise.[6]

(7) *Right to Compromise Suits.*—The court appointing a receiver

1. Calkins *v.* Atkinson, 2 Lans. (N. Y.) 12; Van Wagenen *v.* Clark, 22 Hun (N. Y.) 197; Stewart *v.* Lay, 45 Iowa 604.

2. Shaugnessy *v.* Rensselaer Ins. Co., 21 Barb. (N. Y.) 605; Thomas *v.* Whallon, 31 Barb. (N. Y.) 172; Williams *v.* Babcock, 25 Barb. (N. Y.) 109; Sands *v.* Sweet, 44 Barb. (N. Y.) 108; Sands *v.* Hill, 55 N. Y. 18; Sands *v.* Sanders, 28 N. Y. 416; Jackson *v.* Roberts, 31 N. Y. 304; Lawrence *v.* McCready, 6 Bosw. (N. Y.) 329; Berry *v.* Brett, 6 Bosw. (N. Y.) 627; Manlove *v.* Burger, 38 Ind. 211; Embree *v.* Shideler, 36 Ind. 423; Tippecanoe Township *v.* Manlove, 39 Ind. 249; Downs *v.* Hammond, 47 Ind. 131; Boland *v.* Whitman, 33 Ind. 64; Russell *v.* Berry, 51 Mich. 287.

If the policy has been surrendered under an agreement with an authorized agent of the company prior to the appointment of the receiver, such a surrender is a good defense to an action on the note by the receiver. Sands *v.* Hill, 55 N. Y. 18; Bolan *v.* Whitman, 33 Ind. 64; Devendorf *v.* Beardsley, 23 Barb. (N. Y.) 661; Tolford *v.* Church, 66 Mich. 431.

Where a policy has been issued before the company is authorized to do business, a receiver cannot recover upon a premium note. Williams *v.* Babcock, 25 Barb. (N. Y.) 109.

3. Williams *v.* Babcock, 25 Barb. (N. Y.) 109; Devendorf *v.* Beardsley, 23 Barb. (N. Y.) 565.

In Bangs *v.* Duckinfield, 18 N. Y. 592, two rates of assessment were imposed, a smaller rate on what were called "large notes," and a higher rate on what were called "small notes," but neither the assessment nor the notice showed to what class the defendant's note belonged. The court held that the notice was defective, and that the plaintiff could not recover.

4. Embree *v.* Shideler, 36 Ind. 423; Manlove *v.* Naw, 39 Ind. 289; Whitman *v.* Mason, 40 Ind. 189; Jackson *v.* Roberts, 31 N. Y. 304; Sands *v.* Sanders, 28 N. Y. 416; Sands *v.* Hill, 42 Barb. (N. Y.) 651; Wardle *v.* Townsend, 75 Mich. 385; Tobey *v.* Russell, 9 R. I. 58.

5. Jackson *v.* Roberts, 31 N. Y. 304; Sands *v.* Hill, 42 Barb. (N. Y.) 651.

6. *In re* Van Allen, 37 Barb. (N. Y.) 231. In Van Dyck *v.* McQuade, 85 N. Y. 616, it was held that the receiver of an insolvent bank has no power to allow a set-off against a debt owing to the bank, where the demand sought to be set-off was assigned to the debtor for that purpose after the receiver's appointment.

In Osgood *v.* Ogden, 4 Keyes (N. Y.) 70, an action was brought by the receivers to recover certain illegal dividends paid to a shareholder. The court held that the shareholder could not set off an indebtedness due to himself by the corporation.

But where a set-off is just and equitable, the court may allow it. Hebrook *v.* American F. Ins. Co., 6 Paige (N. Y.) 220.

y authorize him to compromise claims and suits, if it is best the interest of all parties concerned.[1]

3) *Power of Sale.*—When, in a proper case, the court orders a of the property of the corporation by the receiver, the title he property passes, not because the receiver has title in him-, but because the law invests him with a power to make a sale ch will bind the corporation.[2]

A court, at its discretion, may refuse to compel a receiver to nplete an executory contract of sale;[3] but if the contract has n made in pursuance of a direction of the court, the proposed chaser may be compelled to complete his contract.[4]

'urchasers at receivers' sales take only the interest of the cor- ation in the property, and are bound to ascertain what that rest is.[5]

WHO MAY BE APPOINTED A RECEIVER.—One corpora- may be appointed a receiver of another corporation.[6]

In re Croton Ins. Co., 3 Barb. Ch. Y.) 642. A receiver may receive ey payable under the contract be- it becomes due. Olcott *v.* Heer- s, 3 Hun (N. Y.) 431; or satisfy a gage on payment of the same be- it becomes due. Heermans *v.* kson, 64 N. Y. 171. On the same ciple a receiver may exercise an on of having securities deposited llateral considered as an absolute nent. Phoenix Iron Co. *v.* New k etc. Chair Co., 27 N. J. L.

Libby *v.* Rosekrans, 55 Barb. (N. 218; Hoyt *v.* Thompson, 5 N. Y. Russell *v.* Texas etc. R. Co., 68 Tex. Kam *v.* Rorer Iron Co., 86 Va. In Watkins *v.* Minnesota sher Mfg. Co., 41 Minn. 150, the decreed the sale of all the assets e corporation without redemption. receiver made the sale and exe- proper conveyances to the pur- r. The plaintiff held a judgment st the corporation which had been ed after the receiver's appoint- but before the sale. He claimed leem a portion of the real estate had been sold. The court said: inconsistent with the idea of the rty being sequestered and held *in dia legis* for the accomplishment se ends that it still be subject to dinary remedies in favor of par- r creditors, who had acquired no interest in the property when ourt took it into custody to be ap- iated in this special manner, in dance with the statute, to the sat- ion of all legal demands. The plaintiff's judgment did not charge this real estate with a lien enforceable against the property, either in the hands of the receiver or of the purchaser at the receiver's sale. That sale was absolute, and without redemption. The plaintiff, for the satisfaction of his judgment, can look only to the fund derived from the sale, and not to the property sold for the very purpose of creating such a fund."

Where a receiver has made a sale of property in compliance with the order of the court, and without fraud, or sacrifice of the property, the sale cannot be impeached by a third party. The proceeds of the sale take the place of the property, and the rights of creditors and others may be protected in the distribution. Mellen *v.* Moline etc. Iron Works, 131 U. S. 352; Bradly *v.* Williams, 3 Hughes (U. S.) 26; Battershall *v.* Davis, 31 Barb. (N. Y.) 323.

3. Attorney-Gen'l *v.* Continental L. Ins. Co., 94 N. Y. 199; Knott *v.* Receivers of Morris Canal etc. Co., 4 N. J. Eq. 423.

4. *In re* Grocers' Bank, 114 N. Y. 621; Kneeland *v.* American L. & T. Co., 136 U. S. 89.

5. For the application of the rule of *caveat emptor* to such sales, see Kneeland *v.* American L. & T. Co., 136 U. S. 89; Barron *v.* Mullin, 21 Minn. 374; Hackensack Water Co. *v.* DeKay, 36 N. J. Eq. 548; Foster *v.* Barnes, 81 Pa. St. 377; Manning *v.* Monaghan, 23 N. Y. 544.

6. *In re* Knickerbocker Bank, 19 Barb. (N. Y.) 602; *In re* Empire City Bank, 10 How. Pr. (N. Y.) 498.

The mere fact that a person is a creditor of a corporation does not disqualify him for the position of receiver;[1] and in *New York*, officers or stockholders may be appointed receiver.[2]

The court will not appoint as receiver of corporations a person or persons under whose management the property of the company has been squandered;[3] nor in general will a party to the suit, nor a master be appointed receiver.[4]

2. Receivers of Railroads.—See RECEIVERS OF RAILROADS.

3. For Partnership Property—*a.* GROUNDS FOR APPOINTING RECEIVER—(1) *In General.*—Where a partnership has been dissolved, and the management of its affairs cannot be safely intrusted to any of the partners, or where all the partners are dead a receiver will be appointed to take charge of the property and wind up the business.[5]

Where a decree of dissolution has been entered on account of the improper conduct of the parties, a receiver will be appointed as a matter of course; but where after a dissolution, application is made for the appointment of a receiver merely for the purpose of properly administering the partnership assets, a receiver will not be appointed as a matter of course. In such a case, it must appear either that a partner is misconducting himself, or that the assets are in peril.[6]

1. *In re* Knickerbocker Bank, 19 Barb. (N. Y.) 602; Taylor *v.* Life Assoc., 3 Fed. Rep. 465.

2. *In re* Waterbury, 8 Paige (N. Y.) 380. See Bank of Monroe *v.* Schermerhorn, 1 Clark Ch. (N. Y.) 366.

3. Buck *v.* Peidmont etc. L. Ins. Co., 4 Hughes (U. S.) 415; Middlesex Co. *v.* State Bank, 28 N. J. Eq. 166; People *v.* Third Ave. Sav. Bank, 50 How. Pr. (N. Y.) 22. In Attorney-Gen'l *v.* Bank of Columbia, 1 Paige (N. Y.) 511, Chancellor Walworth said: "Public policy requires that the directors shall understand distinctly that if they so manage the concerns of the institution as to produce insolvency, the property and effects of the institution will be taken from them entirely, and be placed in the hands of those who will investigate their conduct fearlessly and impartially."

4. Young *v.* Rollins, 85 N. Car. 485; Kilgore *v.* Hair, 19 S. Car. 486; Benneson *v.* Bill, 62 Ill. 408.

5. Wilcox *v.* Pratt, 125 N. Y. 688; McDonald *v.* Trojan Button-Fastener Co. (Supreme Ct.), 10 N. Y. Supp. 91; Taylor *v.* Neate, L. R. 39 Ch. Div. 538; McNair *v.* Gourrier, 40 La. Ann. 353; Bufkin *v.* Boyce, 104 Ind. 53; Jordan *v.* Miller, 75 Va. 442; Word *v.* Word, (Ala. 1890) 7 So. Rep. 412; Const *v.* Harris, T. & R. 517.

In Speights *v.* Peters, 9 Gill (Md.) 472, the court by Frick, J., said: "While in a variety of instances, especially in partnership transactions where the parties after dissolution of their connections cannot agree upon the adjustment, and the property and funds in dispute are in the hands of one partner alone, each having an equal right to the control of the property, cases must necessarily arise where the interest of both can only be properly secured by the intervention and appointment of a receiver."

6. In Harding *v.* Glover, 18 Ves. 281, Lord Eldon said: "I have frequently disavowed, as a principle of the court, that a receiver is to be appointed merely on the ground of a dissolution of a partnership. There must be some breach of a duty of a partner, or of the contract of a partnership."

Where a partnership has been dissolved by the insolvency of certain members of the firm, and the insolvent members attempt to appropriate the firm assets to the payment of their individual debts by an assignment of them for the benefit of creditors,

re a receiver is applied for prior to dissolution of the firm, ointment will depend largely upon the probability of a for a dissolution being entered, and even where it appears e complainant is entitled to a decree of dissolution a will not be appointed in the absence of improper con- the defendant partner.[1]

will be appointed. Davis *v.* Robt. (N. Y.) 134.

, upon the dissolution of a of the partners is authorized up the business, and he re- d misappropriates the funds sufficient grounds for the ap- nt of a receiver. Drury *v.* 2 Md. Ch. 157.

the articles of partnership that either member of the dissolve the partnership at no method is provided for p the concern, and the part- r notice of dissolution by one number, disagree as to the winding up the business, a re- will be appointed. Law *v.* Paige (N. Y.) 310; Martin *v.* aick, 4 Paige (N. Y.) 479; sselaer *v.* Emery, 9 How. Pr. 135; Sloan *v.* Moore, 37 Pa.

ilure of a surviving partner to ccount of stock, and to keep a all sales of the partnership hereby endangering loss to e, is sufficient ground for the nent of a receiver. Word *v.* Ala. 1890) 7 So. Rep. 412.

iver may be appointed on the on of a creditor where it ap- at the business is being so ged that the partnership assets ril. Oliver *v.* Victor, 74 Ga. k *v.* Laird, 4 Cranch (U. S.)

count having been taken show- different debts of the partner- amount and to whom due, much each partner was to as held that the court might a receiver with authority to om each partner the amount pay, and apply the fund to creditors. Jordan *v.* Miller, 42.

ourt has jurisdiction to ap- receiver and manager of a hip business with a view to he business as a going con- withstanding that the partner- expired in pursuance of the s to that effect contained in the partnership deed. Taylor *v.* Neate, L. R., 39 Ch. Div. 538; 57 L. J. Ch. D. 1044; 37 Week. Rep. 190.

But in the absence of a special showing, a receiver of the affairs of a partnership dissolved by limitation of time will not be appointed simply because one of the partners desires it. Bufkin *v.* Boyce, 104 Ind. 53.

1. In Gowan *v.* Jeffries, 2 Ashm. (Pa.) 296, the court by King, J., said: "The principle oh which a receiver is appointed in the case of a dissolution or copartnership, and a disagreement between the partners as to the present disposition of the joint estate, is, that each partner has an equal right to the possession and control of the partnership effects and business. In the mode of carrying out this principle, in cases of dissolution, there seems to be a difference between courts of equity in this country and in *England*. In *England*, even after a dissolution, a receiver is not of course. There must be some breach of the duty of a partner or of the contract of partnership. Harding *v.* Glover, 18 Ves. 281; Cary on Partnership, 167–8; Wilson *v.* Greenwood, 1 Swanst. 481. In *New York*, however, the rule seems to be, that upon a bill filed by one partner to close up a dissolved partnership concern, it is a matter of course, to appoint a receiver if the parties cannot agree among themselves, as to the disposition and control of the joint property. Martin *v.* Van Shaick, 4 Paige (N. Y.) 497; Law *v.* Ford, 2 Paige (N. Y.) 310. Practically, this conflict of authority can produce but little embarrassment; because, an application for a receiver by either party will rarely be made, unless a breach of partnership duty exists; seeing it is the manifest interest of a dissolved copartnership, that its assets should be administered by one of the associates, instead of a public officer, having no knowledge of, or concern in the business. When the case, however, does arise, unless this apparent difference can be reconciled, we must adapt that practice which seems the

most suited to effectuate a fair and equal adjustment of the joint affairs, and to all parties in interest their respective rights in the joint estate. So much, then, as respects the case of an actually dissolved copartnership, or one in which a dissolution is of course at the pleasure of either copartner. The present, however is a case of more special character. It is the case of an application for receiver, on a bill filed for the dissolution of a subsisting partnership, and made before answer and final decree. Such a case, to authorize the appointment of a receiver, must be one which would authorize a decree for a dissolution; and where it is apparent, that a dissolution will be decreed, on the ground of some breach of duty or contract, a receiver will be appointed. Henn *v.* Walsh, 2 Edw. Ch. (N. Y.) 129; Goodman *v.* Whitcomb, 1 J. & W. 589. In this last case Lord Eldon states the principle on which the court acts in appointing a receiver on a bill filed for the purpose of having a dissolution of partnership declared, to be, that 'if the court can see, that that must be done, it follows very much of course, that a receiver must be appointed; but, if the case made, stands in such a state, that the court cannot see whether it will be dissolved or not, it will not take into its own hands the conduct of a partnership, which only may be dissolved.' In this case, which was a motion for a receiver, on a dissolution bill, before final decree, the complainant took nothing by his motion; because Lord Eldon did not see his way clear, whether a dissolution would be ultimately decreed. Now, applying this plan and practical principle to the case before us, it seems to us to be a case, in which a dissolution must be decreed, judging, as far as we are able, from the affidavits and exhibits. Ultimately, and on the final hearing, it is possible, that by the aid of new lights, and even of better advice and consideration of the proof before us, we may be of a different opinion. But, if such a possibility is to prevent the action of the court, on this motion, then the case of a receiver, on a dissolution bill, before final decree, can scarcely be imagined: for I can hardly suppose a case, merely resting on conflicting evidence, in which a judicial tribunal might not be convinced, on a full and final hearing, of the propriety of abandoning an inceptive impression formed on an interlocutory hearing.

The ground exhibited in this case, on which we are of the present opinion that a dissolution must be ultimately decreed, among others, are these: the insolvency of the copartnership; the exclusion of the complainants from their full share in the management of the concern; the neglect of the defendant, the acting party, to keep perfect books of account; and his refusal to keep his books and accounts free and open at all times to the inspection of the complainants." See also Hall *v.* Hall, 3 M. & G. 79; Chapman *v.* Beach, 1 J. & W. 594; Smith *v.* Jeyes, 4 Beav. 503; Garretson *v.* Weaver, 3 Edw. Ch. (N. Y.) 385; Jackson *v.* De Forest, 14 How. Pr. (N. Y.) 81; Van Rensselaer *v.* Emery, 9 How. Pr. (N. Y.) 135; Cox *v.* Peters, 13 N. J. Eq. 39; Holden *v.* McMakin, 1 Pars. Sel. Cas. (Pa.) 270; Seighortner *v.* Weissenborn, 5 Green (N. J.) 177; Sutro *v.* Wagner, 23 N. J. Eq. 388; Dunn *v.* McNaught, 38 Ga. 179; Katz *v.* Brewington (Md. 1889), 20 Atl. Rep. 139; Rhodes *v.* Wilson (N. J. 1890), 19 Atl. Rep. 732; Semple *v.* Flynn (N. J. 1887), 10 Atl. Rep. 177; Smith *v.* Fitchett, 15 Civ. Pro. Rep. (N. Y.) 207; Davidge *v.* Coe, 54 N. Y. Super Ct. 360; Straus *v.* Heyanga, 5 N. Y. St. Rep. 37; Heflebower *v.* Buck, 64 Md. 15; McNair *v.* Gourrier, 40 La. Ann. 353; Morey *v.* Grant, 48 Mich. 326; Perrin *v.* Lepper, 56 Mich. 351; Simon *v.* Schloss, 48 Mich. 233; Wilson *v.* Fitchter, 11 N. J. Eq. 71; Cox *v.* Peters, 13 N. J. Eq. 39; Renton *v.* Chaplain, 9 N. J. Eq. 62; Randall *v.* Morrell, 17 N. J. Eq. 343; Wolbert *v.* Harris, 7 N. J. Eq. 605; Slemmer's Appeal, 58 Pa. St. 168; 98 Am. Dec. 255; Henn *v.* Walsh, 2 Edw. Ch. (N. Y.) 129; Hayes *v.* Heyer, 4 Sandf. Ch. (N. Y.) 485; Shulte *v.* Hoffman, 18 Tex. 678; Kirby *v.* Ingersoll, Harr. (Mich.) 172; Madgwick *v.* Wimble, 6 Beav. 495; Buchanan *v.* Comstock, 57 Barb. (N. Y.) 568; Loomis *v.* McKenzie, 31 Iowa 425; Wellman *v.* Harker, 3 Oregon, 253.

In a suit for an accounting between partners, it appearing on a preliminary report of a referee, that there were assets of the firm not disposed of, an interlocutory judgment is proper, appointing a receiver and directing that, after passing his final account, the trial be resumed before the same referee. Smith *v.* Fitchett (Supreme Ct.), 10 N. Y. Supp. 459.

) *Receiver Not Appointed to Continue Business.*—A court of ty will not appoint a receiver for the purpose of permanently ducting the business; but it must appear that the ultimate olution of the firm is intended or is necessary.[1]

) *A Partnership Must Exist.*—The court will not appoint a iver unless it appears that there is a partnership existing

a suit for accounting, a receiver e firm's property will not be ap- ed unless the remaining partner cts to perform or improperly per- s his duty of closing up the busi- as expeditiously as may be, with egard to the interests of all con- d. McDonald *v.* Trojan Button- ner Co. (Supreme Ct.), 10 N. Y. . 91.

complaint in an action between ers asked for a formal dissolution, ppointment of a receiver, an ac- ting, an injunction, payment of was due plaintiff under a copart- ip agreement, and other relief. , that plaintiff was entitled to re- under the partnership agree- notwithstanding allegations in complaint to the effect that the ences between the partners had submitted to arbitration and an d made, the allegations respecting arbitration being denied by de- nt and no evidence in support of being offered at the trial. s *v.* Heyanga, 5 N. Y. St. Rep.

e report of a referee appointed to and determine as to an account- etween partners, showed that no decree determining the rights of parties could be made, until the s of the partnership could be halled. *Held*, that an application upon such report for the ap- ment of a receiver should be ed. Smith *v.* Fitchett, 15 Civ. Rep. (N. Y.) 207; 17 N. Y. St. 976; 2 N. Y. Supp. 261.

ding suit for the dissolution of a ership and an accounting, where efendant partner, who is in pos- n of the stock and accounts, is nsible, and the assets of the firm adequate to bear the expense of a ver, the court may refuse to ap- one. Rhodes *v.* Wilson (N. J. , 19 Atl. Rep. 732.

Louisiana, the question of ap- ing a liquidator for the affairs of nership, is discretionary with the . McNair *v.* Gourrier, 40 La. 353.

In a suit brought for the purpose of winding up the affairs of a partnership, a receiver should not be appointed unless the necessity is imperative. Morey *v.* Grant, 48 Mich. 326; Perrin *v.* Lepper, 56 Mich. 351.

1. Goodman *v.* Whitcomb, 1 J. & W. 589. See also Hall *v.* Hall, 3 M. & G. 79; Jackson *v.* DeForest, 14 How. Pr. (N. Y.) 81; Garretson *v.* Weaver, 3 Edw. Ch. (N. Y.) 385; Chapman *v.* Beach, 1 J. & W. 594; Allen *v.* Hawley, 6 Fla. 164; 63 Am. Dec. 198.

Although the court will not appoint a receiver to permanently continue and manage the business, yet where for good cause shown a receiver is appointed he will be permitted to continue the business until the litigation is ended. Thus in Allen *v.* Hawley, 6 Fla. 164; 63 Am. Dec. 198, the receiver was directed to operate a steamboat. And in Jackson *v.* DeForest, 14 How. Pr. (N. Y.) 81, the receiver was permitted to hire horses and carriages. But the court will not continue the publication of a political newspaper longer than is absolutely necessary. In Marten *v.* Van Schaick, 4 Paige (N. Y.) 479, the chancellor said: "If a receiver is appointed, he must proceed and sell the establishment without delay; and in the meantime the business must be carried on by him, as usual, so that the good will thereof may be secured to the purchaser, and the full value of the establishment realized by the partners, on such sale. But the court will not take upon itself the responsibility of continuing the publication of a political paper, by a receiver, any longer than is absolutely necessary to prevent a sacrifice of the property. Until a sale can be effected, the defendants may continue to superintend the editorial department of the paper, as they have heretofore done; but the paper must be published under the direction of the receiver, who will be personally responsible for any publication therein which is improper." See also Dayton *v.* Wilkes, 17 How. Pr. (N. Y.) 510; McMahon *v.* McClernan, 10 W. Va. 419; Crane *v.* Ford, Hopk. Ch. (N. Y.) 114; Wolbert

between the parties;[1] but a mere denial of the partnership is not sufficient to prevent the appointment of a receiver.[2]

v. Harris, 7 N. J. Eq. 605; Heatherton *v.* Hastings, 5 Hun (N. Y.) 459.

1. A request for the appointment of a receiver to take charge of goods and a business, made by one claiming to be a partner in the business, will not be granted where the fact of a partnership is not satisfactorily proved, and where such appointment would totally destroy the business. Semple *v.* Flynn. (N. J. 1887), 10 Atl. Rep. 177; 2 R. & Corp. L. J. 224; Goulding *v.* Bain, 4 Sandf. (N. Y.) 716; Hobart *v.* Ballard, 31 Iowa 521; Peacock *v.* Peacock, 16 Ves. 49; Chapman *v.* Beach, 1 J. & W. 594, n.; Popper *v.* Scheider, 7 Abb. Pr. N. S. (N. Y.) 56; Fairburn *v.* Pearson, 2 M. & G. 144; Russell *v.* White, 63 Mich. 409; Katsch *v.* Schenck, 18 L. J. N. S. Ch. 386.

Where a partnership is only a nominal one and one of the parties is in reality only a clerk of the other under a salary, a receiver will not be appointed. Kerr *v.* Potter, 6 Gill (Md.) 404; Nutting *v.* Colt, 7 N. J. Eq. 539.

If the partnership is not actually completed so as to entitle the parties to a participation in the profits, a receiver will not be appointed. Hobart *v.* Ballard, 31 Iowa 521. But one who has entered into a partnership with another to whom he has paid a portion of the price of his share of the partnership property, and given his notes, which are not yet due, for the balance, has sufficient interest in the firm property, after the partnership has gone into operation, to maintain a bill for the appointment of a receiver. Taylor *v.* Bliley (Ga. 1890), 12 S. E. Rep. 210.

In Davidge *v.* Coe, 54 N. Y. Super. Ct. 360, it was held that it does not follow because plaintiff and defendant were not partners, a receiver may not be appointed pending litigation concerning their affairs, which partake of the nature of a partnership.

In Wilcox *v.* Pratt, 128 N. Y. 688, defendant who owned a tract of land, entered into a contract with plaintiff, for the purpose of cutting timber thereon, and making sales, both parties undertaking to contribute money towards the enterprise. While the business contemplated by the contract was being carried on under plaintiff's personal supervision, and he was devoting his entire services and attention thereto, defendant published a notice that "the copartnership heretofore existing" between herself and plaintiff was dissolved, and that she would carry on the business alone, which she proceeded to do, excluding plaintiff from possession and control of the personal assets, and from all connection with the business. The court held that such conduct warranted plaintiff in seeking relief from a court of equity, whether the relation of the parties was that of partners or not, and that the case was a proper one for the appointment of a permanent receiver to complete the contract and close up the business; and the fact that he had assigned an interest under the contract to another was immaterial.

2. In Hottenstein *v.* Conrad, 9 Kan. 435, the court by Brewer, J., said: "It would be opening the door to a great deal of wrong to hold that by simply denying the existence of a partnership, a party in possession of large amounts of partnership property could hold that possession until, after the delay of a suit, the verdict of the jury had established a partnership. It would often result in real victory to the wrongdoer. A court having the right to hear testimony as to a fact, upon a motion, has a right to find the existence of that fact. Wherever an application for a receiver in a partnership case is made, the court has to hear some testimony as to the existence of the partnership. Ordinarily, there is on this point no counter-testimony; yet the court finds on the testimony presented on the motion that there was a partnership. Without such finding, it could not appoint a receiver. Having power to make such a finding, that power is not taken away by the introduction of counter-testimony. It must still find as to the fact. If there be much contradiction in the testimony, it may require proof of additional facts, such as the insolvency of the defendant, before making any appointment. But still, its power to examine the testimony and determine as to the fact, remains. Whatever a court may examine into on motion, it may also determine. Its determination for the purposes of the motion, established the fact." See also Henn

Misconduct of Partner.—The usual ground upon which an ation is made for the appointment of a receiver over the ty of a partnership, is some alleged misconduct on the part or more of the partners. Receivers have been appointed one of the partners has been wasting the joint assets;[1] a partner has been in collusion with the debtors of the nd allows them to delay in paying their debts;[2] where the ce shows a deliberate intent to ruin the firm business;[3] one of the partners is carrying on a separate trade for his enefit with the firm's property;[4] where the insolvent mem- f a firm attempt to appropriate the firm assets to the pay- of their individual debts;[5] where the partners violate their nent with the retiring partner;[6] where, after dissolution, the ning partners continue to carry on the business on their ccount with the partnership assets;[7] where a partner will- violates the terms of the partnership agreement;[8] where a ing partner fails to keep proper records of the sales of the rship effects, thereby endangering loss to the estate;[9] a partner fails to contribute his portion of the capital [10] and in general where a partner is so mismanaging the ss that the partnership assets are in peril.[11]

eceiver, however, will not be appointed on account of mere nces between the partners where the firm assets are not gered;[12] nor on account of the failure of one partner to

sh, 2 Edw. Ch. (N. Y.) 129; rst v. Muir, 7 N. J. Eq. 307; gton v. Tappan, 26 N. J. Eq. Villiamson v. Monroe, 3 Cal. odes v. Lee, 32 Ga. 470. illiamson v. Wilson, 1 Bland 18; Todd v. Miller, 2 Tenn. Ch.

twick v. Conningsby, 1 Vern.

tro v. Wagner, 23 N. J. Eq. ew v. Wright, 44 Miss. 202. arding v. Glover, 18 Ves. 281. avis v. Grove, 2 Robt. (N. Y.)

hite v. Colfax, 33 N. Y. Super. ; West v. Chasten, 12 Fla. 315; v. Roberts, 2 Md. Ch. 157. arding v. Glover, 18 Ves. 281; rick v. Wimble, 6 Beav. 495; v. McMackin, 1 Pars. Sel. Eq. a.) 270; Miller v. Jones, 39 Ill. cdonald v. Trojan Button-Fast- . (Supreme Ct.), 10 N.Y. Supp. non v. Schloss, 48 Mich. 233; v. Boorman, 30 Wis. 684. ew v. Wright, 44 Miss. 202; an v. Robinson, 21 Md. 30. ord v. Word (Ala.), 7 So. Rep. ee also as to improper entries, . Bowers, 4 Bro. C. C. 441; Goodman v. Whitcomb, 1 J. & W. 589.

10. Heathcot v. Ravenscroft, 6 N. J. Eq. 113; Jordan v. Miller, 75 Va. 442.

11. Drury v. Roberts, 2 Md. Ch. 157; Saylor v. Mockbie, 9 Iowa 209; Boyce v. Burchard, 21 Ga. 74; Jefferys v. Smith, 1 J. & W. 298; Hall v. Hall, 3 M. & G. 79; Chaplin v. Young, 6 L. T. N. S. 97; Chapman v. Beach, 1 J. & W. 594; Goodman v. Whitcomb, 1 J. & W. 589; Smith v. Jeyes, 4 Beav. 503; Tillinghast v. Champlin, 4 R. I. 173; 67 Am. Dec. 510; Renton v. Chaplain, 9 N. J. Eq. 62; Walker v. House, 4 Md. Ch. 45; Hamill v. Hamill, 27 Md. 679; Sheppard v. Oxenford, 1 K. & J. 491; Brenan v. Preston, 2 De G. M. & G. 813; Barnes v. Jones, 91 Ind. 161; Haight v. Burr, 19 Md. 130; Shannon v. Wright, 60 Md. 520; Geortner v. Canajoharie, 2 Barb. (N. Y.) 625; Arnold v. Providence Lumber Co., 15 R. I. 15; Weinrich v. Koelling, 21 Mo. App. 133; Wallace v. Milligan, 110 Ind. 498.

12. Goodman v. Whitcomb, 1 J. & W. 589; Henn v. Walsh, 2 Edw. Ch. (N. Y.) 129; Slemmer's Appeal, 58 Pa. St. 168; 98 Am. Dec. 255; Connor v. Belden, 8 Daly (N. Y.) 257.

co-operate with the other;[1] nor because the business has been unprofitable;[2] nor where the partners have agreed that one of their number should conduct the business, or wind up its affairs, and there is no fraud on his part.[3]

(5) *Exclusion from the Firm.*—The exclusion of a partner from his full share in the management of the business of the firm is a strong ground for appointing a receiver. In such cases, of course, the court will grant a receiver only where it would dissolve the partnership.[4]

1. Roberts *v.* Eberhardt, 1 Kay 148.

2. Moies *v.* O'Neill, 23 N. J. Eq. 207; Shoemaker *v.* Smith, 74 Ind. 71.

3. Heflebower *v.* Buck, 64 Md. 15; Simon *v.* Schloss, 48 Mich. 233; Wagoner *v.* Warne (N. J. 1888), 14 Atl. Rep. 215; Weston *v.* Watts, 1 N. Y. St. Rep. 763.

4. In Const *v.* Harris, 1 T. & R. 517, it appeared that in 1812, the proprietors of the Covent Garden Theater executed a deed, by which they covenanted and agreed that the profits of the theater should be exclusively appropriated to particular purposes, and that the treasurer for the time being should be irrevocably directed so to apply the profits, and in 1822, parties then entitled, under the former proprietors, to seven-eighths of the theater entered into an agreement, which provided, in some respects, for a different application of the profits, and otherwise affected the rights of a party interested in the remaining eighth, who was not consulted on the subject. The court upon a bill filed by that party, for the specific performance of the covenants and agreements contained in the deed of 1812, appointed a receiver. Lord Eldon said: "It is not enough for the parties who have executed the deed of 1822 to say, we, the owners of seven-eighths, will meet, and Mr. Const may come if he pleases; where there is any material change to be made, which is to be a binding change, notice must be given to all parties of what that change is, and at what time it is to be taken into consideration; for instance, if notice was given with respect to dismissing Mr. Brandon, I am not of opinion, supposing the deed of 1812 to have been an operative deed when Mr. Brandon was dismissed, that it was not competent to the parties to dismiss him, duly taking into consideration whether he ought to be dismissed or not, and duly providing a substitute who should be constituted and bound to all the duties Mr. Brandon was constituted and bound to, and whose discharge of those duties should be as well secured as Mr. Brandon's discharge of those duties was secured; but I say, that, supposing the deed of 1812 to have been then operative, the proprietary could not dismiss Mr. Brandon without consulting all their partners; if the deed of 1812 was then operative, his dismissal ought to have been the act of all the partners; and I call that the act of all, which is the act of the majority, provided all are consulted, and the majority are acting *bona fide*, meeting not for the purpose of negativing what any one may have to offer, but for the purpose of negativing what, when they are met together, they may, after due consideration, think proper to negative; for a majority of partners to say: We do not care what one partner may say, we, being the majority, will do what we please, is, I apprehend, what this court will not allow. So, again, with respect to making Mr. Robertson the treasurer, Mr. Const had a right to be consulted; his opinion might be overruled, but he ought to have had the question put to him and discussed; in all partnerships, whether it is expressed in the deed or not, the partners are bound to be true and faithful to each other; they are to act upon the joint opinion of all, and the discretion and judgment of any cannot be excluded; what weight is to be given to it is another question: the most prominent point on which the court acts in appointing a receiver of a partnership concern, is the circumstance of one partner having taken upon himself the power to exclude another partner from as full a share in the management of the partnership as he, who assumes that power, himself enjoys."

In Katz *v.* Brewington (Md. 1889), 20 Atl. Rep. 139, a bill by his partner against his copartner, to wind up the affairs of the firm, alleged that defendant had sole possession and control of

Death of a Partner.—The death of a partner is not of a sufficient ground for the appointment of a receiver, because surviving partner is vested with the partnership assets in to wind up the business, and account to all parties in inter- If, however, the surviving partner or partners misappro- e the assets, or seek to continue the business on their own ınt with the assets of the deceased partner, a receiver will ppointed.[1]

ooks and goods of the firm; that s disposing of the goods in fraud nplainant; and that he refused e complainant any information rning the business, that he ex- l him from any part in the man- ent, and concealed the books him. The court held that the tions were sufficient to authorize ppointment of a receiver, though not alleged that any profits had earned. In Haight *v.* Burr, 19 130, a receiver was appointed similar circumstances.

Seibert *v.* Seibert, 1 Brews. (Pa.) was held that if the right of a er is denied and he is excluded, entitled to an injunction and a re- r.

ere one partner sells his interest partnership and the remaining er excludes the purchaser and ıp an adverse claim to the prop- a receiver may be appointed. rt *v.* Seibert, 1 Brewst. (Pa.) 531. also in general, as to exclusion rtners, Wilson *v.* Greenwood, 1 st. 481; Maynard *v.* Railey, 2 Nev. Kirby *v.* Ingersoll, 1 Dougl. ı.) 477; Katsch *v.* Schenck, 18 L. S. Ch. 386; Shulte *v.* Hoffman, x. 678; Hottenstein *v.* Conrad, 9 435; Hale *v.* Hale, 4 Beav. 369 ghts *v.* Peters, 9 Gill (Md.) 472; man *v.* Whitcomb, 1 J. & W. 589; *v.* Wood, 2 J. & W. 559; Page *v.* irk, 1 Brewst. (Pa.) 282; Gowan fries, 2 Ashm. (Pa.) 296; Wolbert rris, 7 N. J. Eq. 605; Brenan *v.* on, 2 De G. M. & G. 813; Peacock acock, 16 Ves. 49; Blakeney *v.* ur, 15 Beav. 40; Heflebower *v.* , 64 Md. 15; Wolbert *v.* Harris, 7 Eq. 605; Terrell *v.* Goddard, 18 64.

In Holden *v.* McMakin, Par. Eq. (Pa.) 270, a bill was filed praying e sale of partnership property in rspaper, the appointment of a re- r, and for an account. The bill iled by the administrator of the deceased partner against the surviving partner. The court laid down the following rule as applicable to such cases: "The surviving partner having at law, the right to the care, custody and management of the joint estate, a court of equity will not, generally speaking, on a bill being filed against him for an account of the partnership transactions, deprive him of his legal right by appointing a receiver, because, notwithstanding the death of one, the confidence in the other remains. But, if he be guilty of such acts of mismanagement and improper conduct as to satisfactorily prove that he cannot be intrusted with the joint estate, the court will then exercise its power, and appoint a receiver to collect the debts and dispose of the property."

In Philips *v.* Atkinson, 2 Bro. C. C. 272, Lord Kenyon, said: "Where there is a co-partnership there is confidence between the parties, and if the one dies the confidence in the other partner remains, and he shall receive; but when both are dead, there is no confidence between the representatives, and therefore the court will appoint a receiver."

In Miller *v.* Jones, 39 Ill. 54, the court by Lawrence, J., said: "If there is an unreasonable delay on the part of the surviving partners in closing the affairs of the partnership, or if they are wasting the partnership property, it is then the right and duty of the administrator, if the partnership creditors remain inactive, to file a bill, as in the present instance, calling the survivors to account and praying for an appointment of a receiver and the complete adjustment of the partnership affairs. The administrator himself, if a proper person, may be made a receiver, but in that event the court should require him to give a new bond as such."

In Madgwick *v.* Wimble, 6 Beav. 495, it was held that where the surviving partner insisted on continuing the partnership business, with the assets of a deceased partner, the representatives.

(7) *Agreement by Which one Partner Shall Conduct or Wind up the Business.*—Where it is expressly agreed that one partner shall conduct or wind up the business, and it does not appear that such acting partner is guilty of fraud or is misconducting himself, a receiver will not be appointed;[1] but where all the partners have by agreement divested themselves of the right of winding up the business, a receiver may be appointed.[2]

(8) *Partner Appointed Receiver.*—Where a proper case has been made out for the appointment of a receiver, and the partner actually in charge of the business is without fault, he will usually be appointed the receiver.[3]

of the latter are entitled to a receiver. See also Cornor *v.* Allen, Harr. (Mich.) 371; Walker *v.* House, 4 Md. Ch. 39; Clegg *v.* Fishwick, 1 M. & G., 294; Tillinghast *v.* Champlin, 4 R. I. 173; 67 Am. Dec. 510; Hale *v.* Hale, 4 Beav. 369; Helme *v.* Littlejohn, 12 La. Ann. 298; Dick *v.* Laird, 4 Cranch (C. C.) 667.

1. An order appointing a receiver to take possession of and collect certain partnership accounts is unwarranted when the parties have themselves fully agreed as to how the accounts should be collected, and defendants are responsible. Simon *v.* Schloss, 48 Mich. 233. See also Hayes *v.* Heyer, 4 Sandf. Ch. (N. Y.) 485.

One of the partners applied for an injunction and a receiver, pending his suit for an account, etc. It appeared that one of the defendant partners had the most money in the firm, and that the winding up of its affairs belonged to him under an express stipulation. It did not appear that he had been guilty of fraud, or that there was any special reason for the interference of the court. *Held*, that the application was properly refused. Heflebower *v.* Buck, 64 Md. 15.

A bill in chancery averring that plaintiff and defendant had done business together under an agreement which had come to an end, raised the question as to which of the two had the right to settle with the creditors of the concern, to make collections, and to control the correspondence and books. *Held*, that irrelevant allegations in the bill should be stricken out; that the rights of the parties, as disclosed by the evidence, to the correspondence, etc., should be protected by injunction; and that a receiver should not be appointed, the assets being small, and it not appearing that there was any danger of their being lost in case a receiver should not be appointed. Wagoner *v.* Warne (N. J., 1888), 14 Atl. Rep. 215.

2. Thus in Davis *v.* Amer, 3 Drew 65, the plaintiff and defendant on dissolving partnership appointed a third person to collect the assets of the firm, and agreed not to interfere with them. After the agreement had been partially acted on, one of the partners died, and disputes arising between the executors of the deceased partner and the surviving partner, the latter collected some of the debts of the firm in violation of the agreement. On a bill filed by the executors of the deceased partner for an injunction and a receiver, the court on motion appointed a receiver. See also Turner *v.* Major, 3 Giff. 442; O'Bryan *v.* Gibbons, 2 Md. Ch. 9. Where all the interest of all the partners have been assigned to third persons, a receiver may be appointed. Maynard *v.* Railey, 2 Nev. 313.

3. On a complaint for dissolution of a partnership on the ground of one partner's insanity, the complainant partner may be appointed receiver. Reynolds *v.* Austin, 4 Del. Ch. 24.

Where the receiver of the assets of a partnership was appointed, and the failure of the judge to appoint a member of the firm such a receiver is assigned as error, and it appears that no request was made to him that such member should be so appointed, his action is not subject to review. Bliley *v.* Taylor (Ga. 1891), 13 S. E. Rep. 283.

See also in general as to the appointment of a partner as receiver. Wilson *v.* Greenwood, 1 Swanst. 471; Maund *v.* Allies, 4 M. & C. 503; Sheppard *v.* Oxenford, 1 K. & J. 491; Hoffman *v.* Duncan, 18 Jur. 69; Blakeney *v.* Dufaur, 15 Beav. 40; Sargent *v.* Read, 1 Ch. Div. 600; Brien *v.* Harriman, 1 Tenn. Ch. 467; Kirkpatrick *v.* Corn-

PROCEDURE CONCERNING APPOINTMENT—(1) *Notice of cation.*—A court of equity will not ordinarily appoint a er of partnership assets on the application of one partner, ut notice to the defendant partner, and without service of ss.[1]

When Issue Will be Directed to be Tried.—Where an issue t is raised upon the application for the appointment of a er, the court will sometimes direct the issue to be tried at efore proceeding to appoint a receiver.[2] Thus an issue has directed where it is doubtful whether the partnership rela- exists; and also in a case where it was denied that the lainant was entitled to profits.[3]

N. J. Eq. 234; McMahon *v.* Mc- n, 10 W. Va. 419; Hubbard *v.* 2 Duer (N. Y.) 685; Gridley *v.* , 2 La. Ann. 87; Whitesides *v.* y, 3 Humph. (Tenn.) 150; Todd er, 2 Tenn. Ch. 107.

cCarthy *v.* Peake, 18 How. Pr.) 138. But a receiver may be ed in a suit brought by a part- inst his copartners for a dissolu- ithout notice to a non-resident . The power is given by *New* Code, § 1947. Alford *v.* Berkele, 1 (N. Y.) 633. The appoint- f a receiver of a firm is not in- ed by the fact that one of the s not made a party to the pro- s, it not appearing that the co- was not within the jurisdiction ourt, or had a substantial inter- he partnership. Stelzer *v.* La- 9 Ind. 435. In *Massachusetts* eld that a receiver will not be ted against a non-resident pur- of the interest of one partner, ting the business in another Harvey *v.* Varney, 104 Mass. ee Sheppard *v.* Oxenford, 1 K. ; Evans *v.* Evans, 9 Paige (N. .

re the defendant partner volun- ppears and files an answer, the ment of the receiver cannot be d collaterally in a subsequent Pressley *v.* Lamb, 105 Ind.

eiver will not be appointed on t request of the partners, where is pending. Pressley *v.* Harri- Ind. 14.

Fairburn *v.* Pearson, 2 M. & the bill alleged that the part- in question was a partnership and had been determined by in February, 1850, and prayed a tion accordingly. The evidence consisted of conflicting affidavits upon the point, whether the partnership was a partnership at will or for a term of twenty-one years, the plaintiff contending for the former and insisting on the fact of the dissolution. The Lord Chancellor was of opinion that the question could not be decided on the present motion; and, acting on the principle laid down in Peacock *v.* Peacock, 16 Ves. 49, directed an issue, to be tried at the next Yorkshire assizes, the terms of which issue to be, whether on the 11th of February, 1850 (the day after the service of the notice of dissolution), any partnership was subsisting between the plaintiff and the defendant.

3. In Peacock *v.* Peacock, 16 Ves. 49, the bill represented, that the defendant Peacock had verbally agreed to take into partnership with him in his business of law stationery the plaintiff, his son; to be entitled to equal moieties, from the first of October, 1803. Disputes arising between them, the plaintiff was compelled to quit the defendant's house where the business was carried on; and the defendant Peacock afterwards took the defendant Thomson into partnership with him. The defendant Peacock by his answer denied the agreement to admit the plaintiff into partnership. Lord Eldon said: "Taking it to be clear at this moment, that this was a beneficial partnership, the plaintiff having title to a certain definable, aliquot part of the profits at the period of dissolution; taking care, that what business is now in execution shall be considered as part of the partnership; and that all debts shall be paid. At some period such an account must be taken; and with a view to it the plaintiff is entitled to an investigation before a jury, in an issue,

(3) *Scope of the Application.* — Where one partner assumes payment of all the debts of the firm, and a creditor subsequently applies for a receiver, the application should cover not only the individual property of the partner, who has assumed the indebtedness, but should cover all the partnership effects.[1]

(4) *Effect of Reversal of Appointment.*—Where an order appointing a receiver in an action for an accounting between copartners is reversed on appeal, the receiver's fees and compensation must be paid by the unsuccessful party.[2]

c. EFFECT OF THE APPOINTMENT.—The effect of the appointment of a receiver is to prevent a creditor who obtains judgment after the appointment from having any lien which would give preference over other partnership creditors.[3]

d. RECEIVER'S POWERS AND DUTIES.—A receiver is entitled to the possession of all the moneys, property, and evidence of indebtedness of the firm;[4] and he may without special leave of

to ascertain, whether he is entitled, and in what share and amount, to the profits of this partnership. After the determination of that issue the account will be given upon the principle, resulting from the verdict; or, if the plaintiff shall appear to have no interest, the bill will be dismissed."

1. Henry *v.* Henry, 10 Paige (N. Y.) 314.

2. Weston *v.* Watts, 45 Hun (N. Y.) 219; 9 N. Y. St. Rep. 779.

3. Waring *v.* Robinson, Hoffm. Ch. (N. Y.) 524. In Van Alstyne *v.* Cook, 24 N. Y. 489, it was held that where an action was commenced by one of the partners for the dissolution of the partnership and the distribution of its effects, and before the order for the appointment of a receiver the sheriff levied on partnership property the execution of a creditor who had obtained judgment by default, the title of the creditor to the avails of such property was not overreached by that of the receiver.

In *California*, the filing of a bill by one partner for a dissolution, and an account, and the appointment of a receiver thereon, will not prevent a general creditor of the firm from proceeding by attachment and judgment, and thus gaining a priority over other creditors, at any time before a final decree dissolving the firm. Dunn *v.* McNaught, 38 Ga. 179; Adams *v.* Woods, 8 Cal. 152; 68 Am. Dec. 313; Naglee *v.* Minturn, 8 Cal. 540; Adams *v.* Woods, 9 Cal. 24; Williamson *v.* Wilson, 1 Bland (Md.) 428.

After a receiver has been appointed in a proceeding to wind up a partnership, a judgment creditor will not be permitted to claim rights in the fund paramount to the rights of creditors generally, by filing a creditor's bill after the entry of an order calling creditors together to prove their claims. Jackson *v.* Lahee, 114 Ill. 287.

The fact that the partnership property is in the hands of a receiver, pending an accounting between the partners, does not prevent one of them from selling his interest, with the consent of the other. Schurtz *v.* Romer, 82 Cal. 474.

A levy subsequent to the appointment of a receiver will not affect the receiver's title. Knode *v.* Baldridge, 73 Ind. 54.

One who purchases the interest of a partner after a receiver of the firm's assets is appointed cannot interfere with the property in the possession of the receiver. Noonan *v.* McNab, 30 Wis. 277.

4. In Wallace *v.* Yeager, 4 Phila. (Pa.) 251, the court by Hare, J., said: "The receiver succeeds not only to the legal title of the partners as joint tenants, but also to the equitable rights and remedies of the firm; his authority is conferred by law, and not like that of a voluntary assignee derived from the appointment of the parties." See also Miller *v.* Jones, 39 Ill. 54; Jackson *v.* DeForest, 14 How. Pr. (N. Y.) 81; Van Rensselaer *v.* Emery, 9 How. Pr. (N. Y.) 135; Gregory *v.* Gregory, 1 Sweeny (N. Y.) 613; Higgins *v.* Bailey, 7 Robt. (N. Y.) 613; Brush *v.* Jay, 113 N. Y. 482; Wallace *v.* Milligan, 110

urt bring any suit or action to recover possession of the property which he is entitled to hold.[1] He may also intervene and fend suits brought against the firm.[2] A receiver may, under e direction of the court, sell the partnership property,[3] pay

d. 498; Noonan *v.* McNab, 30 Wis. .

in Fincke *v.* Funke, 25 Hun (N. Y.) , where an order directed the partrs to convey the property to a rever, no title was held to vest in the eiver until the conveyance was exeed.

A receiver of the individual assets of partner has no right to interfere h the partner's interest in the firm perty. Hamill *v.* Hamill, 27 Md. .

A receiver was appointed in another te, the order directing a resident mber of a certain firm to transfer ck owned by him to such receiver, l making him an attorney in fact to nsfer such stock to himself as such eiver, on the company's books. *ld*, that the receiver acquired the al title by such assignment and ver of attorney, regardless of his e as receiver. Weller *v.* J. P. Pace bacco Co. (Supreme Ct.), 2 N. Y. pp. 292; 5 R. & Corp. L. J. 5.

A partner who is a receiver cannot ly the funds of the firm which have ne into his hands to the payment of ersonal debt due to him by the firm. dley *v.* Conner, 2 La. Ann. 87.

. Tillinghast *v.* Champlin, 4 R. I. ; 67 Am. Dec. 510; Helme *v.* Litohn, 12 La. Ann. 298.

Plaintiff, having been appointed rever of a partnership with power "to e possession of all the accounts, ck in trade, . . . and to collect outstanding debts due to said partship," brought an action in his own ne to collect a debt due the partship. *Held*, that whatever reason y have existed for refusing to per common-law receivers, such as intiff to sue in their own names, y existed no longer, under the *nnesota* Code; and that plaintiff, as officer intrusted with the administion of the partnership assets, had h a special property in them as to stitute him the "real party in inest," within the meaning of the tute. Henning *v.* Raymond, 35 nn. 303.

The possession and control of partship effects, and the authority to settle the partnership affairs, are, by the appointment of a receiver, vested exclusively in the officer. He is a necessary party to any suit affecting the partnership property. Kirkpatrick *v.* McElroy, 41 N. J. Eq. 539.

In *New York*, a receiver appointed in a partnership suit cannot sue for debts due the firm without leave of court. Fincke *v.* Funke, 25 Hun (N. Y.) 616.

2. In a suit against the members of a firm, whose affairs are in process of liquidation and in the hands of a receiver, the receiver may intervene, and, unless restricted by the order of intervenor, he may set up as many defenses as he may have reason to believe can be sustained, notwithstanding the plaintiff's objection that such defenses would inure to the benefit of the members of the firm, though not pleaded by them, where the judgment if obtained, would have the force and effect of a conclusive adjudication as to the plaintiff's right to share in the assets in the receiver's hands, such assets being insufficient to satisfy all creditors in full. Honegger *v.* Wettstein, 47 N. Y. Super. Ct. 125.

3. In Williams *v.* Wilson, 4 Sandf. Ch. (N. Y.) 379, a partnership in conducting an insane hospital and an immigrant lazaretto was broken up by controversies among the partners. The court appointed a receiver, and directed a sale of the movables and good will of the business. The court, by the vice chancellor, said: "It is manifest that the principal value of the establishment in which these gentlemen were partners consisted in the good will attached to it. . . . Then as to the course to be pursued by the receiver, when vested with the good will of the concern, it is impossible for him to conduct an insane hospital, or a lazaretto for foreign immigrants. The only practicable course is for him to sell immediately the lease of the premises where the business was conducted, with the good will of the business, and the movables which belonged to the institution. And in order to give efficacy to the sale of the good will, either of the parties may become

the debts,[1] and make distribution of the proceeds to the persons entitled.[2]

4. For Trust Property—*a.* GENERAL PRINCIPLES.—A court of equity is usually reluctant to displace a trustee by the appointment of a receiver; but where it appears that the trust property estate is being dissipated or is likely to be destroyed, a receiver will be appointed.[3]

the purchasers." See also Crane *v.* Ford, Hopk. Ch. (N. Y.) 114; Loney *v.* Penniman, 43 Md. 130; McNab *v.* Noonan, 27 Wis. 434; Noonan *v.* McNab, 30 Wis. 277.

But a sale will not be ordered unless some necessity appear. In Brush *v.* Jay, 113 N. Y. 482, in an action to dissolve a law firm, an order was made *pendente lite* appointing a receiver and directing him to take possession of certain abstracts of titles, the ownership of which by the firm was denied. The order further ordered the receiver to sell the abstracts, though no immediate necessity for such sale appeared. *Held*, that the order was erroneous, as anticipating a material issue on affidavits, and that the abstracts should remain in the receiver's possession until the trial and ultimate determination of the rights of the respective parties.

1. Kellar *v.* Williams, 3 Rob. (La.) 321; Maher *v.* Bull, 44 Ill. 97; Skipp *v.* Harwood, Dick. 114; Hospes *v.* Almstedt, 13 Mo. App. 270; Butler *v.* Sprague, 66 N. Y. 392.

2. Maher *v.* Bull, 44 Ill. 97.

Where substantial distribution of a fund in a receiver's hand for the settlement of a partnership can be made, such distribution should not be delayed because of a pending controversy concerning an outstanding claim for a small amount. Trayhern *v.* National Mechanics' Bank, 57 Md. 590.

3. If all the *cestuis que trustent*, or parties beneficially interested in an estate, concur in the application for a receiver, and the trustee consents, the court will make the order. Brodie *v.* Barry, 3 Merw. 695; Bartley *v.* Bartley, 9 Jur. 224.

In Burroughs *v.* Gaither, 66 Md. 171, it was held that where, by his will, a testator leaves his property to his son, in trust for the son's children, the income of the property to be applied to the support and education of such children until the youngest reaches the age of twenty-one years, when the whole property is to be divided among the several children, and by said will the trustee is to be held accountable to the children for the income of the property, the trustee takes beneficial interest in the estate; and it is such a trust as a court of equity has jurisdiction of; and the court can assume entire control and management of the property whenever its interposition is invoked by proper proceeding on the part of either the trustee or *cestui que trust* and such control is properly assumed by an order made when all the parties are before the court on proceedings for the removal of the trustee and appointment of a receiver.

Where a "trust" has been declared illegal, each certificate holder has the right to demand a settlement of the affairs of the trust and the appointment of a receiver, though the trustees are endeavoring to effect a reorganization on a legal basis. The "trust" is not a corporation, and hence the statutes relating to the reorganization of corporations do not apply. Cameron *v.* Havemeyer (Supreme Ct.), 12 N. Y. Supp. 126; Havemeyer *v.* Brooklyn Sugar Refinery, 59 Hun (N. Y.) 619.

Where a trust is created by an act of the Legislature, and vested in certain public officials, the court will not interfere except for the most urgent reasons. In Vose *v.* Reed, 1 Woods (U. S.) 647, the legislature created an internal improvement fund, which was vested in the governor, and other State officers as trustees. In refusing an application for a receiver over this fund, the court by Bradley, J., said: "It must be a very strong case, indeed, which will induce the court to take the property out of their hands and put it in the hands of its own officers. The Legislature has seen fit to intrust the chief officers of the state with these important duties, and it would show a great disrespect to this co-ordinate branch of the government for the judiciary, on light grounds, to displace these officers from the trust, and to put appointees of its own in

ISCONDUCT OF THE TRUSTEE.—If it appears that the has been guilty of misconduct, waste, or improper dispo- f the trust estate, or that he has an undue bias towards two conflicting parties, or that the estate is liable to be or destroyed, a proper case is made out for the appoint- f a receiver.[1]

ad. If they are guilty of f duty, they can be enjoined; be made personally responsi- fund can be followed in the persons getting hold of it in a ıt manner. It would be very f the courts could not in some re the rights of parties having st in the fund, without remov- the trust those official person- whose administration it has usted by the legislature. The l not shut its eyes to the fact e officers are constantly being by the suffrages of the people ate and the constituted power ntment; and it would be very ient and awkward for the the appointment of a receiver, old the property from the pos- nd management of new State fresh from the confidence of ple, and against whom no of incapacity or want of integ- been made. To my mind it be a case in which, if a receiv- appointed at all, the appoint- ght not to be made until every nedy has been tried in vain. looking at the peculiar and t duties attaching to the trust, uld a receiver, how could a thout the greatest embarrass- dminister the trust? How court take cognizance of the ents of a vast political terri- reference to drainage, develop- e-emption and population? It a herculean task for a court ceiver of a court, to perform. I feel that I ought to take the d out of the hands of the State n this case, and place it in the a receiver. The motion for a is therefore denied."

vlin *v.* Hope, 16 Abb. Pr. (N. it was held that a receiver will pointed at the suit of a person l a small interest in certain due for building public works, o misconduct was alleged on of the trustees who had been d to make distribution.

rustee will not ordinarily be appointed receiver. Sykes *v.* Hastings, 11 Ves. 363; ——— *v.* Jolland, 8 Ves. 72; Sutton *v.* Jones, 15 Ves. 584. But if it appears that such an appointment would be for the best interest of the estate, the rule will be departed from. Hibbert *v.* Jenkins, *cited* in Sykes *v.* Hastings, 11 Ves. 363.

1. In Middleton *v.* Dodeswell, 13 Ves. 266, Lord Erskine said that it was sufficient for the appointment of a receiver if a manifest abuse of the trust by wasting the property appears, not from a single act, but an habitual and prospective course of dealing, bringing the property into danger. See also Anonymous, 12 Ves. 4; Walker *v.* Morris, 14 Ga. 323; Jones *v.* Dougherty, 10 Ga. 274; Halcher *v.* Massey, 66 Ga. 66; Evans *v.* Coventry, 5 De G. M. & G. 918; Earl Talbot *v.* Hope Scott, 4 K. & J. 96; Malcolm *v.* Montgomery, 1 Hog. 93; Burroughs *v.* Gaither, 66 Md. 171; Ellett *v.* Newman, 92 N. Car. 519; *In re* Fowler, L. R., 16 Ch. Div. 723.

Where a trustee refuses to collect a debt belonging to the trust estate a receiver may be appointed. Sharp *v.* San Paulo R. Co., L. R., 8 Ch. App. 597; and also where a trustee fraudulently conveys lands. Gunn *v.* Blair, 9 Wis. 352; and where an irresponsible husband is trustee. Ladd *v.* Harvey, 21 N. H. 514; see also Robert *v.* Tift, 60 Ga. 566.

But in Barkley *v.* Lord Reay, 2 Hare 306, the court said that it would not "displace a competent trustee, or take the possession from him, unless he wilfully or ignorantly permitted the property to be placed in a state of insecurity, which due care or conduct would have prevented."

In Poythress *v.* Poythress, 16 Ga. 406, where an application was made to remove a testamentary trustee, the court held that mere bad habits and capricious conduct on the part of the trustee towards the *cestui que trust* were not sufficient to justify the appointment of a receiver, although they might be grounds ultimately for his removal from the trust.

c. INSOLVENCY OF THE TRUSTEE.—Where the trust estate endangered by the bankruptcy or insolvency of the trustee, receiver may be appointed.[1]

d. POVERTY OF THE TRUSTEE.—Mere poverty is not a reaso for the appointment of a receiver; but where the trustee is n only extremely poor, but also of a bad character and of drunk habits, a receiver may be appointed.[2]

e. WHERE THE TRUST ESTATE IS UNPROTECTED.—Where a the trustees have died, resigned or left the jurisdiction of t court, or where the several trustees have disagreed and quarrel over the management of the estate, a receiver may be appointed

The fact that the trustee mingles trust funds with his own, is not a sufficient ground for the appointment of a receiver. Orphan Asylum Soc. *v.* McCartee, Hopk. (N. Y.) 429. Nor will a receiver be appointed because the appointment can do no harm. Rogers *v.* Ross, 4 Johns. Ch. (N. Y.) 388; 8 Am. Dec. 575.

Where a trustee denies the trust a receiver may be appointed. McCandless *v.* Warner, 26 W. Va. 754. And also where a trustee of a pension refuses to pay the person and removes from the jurisdiction. Noad *v.* Backhouse, 2 Y. & Coll. C. C. 529; or where the trustee is irresponsible. Ellett *v.* Newman, 92 N. Car. 519; or where the trustee loans trust funds to a banking concern of which he is a member. North Carolina R. Co. *v.* Wilson, 81 N. Car. 223; or where the trustee entirely neglects his duties. Taylor *v.* Emerson, 4 D. & W. 117; or uses the trust funds on his own account. Albright *v.* Albright, 91 N. Car. 220.

1. In Steele *v.* Cobham, L. R. 1 Ch. App. 325, a sole trustee having become bankrupt, a receiver was appointed. Turner, J., said: "The sole executor and trustee having become bankrupt, and his assignees having no power to interfere with the trust estate, there is no person to take care of it in whom the court can place confidence. Under such circumstances it is proper to appoint a receiver."

Where an insolvent debtor makes an assignment for the benefit of creditors to a person who is also insolvent, a receiver will be appointed. In Haggarty *v.* Pittman, 1 Paige (N. Y.) 298; 19 Am. Dec. 434, the court by the Chancellor, said: "The allegation in the bill, that Pittman is insolvent, is not denied in his affidavit. This court will never, for a moment, sanction the idea th debtors in failing circumstances sh be permitted to put their creditors the power of an insolvent assignee, a voluntary assignment of their pro erty to him, although it is expressed be for the payment of their debts, for his indemnity against prior respo sibilities. They may lawfully pre one creditor to another, and indemni their securities in preference to eith but they have no equitable right jeopardize the honest claims of any, assigning their property to truste who are irresponsible. And the prop course for this court in such cases is appoint a receiver, on the applicati of the parties for whose benefit t fund is assigned." See also Jenkins Jenkins, 1 Paige (N. Y.) 243; Keyes Brush, 2 Paige (N. Y.) 311; *Ex pa* Walker, 25 Ala. 81; Dougherty McDougald, 10 Ga. 121; Ellett Newman, 92 N. Car. 519.

2. Everett *v.* Prythergch, 12 Si 363.

3. In Tidd *v.* Lister, 5 Mad. 429, a r ceiver was appointed where four tru tees had been named in the will, a one had died, and another was abroa the third had scarcely interfered in t trust, and the fourth agreed to the a pointment of the receiver.

In Swale *v.* Swale, 22 Beav. 5 there was a disagreement between tw trustees; the majority acted alone a took securities in their own name omitting the name of the other truste The court held that the plaintiff, wh was interested in the trust propert was entitled to a receiver. The mast of the rolls said: "The testator i tended to have the assistance and di cretion of three trustees, but here, as sometimes happens, they do not a amicably together, their united assis ance and discretion cannot be obtaine

or Co-tenants—(See *supra*, this title, *Appointment*).—This t has been fully discussed in the present title under the of *Appointment*, in the sub-head of *Particular Kinds of Where Receiver Appointed.*

or or Against Tenants.—See *infra*, this title, *For Real ty.*

f Rents and Profits.—See *infra*, this title, *For Real Property.*

etween Vendors and Purchasers.—See *infra*, this title, *For Property.*

fter Judgment—(See also SUPPLEMENTARY PROCEEDINGS) ENERAL PRINCIPLES.—In *England*, and in several of the *States*, it is the practice to appoint receivers upon cred- bills, after the return of an unsatisfied execution. The of the appointment is to discover and preserve the prop- the debtor until the litigation is ended.[1]

majority act alone in the ad- tion of the trust. In that state s, the plaintiff is entitled to receiver appointed. A neces- nown for some interposition to this property not merely for of the two tenants for life, the interest of the persons who eafter become entitled, who are *uris*, and are a class at present ained." See also McCosker , 1 Barb. Ch. (N. Y.) 329.

ad *v.* Backhouse, 2 Y. & Coll. 9, the court granted a receiver, t appeared that there was no within the jurisdiction of the

v. Barry, 3 Meriv. 695, was of a devise to four persons nts), their heirs, executors, all the testator's freehold and d estates, and all his works, trade, etc., and all his personal nd effects whatever, to hold, g to the nature of the estates ely, upon the trusts in the will ed; and the testator appointed e four persons his executors. he four only proved the will; bill charged that all the four arly those who had proved) d themselves of the personal nd entered into possession and of the real estates; therefore (among other things) an ac- nd a sale of the real estates, or ch as should not be necessary ing on the works in the bill ed; and the appointment of new in case of any of the four re- act, and in the meantime a re- pon a motion to refer it to the master, to appoint a proper person to be receiver, with the usual directions, it was alleged that all the defendants had appeared, but that no answers had yet been put in, and that the two defendants who had not proved, declined to act in the trusts of the will. Sir S. Romilly, in support of the motion, referred to the case of Beaumont *v.* Beaumont, 2 Dowl. N. S. 972, in which it was stated to be settled, that the court will, upon the application of all parties beneficially interested, appoint a receiver, when any of the trustees refuse to act. The lord chancellor, upon the authority of the case cited, made the order accordingly.

A trustee appointed by will to hold with another person as trustees with power of sale, certain corporate stock, and not being allowed to qualify because a non-resident, brought a bill in equity against the other trustee, alleging that, by reasons of dissensions between the parties, the stock could not be voted upon at an approaching meeting of the corporation so as to secure proper management of the affairs of the company, and asking the appointment of a receiver of such stock to vote upon it at the approaching meeting, and to sell the same under the will. The answer showed that the acting trustee had applied to the probate court for, and obtained an order of sale of the stock, on the ground that it was liable to depreciate. *Held*, that the proceedings of the probate court would not be disturbed, and the relief should be refused. Wanneker *v.* Hitchcock, 38 Fed. Rep. 383.

1. In Bloodgood *v.* Clark, 4 Paige

(N. Y.) 574, the court by the Chancellor said: "In these cases of creditors' bills, where the return of the execution unsatisfied pre-supposes that the property of the defendant, if any he has, will be misapplied, and entitles the complainant to an injunction in the first instance, it seems to be almost a matter of course to appoint a receiver, to collect and preserve the property pending the litigation. And where the sworn bill of the complainant shows that he has an equitable right to all the funds and property of the defendant, to satisfy his debt, if the right of the complainant is not denied by the defendant, in answer to the application for receiver, there can be no good reason why the complainant should not have a receiver appointed, to preserve the property from waste or loss. Indeed this court has already declared that it is the duty of a complainant, who has obtained an injunction, upon such a bill, restraining the defendant from collecting his debts, or disposing of property which might be liable to waste or deterioration, to apply to the court and have a receiver appointed without any delay. (See Osborn *v.* Heyer, 2 Paige (N. Y.) 343). It is no sufficient answer to such an application to say there may not be any property to protect; as the complainant proceeds at the peril of costs, if there is no property. And if there is nothing for the receiver to take the defendant cannot be injured by the appointment."

In a supplementary proceeding under *New Jersey* Rev., p. 393, a receiver should be appointed if there be a disputed right, or if there be probable grounds for believing property to exist which he may obtain; the results may be left to be determined in a subsequent suit by him. Colton *v.* Bigelow, 41 N. J. L. 266.

In Fields *v.* Jones, 11 Ga. 413, a receiver was appointed in a bill showing an execution on the property, and that it was the only property of defendant within the jurisdiction of the court, and that there were conflicting claims which might defeat an ultimate recovery unless the fund was placed in the hands of a receiver.

In Frazier *v.* Barnum, 19 N. J. Eq. 316; 97 Am. Dec. 666, a receiver was appointed to take charge of the rings and jewelry of the defendant, on the grounds that such articles being usually worn upon the person, the sheriff might not be able to levy upo them.

A judgment debtor denied that stoc standing in his name, on the books a corporation, belonged to him, ar stated that he had previously sold ar disposed of it. In such a case th judgment creditor is not concluded b the statement of the debtor, but ma obtain the appointment of a receiv who will be empowered to contest Hoyt *v.* Mann, 44 Hun (N. Y.) 62 See also Webb *v.* Overman, 6 Abb. P (N. Y.) 92.

Under the *South Carolina* statut any creditor who can make the requ site showing may institute supplemen ary proceedings. A creditor who o tains his judgment after the appoin ment of a receiver in proceedings i stituted by another creditor may ha an examination. He cannot, howeve have another receiver. Sparks *v.* Dav 25 S. Car. 381.

In an action by a bank against supplementary to execution to rea certain shares of mining stock claim to belong to G, but standing on t company's books in the name of G wife, it was held that the bank h such "an apparent right to or intere in" the stock, within the *New Yo* Code, upon showing that there w reasonable ground to apprehend th before the suit could be determine the stock would be removed beyo jurisdiction, or lost in some adver turn of G's affairs. Syracuse Sta Bank *v.* Gill, 23 Hun (N. Y.) 410.

For other cases illustrating the ge eral principle upon which receive are appointed after judgment, s Curling *v.* Townsend, 19 Ves. 62 Fitzburgh *v.* Everingham, 6 Paige (Y.) 29; Bank of Monroe *v.* Sherme horn, Clarke Ch. (N. Y.) 214; Brow ing *v.* Bettis, 8 Paige (N. Y.) 568; Fu ler *v.* Taylor, 6 N. J. Eq. 301; Gillin Campbell, 9 N. Y. St. Rep. 538; W son *v.* Chichester (N. Car. 1890), 12 E. Rep. 139; Coates *v.* Wilkes, 94 Car. 174; Hawkins *v.* Gathercole, Sim. N. S. 63; Rutherford *v.* Jones, Ga. 150; Bank of Wooster *v.* Spenc Clarke Ch. (N. Y.) 386; Sandford Sinclair, 8 Paige (N. Y.) 373; Root Safford, 2 Barb. Ch. (N. Y.) 33; Ba ker *v.* Dayton, 28 Wis. 367; McCrai *v.* Quinn, Rep. 7 Eq. 324 (Ir.); Mu rough *v.* French, 2 Mol. 497; Barker Herkimer, 43 Hun (N. Y.) 86; Hugh *v.* McKenzie (Supreme Ct.), 14 N. Supp. 352.

CREDITOR MUST USE DILIGENCE.—A receiver will not be inted at the suit of a judgment creditor, unless the creditor ised due diligence. He must file his bill within a reasonable after the return of the execution unsatisfied, or be barred this form of remedy.[1]

REMEDY AT LAW MUST BE EXHAUSTED.—The creditor have completely enforced his remedy at law before a court uity will interfere to aid him. Thus a bill for a receiver will be sustained where the creditor may issue execution and er his debt by the sale of the debtor's property.[2]

Iational Mechanics' Banking . *v.* Mariposa Co., 60 Barb. (N. 3; Gould *v.* Tryon, Walk. (Mich.) Fogarty *v.* Burke, 2 D. &. W.

n Parker *v.* Moore, 3 Edw. Ch. Y.) 234, which was decided on nber 25, 1838, the court, by the hancellor, said: "The bill itself that a writ of *fieri facias* has en issued since the year one thouight hundred and thirty-five; and exhibits a large present amount perty that could be taken under cution. The defendant is openly an extensive business, and in the sion of a large amount of propf his own. All that the complainis to do is to issue another writ of *facias* and levy. There would o be no obstacle in the way of his y at law."

Iart *v.* Tims, 3 Edw. Ch. (N. 6, it appeared that the defendant ot been served with the bill; and idavit showed that the proceedd been precipitated against him it necessity, or any previous no- the amount of the judgment or uch he was required to pay, al- he swore that he would have orthwith if he had been notified. urt refused to appoint a receiver. Congden *v.* Lee, 3 Edw. Ch. (N. 4, a creditor's bill was filed to receiver of the rents of real The court refused to appoint a er, on the ground that the comnt and sheriff had known of the tate before the return of the *fieri* . The court, by the vice-chansaid: "The authority of this and the extent of its jurisdiction, e cases of creditors' bills, are here clearly shown. This court will strict or limit itself, in regard to ee or order for a sale of lands, exhere it appears that the lands are by the judgment and that there is no impediment to a sale under an execution upon the judgment. Where it becomes necessary to file a bill in order to discover the defendant's ownership or seisin of lands thus bound, and this can then be effectually sold, this court, having rightfully obtained jurisdiction for the purpose of discovery, may, in addition to allowing the creditor to sue out a fresh execution at law, without prejudice to the bill, also appoint a receiver of the rents and profits, with power to let the premises, as mentioned in the 192d rule, until the sheriff's sale shall become absolute and the purchaser be let into possession under it; unless it shall appear that, upon the sheriff's sale, the property will bring enough to satisfy the judgment without resorting to the rents. So, likewise, a receiver of the rents and income of lands may be appointed, where the lands are so situated as not to be reached by an extension upon the judgment, or some obstacle exists to an effectual sale of the legal estate by the sheriff; and resort must be had to the power of this court to convert the lands into money, for the purpose of applying it to the payment of the judgment. Hence the 192d rule recognizes rents and the attornment of tenants, as subjects connected with receiverships upon creditors' bills.

"Then, as to the case in hand and the exercise of the powers of this court over the property in question. The facts, as they now appear by the answer and by the affidavits read in opposition to the motion of the complainants, show that there was no necessity for the complainants' coming into this court for a discovery of the defendant's real estate now sought to be reached. The complainants were informed beforehand of this particular property; and knew all about it. It was offered to them in satisfaction of their debt, before the judgment was obtained. When

It seems to be established by the weight of authority that a receiver will not be appointed prior to the return day of the execution.[1]

the sheriff called with the execution and inquired for property, he was referred, by the defendant, to the records of deeds for a description of the property which he could levy on and sell; and there was no impediment to such a sale. This must be supposed to have been well known, both to the complainants and the sheriff, who, nevertheless, returned the execution unsatisfied, without taking any step towards a levy or sale. There is no direct proof of collusion in this case between the complainants and the sheriff, but there is enough to show that the legal remedy had not been fairly exhausted when the bill was filed."

A receiver will not be appointed to sell an estate of a judgment debtor, disclosed by his examination in supplementary proceedings, where it does not appear that an execution has been issued and returned since the acquisition of the estate. Bunn *v.* Daly, 24 Hun (N. Y.) 526.

In a proceeding under *Minnesota* Gen. St., ch. 66, upon an order for the judgment debtor to appear and make disclosure of property, the truth or falsity of the return of the execution unsatisfied cannot be inquired into, nor whether the plaintiff wrongfully procured the same to be made when there was sufficient property upon which to make a levy. The appointment of a receiver in such proceedings is a matter resting in the sound discretion of the court before whom they are instituted. Flint *v.* Webb, 25 Minn. 263.

Since the rule that a creditor should sell the judgment debtor's land on execution and not seek to collect his judgment by means of supplementary proceedings, exists to save the judgment debtor's right of redemption, he cannot complain, where he has formerly consented to an order extending the receivership to the land in question. Webb *v.* Osborne, 7 N. Y. Supp. 762.

See also, in general, Starr *v.* Rathbun, 1 Barb. (N. Y.) 70; Second Ward Bank *v.* Upmann, 12 Wis. 499; Smith *v.* Thompson, Walk. (Mich.) 1; Beck *v.* Burdett, 1 Paige (N. Y.) 305; 19 Am. Dec. 436; Cassidy *v.* Meacham, 3 Paige (N. Y.) 311; Thayer *v.* Swift, Harr. (Mich.) 430; Steward *v.* Stevens, Harr. (Mich.) 169; Brinkerhoff *v.* Brown, 4 Johns. Ch. (N. Y.) 671; Austin *v.* Figueira, 7 Paige (N. Y.) 56.

1. "The doctrine may now be regarded as established, both upon principle and authority, that the return of an execution unsatisfied, before its return day and in the lifetime of the writ, does not lay the foundation for a receiver upon a bill in behalf of the judgment creditor." High on Receivers 273.

In Spencer *v.* Cuyler, 9 Abb. Pr. (N. Y.) 382, the sheriff, at the request of the plaintiff in the execution, returned the writ before the return day. The plaintiff then applied for a receiver. The court refused the application. Johnson, J., saying: "A return thus procured is, for this purpose, to be regarded as the act of the party, and not the official act of the sheriff. The remedy by execution, in such case, has not been exhausted, as the statute obviously intended it should be before these supplementary proceedings could be instituted. If the practice adopted in the case before us is to prevail, the issuing and return of an execution would become a mere empty form, and might as well be dispensed with altogether; and besides, it would naturally, if not inevitably, lead to the most intolerable favoritism and abuse. If we allow a sheriff to yield to the persuasion or dictation of a friendly or influential creditor, and fix at his own discretion or caprice different return days for different executions in his hands at the same time, we at once invest him with the dangerous powers of discriminating between creditors, and giving one a preference over another in respect to all the equitable assets of the debtors capable of being reached by these proceedings. This consideration alone seems to us a sufficient objection to the practice, without adverting to the hardship and oppression to which a defendant may be so readily and so summarily subjected under it." A similar conclusion was reached in Thayer *v.* Swift, Harr. (Mich.) 430; but see *contra* Tyler *v.* Whitney, 12 Abb. Pr. (N. Y.) 465; Cassidy *v.* Meacham, 3 Paige (N. Y.) 311; Bowen *v.* Parkhurst, 24 Ill. 257.

ECEIVERS NOT APPOINTED IN AID OF GENERAL CRED-—A court of equity will not interfere in aid of creditors who ot reduced their claims to judgment, or who have no lien he debtor's property;[1] but in *New York* this rule does not o partnership creditors;[2] nor, in *Wisconsin*, to the creditors ried women doing business as traders.[3]

RAUDULENT ASSIGNMENTS BY DEBTOR.—A fraudulent nent of his property by a debtor may be made the grounds appointment of a receiver on the application of a judg-reditor.[4]

ENIAL OF PROPERTY.—A denial by the defendant that he y property is not a sufficient ground to refuse the appoint-of a receiver;[5] but where the court is satisfied that the ant has really no property, a receiver will not be ted.[6]

Pelzer *v.* Hughes, 27 S. Car. 408, d creditors brought suit to set fraudulent a general assign- the benefit of creditors and a nsfer of choses in action. It ppear that the defendants were t, or that the property was in f being lost or injured. The d that it was error to appoint a during the litigation.

l *v.* Dillon, 10 Md. 500; 69 Am. , the bill alleged that the de- was largely indebted to the nant; that he was disposing of ; had sold his real estate, and ecting debts due to him, with ct of absconding. The court d a receiver. On appeal the as reversed, the court saying: ppellees are merely general of the appellant, who have ecuted their claim to judgment cution, nor in any other man- ired a lien upon the debtor's , and were not entitled to the njunction nor the appointment iver." See also Rich *v.* Levy, 74, where fraud was alleged; *v.* Armstrong, 2 Johns. Ch. see Haggarty *v.* Pittman, 1 N. Y.) 298; 19 Am. Dec. 434; . Myers, 42 Ga. 46, and Thomp- iffenderfer, 1 Md. Ch. 489, in hich cases fraud was alleged.

tt *v.* Dunn, 10 How. Pr. (N. Jackson *v.* Sheldon, 9 Abb. Y.) 127.

d *v.* Lee, 15 Wis. 365.

nah *v.* Sedgwick, 1 Barb. (N. ; Underwood *v.* Sutcliffe, 10 Y.) 453; Goodyear *v.* Betts, Pr. (N. Y.) 187; Journeay *v.* Brown, 26 N. J. L. 111; Bergen *v.* Littell, 41 N. J. Eq. 18. Even where there has been no fraud an assignment will sometimes be sufficient grounds for a receiver, as where an assignee for the benefit of creditors refuses to accept the trust. Suydam *v.* Dequindre, Harr. (Mich.) 347; or where the assignee mismanages the estate. Jones *v.* Dougherty, 10 Ga. 274.

5. Bloodgood *v.* Clark, 4 Paige (N. Y.) 574; Browning *v.* Bettis, 8 Paige (N. Y.) 568; Coates *v.* Wilkes, 92 N. Car. 376. In the latter case it was said that it need not be absolutely certain that there is property to justify the appointment of a receiver.

6. In Rodman *v.* Harvey, 102 N. Car. 1, on motion for the appointment of a receiver in proceedings supplemental to execution it did not appear probable that the debtor had anything except some notes which, though made payable to him, were made so by mistake and belonged to his wife, being taken to secure the purchase money for land sold by her. The court held that the motion should be denied. See also Fogarty *v.* Burke, 1 Con. & L. 565; Morris *v.* Hiler, 57 How. Pr. (N. Y.) 322.

But where a debtor is conducting a business ostensibly as the agent of his wife, and employing his minor sons to aid him, his interest is sufficient to warrant a decree appointing a receiver, where it appears that the property is in peril. Penn *v.* Whiteheads, 12 Gratt. (Va.) 74.

The courts will sometimes appoint a receiver over only a portion of the defendant's property. Corbet *v.* Mahon, 2 J. &

g. RULE AS TO REAL ESTATE.—Where real estate is in the possession of third parties or is claimed by them, a court of equity will proceed with extreme caution in the appointment of a receiver over such property.[1] The court may, however, appoint a receiver of the rents where the defendant is a life tenant;[2] or of the income where he is a beneficiary in a trust estate.[3]

h. LIENS.—The appointment of a receiver over the property of a debtor does not divest existing liens.[4]

i. TITLE OF RECEIVER.—The title of a debtor to his personal property usually passes to the receiver by virtue of the appointment.[5] In regard to real estate, however, it is usually

L. 671; Wardell *v.* Leavenworth, 3 Edw. Ch. (N. Y.) 244.

1. Where, in proceeding supplementary to execution, it is alleged that a third person has property of the judgment debtor's, it is error to restrain such third person from disposing of such property until the receiver can bring an action for its recovery, unless such person has been made a party, in some way, to the proceeding. Coates *v.* Wilkes, 94 N. Car. 174.

And even then the plaintiff must show a clear right to the property, or that he has some lien upon it, or that the property constitutes a special fund to which he may resort for satisfaction. Vause *v.* Woods, 46 Miss. 120; Tredennick *v.* Graydon, 1 Dr. & Wol. 316; Wilson *v.* Chichester (N. Car. 1890), 12 S. E. Rep. 139. See also Jones *v.* Pugh, 8 Ves. 71; Sweet *v.* Partridge, 1 Cox 433; Davis *v.* Duke of Marlborough, 1 Swanst. 74; 2 Swanst. 218.

2. Woodruff *v.* Johnson, 8 N. J. Eq. 729; 55 Am. Dec. 247.

3. Woodruff *v.* Johnson, 8 N. J. Eq. 729; 55 Am. Dec. 247.

4. In Chautauqua Co. Bank *v.* Risley, 19 N. Y. 369; 75 Am. Dec. 347, a debtor made a fraudulent assignment of his real estate, and afterwards judgments were recovered against him. The creditor having the first judgment, and having his execution returned unsatisfied, filed a bill in equity to set aside the assignment and for satisfaction of his debt. A decree was obtained declaring the assignment void as to creditors, and a receiver was appointed to whom the debtor made a general conveyance of his property by order of the court. The receiver then sold the real estate. The court held that another creditor, whose judgment was recovered before the filing of the bill, and who was not a party thereto, might sell the same real estate upon his execution, and that the grantee in the sheriff's deed acquired a title superior to that held by the purchaser from the receiver. See also Becker *v.* Torrance 31 N. Y. 631; Davenport *v.* Kelly, 4 N. Y. 193; Gere *v.* Dibble, 17 How Pr. (N. Y.) 31; Finnin *v.* Malloy, 3 N. Y. Supr. Ct. Rep. 382; McCorkle *v.* Herrman, 117 N. Y. 297.

A receiver appointed in supplementary proceedings is bound by a judgment subsequently recovered against the judgment debtor, in an action to recover possession of real estate pending at the time of his appointment, where it appears that notice of the pendency of the action together with the complaint was duly filed before the receiver's appointment. Spencer *v.* Berdell, 45 Hun (N. Y.) 179; 10 N. Y. St. Rep. 62.

A receiver appointed in proceedings supplementary to execution on a judgment against a building contractor is not entitled to money due the contractor from the owner of a building as against materialmen, although the liens of the latter were not filed until after his appointment. Deady *v.* Fink, 24 N. Y. St. Rep. 734.

A receiver may be appointed, in supplementary proceedings, notwithstanding that since their inception the debtor has made a voluntary assignment for the benefit of creditors. Tomlinson etc. Mfg. Co. *v.* Shatto, 34 Fed. Rep 380. See Chautauqua Co. Bank *v.* White, 6 N. Y. 236; 57 Am. Dec. 442.

5. **Personal Property.**—McEwen *v.* Brewster, 19 Hun (N. Y.) 337; Storm *v.* Waddell, 2 Sandf. Ch. (N. Y.) 505; Iddings *v.* Bruen, 4 Sandf. Ch. (N. Y.) 252; Wilson *v.* Allen, 6 Barb. (N. Y.) 542; Albany City Bank *v.* Schermerhorn, Clarke Ch. (N. Y.) 297; Caggeshall *v.* Howard, 1 Barb. Ch. (N. Y.) 368; Porter *v.* Williams, 5 How. Pr. (N. Y.)

d that the debtor shall make a formal conveyance of the ty.[1]

eceiver takes no title to property exempt by law.[2]

ople *v.* Hulburt, 5 How. Pr. 446; Moak *v.* Coatts, 33 Barb. 498.

Acquired Property.—But prop- quired by the debtor after the ment of a receiver does not pass receiver. Thus in Willison *v.* , 45 N. J. Eq. 257, at the time of ointment of a receiver in pro- s supplementary to execution, tor was executing a building t, the work being unfinished and then being due, it was held amount falling due afterwards pass to the receiver. See also ell *v.* Genet, 2 Hilt. (N. Y.) 290; . Bonnett, 31 N. Y. 9; *affirming* . (N. Y.) 54; 88 Am. Dec. 236; *v.* Minor, 72 N. Car. 424. An y the curtesy passes to the re- Beamish *v.* Hoyt, 2 Robt. (N. .

erty due a judgment debtor by ns of a will probated prior to ointment of a receiver in sup- tary proceedings is not property d after the appointment within aning of the *New York* Code o., §§ 2468, 2469, providing that eceiver obtains no title to the y of the debtor acquired after ointment. Crane *v.* Beecher, . St. Rep. 233; 6 N. Y. Supp.

rder was made in supplemen- oceedings directing third per- pay over to the sheriff moneys ng to the judgment debtor, the t the receiver of the latter had sly been appointed being sup- . *Held*, that such order was r. Columbia Bank *v.* Inger- Abb. N. Cas. (N. Y.) 241.

al Estate.—Under the *New* Code of Civ. Proc., § 2468, the perty of a judgment debtor be- absolutely vested in the receiver ed in proceedings supplemen- execution, when the order ap- g him as such, or a certified hereof, is filed in the county he land lies; and no deed is nec- Kimball *v.* Burrell, 14 N. Y. p. 536; Manning *v.* Evans, 19 . Y.) 500; Porter *v.* Williams, . 142; 59 Am. Dec. 519. See Nat. Bank *v.* Martin, 49 Hun (N. Y.) 571; Moak *v.* Coats, 33 Barb. (N. Y.) 498.

Under Code Civil Proc. *New Jersey*, § 2468, providing that the title to the judgment debtor's property shall vest in the receiver, in supplementary proceedings, from the time of filing in the county clerk's office of an original order of appointment, or an order extending the receivership, the title to the judgment debtor's land vests in the receiver on his filing for record in the county clerk's office the order extending the receivership, though the original order of appointment was not so filed. Webb *v.* Osborne, 7 N. Y. Supp. 762.

In proceedings supplementary to execution in *Minnesota*, the only property of the judgment debtor disclosed was an interest in real estate situate in Dakota Territory. *Held*, that the court had power to appoint a receiver, because the court might compel the debtor to execute a conveyance effectual to pass the real estate and enforce such order by proceedings in contempt. Towne *v.* Campbell, 35 Minn. 231.

A receiver appointed in supplementary proceedings may maintain an action to avoid a conveyance of real property made by the debtor to defraud his creditors, although there has been no transfer of such property to the receiver. Dunham *v.* Byrnes, 36 Minn. 106.

But the general rule applies only to real estate in the possession of the debtor. The appointment does not vest title in the receiver to property previously conveyed by the debtor in fraud of creditors. As to such property the receiver only has a right of action. Bostwick *v.* Menck, 40 N. Y. 383.

It seems that a receiver in supplementary proceedings, to whom a conveyance of real estate has been made by the judgment debtor, cannot maintain, as such, an action for the partition thereof. Miller *v.* Levy, 46 N. Y. Super. Ct. 207.

2. Exempt Property. — Finnin *v.* Malloy, 33 N. Y. Supr. Ct. 382; Tillotson *v.* Wolcott, 48 N. Y. 188; Sands *v.* Roberts, 8 Abb. Pr. (N. Y.) 343; Cooney *v.* Cooney, 65 Barb. (N. Y.) 524.

j. POWERS OF RECEIVERS.—The receiver has power to institute proceedings to enforce the rights of creditors. He may sue to recover debts due the debtor,[1] and he may institute actions to recover property fraudulently assigned by the debtor to third persons.[2] But in conducting such proceedings he acts

1. **Right to Sue.**—In Rogers *v.* Corning, 44 Barb. (N. Y.) 229, an action by a receiver to recover on a note due the debtor, was sustained. In Palen *v.* Bushnell, 18 Abb. Pr. (N. Y.) 301, a receiver was permitted to recover from third parties usurious interest paid by the debtor.

The receiver may proceed against the debtor himself for a conversion. Gardner *v.* Smith, 29 Barb. (N. Y.) 68.

In Turner *v.* Holden, 94 N. Car. 70, it was held that the execution debtor could not enforce a judgment after the appointment of a receiver, that right having become vested in the receiver.

A receiver appointed on a judgment creditor's bill by a Federal court, cannot maintain an action in another district to compel the surrender of securities belonging to the debtor. Brigham *v.* Luddington, 12 Blatchf. (U. S.) 237.

In supplementary proceedings the court found that money in the hands of a witness belonged to the judgment debtor and ordered it paid into the court. A third person claimed the money and the court appointed a receiver of the debtor's property, by whom an action to recover the money was brought against the judgment debtor, the claimant, and others who asserted title to the money. The jury found that it belonged to the judgment debtor and judgment was entered for the receiver. Meanwhile the money had remained in possession of the court. *Held*, that as all the redress sought could have been obtained in the original action pending when the second was brought, the judgment will be reversed, and the action dismissed. Wilson *v.* Chichester (N. Car. 1890), 12 S. E. Rep. 139.

Under the *New York* statute providing that where an account is judicially settled . . . and part of the estate remains, and is ready to be distributed . . . the decree must direct the payment thereof, etc. (*New York* Code Civ. Pro., § 2743), a receiver in supplementary proceedings may appear on the accounting of the debtor as administrator of his deceased wife. Estate of Gilligan, 18 N. Y. St. Rep. 812; 3 N. Y. Supp. 17.

Restrictions on Powers of Receiver.—But a receiver in supplementary proceedings cannot contest the probate of the will of the wife of the execution debtor depriving him of all interests in her estate. *In re* Brown, 47 Hun (N. Y.) 360. Nor can the receiver, in proceedings supplementary to an execution against a husband who has paid premiums in excess of $500 per annum, on a policy held by his wife on his life, maintain an action to reach any interest that the husband, the execution debtor, may have in the policy. Masten *v.* Amerman, 61 Hun (N. Y.) 244. The claim of a receiver, appointed in a proceeding supplementary to an execution issued upon a judgment against a legatee subsequently deceased, to the legacy, cannot properly be determined in an action to obtain construction of the will. Smith *v.* Edwards, 23 Hun (N. Y.) 223.

2. **Right to Set Aside Fraudulent Conveyances.**—A receiver in supplementary proceedings may maintain an action to recover real or personal property transferred by the judgment debtor in fraud of his creditors. Underwood *v.* Sutcliffe, 10 Hun (N. Y.) 453.

Such a receiver may maintain a suit to compel a fraudulent chattel mortgagee under a mortgage from the execution debtor, to account for the proceeds of the mortgage sale. Mandeville *v.* Avery, 3 N. Y. Supp. 745.

A receiver appointed in supplementary proceedings under the *New Jersey* statute can maintain suit to set aside as fraudulent, assignments made by the debtor after he had contracted the debt on which the execution issued, but before judgment. Bergen *v.* Littell, 41 N. J. Eq. 18.

See also Bostwick *v.* Menck, 4 Daly (N. Y.) 68; Porter *v.* Williams, 9 N. Y. 142; 59 Am. Dec. 519; Hamlin *v.* Wright, 23 Wis. 491.

In Porter *v.* Williams, 9 N. Y. 142; 59 Am. Dec. 519, the court by Willard, J., said: "The act which the receiver seeks to avoid in this case was an illegal

r those creditors on whose behalf he has been appointed, cannot maintain any action which they could not have ined.[1]

ROCEDURE—(1) *Notice.*—Where an application is made appointment of a receiver after the return of an un- d execution, notice must be given to the execution [2]

e debtor. The object of the to set aside an assignment the debtor with intent, as to defraud the creditor under udgment and execution the was appointed receiver, and the ditors of the assignor. Such ice was void at common law, expressly forbidden by the It is void as against the cred- the party making it, though between him and his grantee. ntiff, representing the interest editors, has a right to invoke of the court to set aside the nt. He stands, in this respect, ne condition as the receiver of ent corporation, or as executor nistrator, and like them can illegal and fraudulent acts of r whose estate he is appointed ister."

stwick *v.* Menck, 40 N. Y. 383, t by James, J., said: "It was purpose of this provision of to seize upon and sequestrate ment debtor's estate for the f all his creditors. Its pur- to furnish a cheap and easy discovering the concealed of a judgment debtor and ap- t to the satisfaction of the t or payments in which pro- were taken. When property to satisfy such payment or ts is reached, the purpose of intment of a receiver is ac- ed; that officer owes no duty creditors of the debtor."

urt has no power without per- tice to the judgment debtor, to order directing a receiver ap- in supplementary proceedings, any portion of the funds com- s hands in payment of judg- her than that under which he pointed, or those to which his hip has been extended as pre- y *New York* Code, § 2464, *et* s his duty to restore to the t debtor any surplus after the on of the judgments, and such an order, made without notice to the debtor, is not binding upon him, and would be no protection to the receiver. Goddard *v.* Stiles, 90 N. Y. 199.

Where a receiver in supplementary proceedings recovered judgment for property of the judgment debtor in the hands of a third person, sufficient to satisfy the judgment in respect to which he was appointed, and there is nothing to show that the judgment so recovered by the receiver is not good, he cannot sue to recover other property of the judgment debtor without proof that the receivership has been extended. Gifford *v.* Rising, 59 Hun (N. Y.) 42.

See also Kennedy *v.* Thorp, 51 N. Y. 174; Brown *v.* Gilmore, 16 How. Pr. (N. Y.) 527; Rodman *v.* Henry, 17 N. Y. 482; Olney *v.* Tanner, 18 Fed. Rep. 636; Teller *v.* Randall, 40 Barb. (N. Y.) 242; Pettibone *v.* Drakeford, 37 Hun (N. Y.) 628; Smith *v.* Woodruff, 1 Hilt. (N. Y.) 462; Bates *v.* Brothers, 2 S. & G. 509; Parks *v.* Sprinkle, 64 N. Car. 637; Riggs *v.* Whitney, 15 Abb. Pr. (N. Y.) 388.

In *England*, receivers instituted in bankruptcy proceedings are trustees for all the creditors equally. *Ex parte* Jay, L. R., 9 Ch. App. 133.

2. Strong *v.* Epstein, 14 Abb. N. Cas. (N. Y.) 322; Benjamin *v.* Myers, 3 N. Y. St. Rep. 284. A specific notice that a receiver will be applied for in supplementary proceedings is not necessary, when there is a general notice. Dilling *v.* Foster, 21 S. Car. 334. The rule under the *New York* Code, requiring notice to be in writing, applies in a supplementary proceeding to a notice to a judgment debtor of an application for the appointment of a receiver. Ashley *v.* Turner, 22 Hun (N. Y.) 226. In proceedings supplementary to execution, a receiver was appointed. and executors enjoined from making payment to the judgment debtor who had not been notified. *Held*, that the orders should be reversed. Morgan *v.* Von Kohnstamm, 60 How. Pr. (N. Y.) 162.

(2) *Extension of the Powers of a Receiver.*—It is usually pro vided by statute that where a receiver has been appointed upo the application of one creditor, his authority may be extende by an order of court so as to protect the rights of other cred itors.[1]

(3) *Miscellaneous Matters of Practice.*—Certain miscellaneou matters of practice relating to the appointment of receivers afte judgment, are collected in the note.[2]

1. A receiver was appointed on the application of a junior judgment creditor in supplementary proceedings, and his authority was subsequently extended to the senior judgment. *Held*, that his appointment would relate back to the commencement of prior supplementary proceedings on the senior judgment, and moneys coming into his hands would be first applied to the payment of the senior judgment. Guggenheimer *v.* Stephens, 17 Civ. Pro. Rep. (N. Y.) 383; 26 N. Y. St. Rep. 245; 7 N. Y. Supp. 263. See also Robinson *v.* Wood (Supreme Ct.), 15 N. Y. Supp. 169.

In supplementary proceedings in the city court of *New York*, an order was entered by a justice of that court extending the receivership of a person who had theretofore been appointed receiver of the same debtor in supplementary proceedings in the Supreme Court. Afterwards the order extending the receivership was vacated, and another person was appointed receiver by the justice of the city court. *Held*, that the appointment of a new receiver was unauthorized, under Code Civil Proc. New York, § 2466, which provides that only one receiver of the property of a judgment debtor shall be appointed. Where a receiver thereof has already been appointed, the judge must make an order extending the receivership to the special proceeding before him, instead of appointing a receiver; and section 2471, which provides that, when an order of extension is made, the control over, and direction of, the receiver remains in the court to whose control and direction he was originally subject. Garfield Nat. Bank *v.* Bostwick, 14 N. Y. Supp. 919.

The Code of *South Carolina* § 312, provides for supplementary proceedings, when an execution is returned unsatisfied. Section 318, after giving the circuit judge power to appoint a receiver of the judgment debtor's property, provides that the judge before appointment of a receiver, shal ascertain whether any other supple mentary proceedings are pendin against the judgment debtor; and, i such proceedings are so pending, th plaintiff therein shall have notice t appear before him, and shall likewis have notice of all subsequent proceed ings in relation to said receivershi No more than one receiver of th property of a judgment debtor sha be appointed, etc. The court hel that every judgment creditor, wh can make the requisite showing, ca institute supplementary proceeding and a creditor, who obtains judgme after appointment of a receiver in former proceeding, is entitled to hav an examination of the debtor; bu there can be only one appointment a receiver. Sparks *v.* Davis, 25 S Car. 381.

Though an action in the nature of judgment creditor's bill is pending, is error to dismiss proceedings suppl mentary to execution instituted in be half of another creditor against th same debtor. Monroe *v.* Lewald (N Car. 1890), 12 S. E. Rep. 287.

2. Courts.—A receiver in supplemen ary proceedings duly appointed by judge of the city court of *New Yor* has the same rights as such a receive duly appointed by a judge of the Su preme court. Hyatt *v.* Dusenbury, N. Y. St. Rep. 846.

It is not a substantial objection to a order appointing a receiver in suppl mentary proceedings that the title the action named "the N. Y. superi court," instead of "the superior court the city of New York." Terry Bange (Supreme Ct.), 9 N. Y. Sup 311.

Attorneys.—A receiver in suppl mentary proceedings may employ o his behalf the attorney of the party fo whose benefit the proceedings are inst tuted. Baker *v.* Van Epps, 60 Ho Pr. (N. Y.) 79; Day *v.* Brosnan,

)ver Decedent's Estates—*a.* IN GENERAL.—Where a proper made out, a court of equity will appoint a receiver over ate of a decedent, but a strong case must be shown to the court to dispossess an executor who is willing to act.[1]

Cas. (N. Y.) 312; see Branch ington, 49 How. Pr. (N. Y.) mming *v.* Edgerton, 9 Bosw. 685.

ling.—An order appointing a in supplementary proceedings ot be recorded in a register's Wright *v.* Nostrand, 47 N. Y. Ct. 441. See Dubois *v.* Cassidy, '. 298.

-Under *New York* Code Civ. '29, the omission of seals from l of a receiver in supplementary ngs, is an irregularity and not ional. Hyatt *v.* Dusenbury, 5 t. Rep. 846.

of the Proceedings.—Proceed- plementary to execution, and for ointment of a receiver, are not statutory proceedings such as affirmative proof of the facts ng jurisdiction when questioned lly, but simply proceedings to n, and entitled to all presump- regularity belonging to pro- in courts of general jurisdic- Vright *v.* Nostrand, 94 N. Y. 31.

Authority of Receiver Begins.— hority of a receiver appointed edings supplementary to exe- elates back from the time of fil- ond to the time of the order of nent, although the bond was l until after the death of the nd the appointment of an ad- tor. Peters *v.* Carr, 2 Dem. 22.

ion to Appointment.—Objection suing as a receiver in supple- proceedings was not duly ap- can not be taken by general r for want of legal capacity to alsh *v.* Byrnes, 39 Minn. 527.

ats.—A receiver appointed in ngs to sequestrate the property oration after the return of exe- gainst it unsatisfied, will not be to file an account where it ap- at no assets of the corporation ne into his hands. Lyons *v.* Hill Gold Min., etc., Co. (Su- t), 14 N. Y. Supp. 533.

al.—A receiver appointed in entary proceedings should not ved without his having notice harges made against him, and an opportunity to be heard. Bruns *v.* Stewart Mfg. Co., 31 Hun (N. Y.) 195. There should be no removal of the receiver unless accompanied by a substitution of a qualified receiver in his place. Terry *v.* Bange (Supreme Ct.), 9 N. Y. Supp. 311.

In proceedings supplementary to execution, the assignor of the claim upon which the judgment was recovered was appointed receiver. *Held*, that a motion for his removal would be granted. Gillin *v.* Campbell, 9 N. Y. St. Rep. 538.

1. In Haines *v.* Carpenter, 1 Woods (U. S.) 262; *affirmed* in 91 U. S. 254, the complainants alleged that the executor was unfit and incompetent to manage and successfully control the estate; that he had only cultivated a part of the land susceptible of cultivation, when, in the opinion of the complainants, all of it should have been cultivated; that he was endeavoring to defeat the bequest to a certain church, by depreciating the value of the estate, and that he was confederating with one Dennis to institute fictitious suits against the estate in order to sweep away its assets. The court refused the appointment of a receiver. Woods, J., said: "The party in possession of the property for which a receiver is asked is the executor named in the will of the testatrix, who is qualified in the probate court and given bond for the faithful discharge of his trust. Under these circumstances, the court should not displace him upon light grounds. And though a suit be instituted by a party having an interest in the estate, it does not follow that the trust created by the testator is to be set aside. A strong case must be made out to induce the court to dispossess a trustee or executor who is willing to act. . . . These charges are not directly made, but are stated on the information and belief of complainants, and they are not supported by a single affidavit to any fact. The application to appoint a receiver must be supported by evidence showing that the appointment is necessary. There is absolutely no testimony to support the application in this case. It is true that one of the complainants swears to the bill, but in

b. MISCONDUCT OF EXECUTOR OR ADMINISTRATOR.—Where an executor or administrator has been guilty of serious waste and gross mismanagement of the estate, or misappropriation of the funds, he may be dispossessed of his possession and a receiver appointed.[1]

doing so he only swears that he has been informed of and believes certain statements in his bill. This is not evidence, and gives no support to the application. The fact is that the court is asked to appoint a receiver in this case on mere rumor, without any proof showing the necessity of the appointment. But even if the fact were established that the trust property was in danger, that, of itself, would not be sufficient. It must be further shown that the party in possession is irresponsible. There is no proof that the executor is irresponsible, or his bond insufficient, nor is there any averment in the bill to that effect. The motion for a receiver must therefore be overruled." See also Harrup *v.* Wenslet, 37 Ga. 655; Dougherty *v.* McDougald, 10 Ga. 121; Brooker *v.* Brooker, 3 S. & G. 475; Powell *v.* Quinn, 49 Ga. 523; Delaney *v.* Tipton, 3 Hayw. (Tenn.) 14; Simmons *v.* Henderson, Freem. (Miss.) 493; Marvine *v.* Drexel, 68 Pa. St. 362.

1. In the leading case of Middleton *v.* Dodeswell, 13 Ves. 266, a motion was made before answer for a receiver. An affidavit by a son of the testator, one of the residuary legatees, stated that one of three executors and devisees in trust had let part of the trust premises to the Barrack Board at Hull, in his own name, only reserving a rent of £480 to himself alone; that large sums had been received by him, and were not laid out upon the trust of the will, viz., in real securities, or the public funds; that a bond had been taken in the names of two of the executors only for the produce of the sale of some shares in ships; and that the property in his hands was in danger of being lost or misapplied. The court appointed a receiver. Lord Eldon said: "If a manifest abuse of the trust, by wasting the property, appears, which does not appear in this instance, not from a single act, but an habitual and prospective course of dealing, bringing the property into danger, can it be said that this court is not to treat an executor as every other trustee; and an executor may say, that, unless he is proved to be insolvent, the court is to overlook the misapplication, and refus a receiver? To the proposition thu nakedly stated the answer is obviou Lord Eldon's decision must have bee the same that I shall make; that to in duce the court to interfere, especiall before answer, a strong, special groun must be made. It is true the time ha not come at which he is bound to pu in an answer; but he appears by coun sel, and comments upon the affidavi though he makes no affidavit himsel Yet, if it rested there, I should no grant the motion. I ground the ord upon this: that there is, what may b considered, though, perhaps, not th strongest way of expressing it, an affi davit that the property is in dange from insolvency, existing or suspecte by which only it can be in danger Another ground is, that the testato did not trust this executor alone, but i conjunction with two other person who are also executors and devisees i trust. Their consent gives grea strength to the application. Agreein therefore, that the administration i not to be taken from an executor upo slight grounds, I must in this cas make the order for a receiver."

In Clapp *v.* Clapp, 49 Hun (N. Y. 195, executors were directed by th testator's will to carry on a certai hotel. In a proceeding to remove ther from office on the ground that thei management was improvident, a re ceiver of all the personal property o the testator and of the hotel propert was appointed.

In Stairley *v.* Rabe, McMull. Eq (S. Car.) 22, the husband of an execu trix interfered with and mismanage the estate, and a receiver was appointe upon the application of the minor heir of the decedent.

In Price *v.* Price, 23 N. J. Eq. 428, receiver was appointed, where an ex ecutor upon his own admission ha wasted and misappropriated some o the funds of the estate.

In Ware *v.* Ware, 42 Ga. 408, a re ceiver was appointed at the suit of guardian where it appeared that th administrator was committing wast and was wholly insolvent.

VERTY, INSOLVENCY OR BANKRUPTCY OF THE EXECU- Mere poverty, or even insolvency of an executor, is not a t ground for the appointment of a receiver,[1] but it seems actual adjudication in bankruptcy presents a stronger the appointment of a receiver.[2]

EMOVAL OF THE EXECUTOR FROM THE JURISDICTION COURT.—When an executor removes from the jurisdic- the court, leaving both his *cestui que trust* and the trust vithin the jurisdiction, it is the duty of the court of equity application of the *cestui que trust*, to appoint a receiver.[3]

ER FOREIGN ESTATES.—In *England* a receiver is some- ppointed to take charge of decedent's estates situated [4]

NDING PROBATE PROCEEDINGS.—In *England*, the court cery will sometimes entertain a bill for the appointment

vard *v.* Papera, 1 Madd. 142, tion for a receiver on a bill filed an executrix for an account, the executrix might be re- from receiving the testator's In the affidavit in support of n, it was sworn that the exec- wife of the deceased, had no whatever of her own, and, there was danger to the of the testator.

ourt by the vice-chancellor misapplication or abuse of is made out against this exec- d it would be too much to administration of this testator's out of her hands merely be- e is poor; a circumstance o her husband, the testator, appointed her executrix. Mo- ed.

ght *v.* Duplessis, 1 Ves. 224, a motion for the appointment iver accompanied by an affi- t the testatrix was "a person r no fortune." There was no n of bad behavior on the part ecutrix. The court refused the

nymous, 12 Ves. 4, the master ls said: "The allegation goes r than this executrix is in mean nces. If any misconduct, improper disposition of the re shown, the court would in- terfere; but at present no case is a receiver." See also Fair- Fisher, 4 Jones Eq. (N. Car.) s *v.* Johns, 23 Ga. 31; Jenkins s, 1 Paige (N. Y.) 243.

le *v.* Cobham, L. R., 1 Ch. App. 325; Gladdon *v.* Stoneman, 1 Madd. 143*n*.

3. *Ex parte* Galluchat, 1 Hill Eq. (S. Car.) 148. See Davy *v.* Gronow, 14 L. J. N. S. Ch. 134.

4. Cockburn *v.* Raphael, 2 Sim. & S. 453; Smith *v.* Smith. 10 Hare App. 71. In Hervey *v.* Fitzpatrick, Kay 421, a person holding the office of judicial assessor to the native princes, and being also chief judge of Her Majesty's Dominions on the Gold Coast of Africa, took possession of the personal effects of a British subject, who died intestate, domiciled at Cape Coast Town, in Africa, and claimed to be the official administrator of these assets, by usage in his capacity of judicial assessor, and, as such, to be entitled to seven-and-one half per cent. commission upon them. He afterwards transmitted part of the assets to England to be sold, and the proceeds carried to the account of the testator's estate, and came to England himself on a leave of absence for a short time. The father of the intestate, being his sole next of kin, obtained letters of administration to him in England, and filed his bill against the judicial assessor for administration and for a receiver. And upon motion for a receiver in the suit, it was held that the court of chancery had jurisdiction to sustain the application, as the assets and the judicial assessor were both in England, whatever might be the nature of his authority; and that, there being the danger of his taking the assets again out of the jurisdiction, although he might be the proper representative of the intestate in Africa, a good case was made for the appointment of a receiver.

of a receiver, where litigation is pending in the ecclesiastical court for probate or administration.[1]

1. Rendall *v.* Rendall, 1 Hare 150; Wood *v.* Hitchings, 2 Beav. 289; Anderson *v.* Guichard, 9 Hare 275; King *v.* King, 6 Ves. 172; Atkinson *v.* Henshaw, 2 Ves. & B. 85; Ball *v.* Oliver, 2 Ves. & B. 97; Watkins *v.* Brent, 1 M. & C. 97; Jones *v.* Goodrich, 4 Jur. 98. In Colvin's Case, 3 Md. Ch. 279, a lunatic died, leaving a will which she had made when of sound mind. A dispute arose over the will, and, previous to the grant of letters *pendente lite*, a receiver had been appointed by the court of chancery. The appointment was held to be proper, but the duties of the receiver were said to terminate with the appointment of administrator *pendente lite*. The chancellor said: "There can, I presume, be no doubt of the authority of this court to protect the property of an intestate or testator, by appointing a receiver pending a litigation in the ecclesiastical court for probate or administration. It was assumed by Lord Eldon as free from doubt in the case of King *v.* King, 6 Ves. 172, and although apparently to some extent shaken by Lord Erskine, in Richards *v.* Chave, 12 Ves. 462, it has been fully and firmly established in subsequent cases. See Edmunds *v.* Bird, 1 V. & B. 542."

In Rice *v.* Tonnele, 4 Sandf. Ch. (N. Y.) 568, while litigation over a will was pending, an infant to whom an annuity had been bequeathed by the testator, and who, in the event of the will being set aside, was entitled, as heir, to one-fourth of the estate, filed a bill praying that maintenance might be furnished to her out of the estate, and asking that a receiver should be appointed to that end. It also appeared that, owing to her pecuniary condition, maintenance was necessary. It was held that the bill was properly filed, and that maintenance ought to be allowed to the infant, to an amount not exceeding the annuity; and that, if necessary to carry out the decree, a receiver ought to be appointed.

In Schlecht's Appeal, 60 Pa. St. 172, a will was admitted to probate, and on appeal an issue was directed. The executors were also devisees and in possession. The court held that a bill to restrain the executors from collecting rents, and for the appointment of a receiver disclosed no equity. The court by Sharswood, J., said: "It i impossible to sustain this proceedin in any aspect of the case. Dismissin the consideration of all formal objec tions, the bill discloses no equity t give the court jurisdiction. The de fendants under the will and probat had a *prima facie* legal right to th lands which were specifically devise to them, and of which they were i possession; but even if they had no if they were in possession withou color of title, that adverse legal claim ants should come into a court c equity and obtain an injunction, pre liminary or final, to turn them out c possession, is a proceeding entirel unprecedented. The plaintiffs have full and adequate remedy at lav They can recover possession by a action of ejectment, and the mesn profits either in that action or a sepa rate action of trespass. No authorit has been adduced in support of suc an arbitrary and unreasonable powe in any court summarily to turn an man out of his house or farm and ap point a receiver to collect the rent An injunction and receiver are re sorted to in any case only to preserv property in *statu quo* pending a cor test. For any waste the law has pro vided a remedy by estrepment, or a injunction may be enjoined if pre ferred; but anything like an avermer of waste is not to be found in the bil In Carron *v.* Ferrier, 18 L. T. N. S 806, it was decided that where a mer legal right is in dispute, there bein no privity between the different claim ants, no receiver will be appointed and in Earl Talbot *v.* Hope Scott, 4 K & J., Ch. Rep. 96, it was held to be to clear for any contention that in th absence of fraud, and when there is n privity between the parties, the cou will not interfere at the instance of person claiming real property under legal title, to grant a receiver again parties in possession. 'No one ha dreamt,' says the Vice-Chancello Wood in that case, 'of approachin this court, however heavy the litig tion between the parties, for the pu pose of obtaining a receiver until h had established his right at law t possession of the whole. The cou cannot interfere with a legal title c any description unless there be som

BEHALF OF JUDGMENT CREDITORS AGAINST EXECU-
-Where an executor is mismanaging or squandering an
a court of equity will sometimes interfere by the appoint-
a receiver to protect the interests of judgment creditors.[1]
HERE THERE IS NO PERSON TO PROTECT THE ESTATE.
re executors have died or refused to act, a receiver may
ointed upon the application of persons interested.[2]
ver Infants and Lunatics—(See *supra*, this title, *Appoint-*
-This subject is fully treated under *Appointment*, this
discussion of *Special Objects for Which Appointment*

ver Real Property—*a.* GENERAL PRINCIPLES.—A court
ty will only appoint a receiver over real estate pending
n as to title, where it appears, first, that the plaintiff has
nable probability of establishing his title; and, second,
ere is imminent danger of the rents and profits of the land
ost or squandered by the person in possession. Both of
onditions must appear or the court will refuse the appli-

y which it can affect the
e of the defendant.'"
Chappell *v.* Akin, 39 Ga. 177,
nt creditor filed a bill averr-
the executor had given no
that he was insolvent and of
ant habits, and that he was
ging the estate and was about
the country, and praying an
n and a receiver. No answer
. The court appointed a re-
See also *Ex parte* Walker, 25
Barker *v.* Clark, 12 Abb. Pr.
. Y.) 106.
ecutor was ordered by the will
on the testator's business. A
was recovered against him
rice of goods furnished for the
The executor refused to pay,
there were sufficient assets of
e, he personally, being insol-
ld, that a receiver of the estate
appointed to take the assets
the judgment. Willis *v.* Sharp,
N. Y.) 540.
Palmer *v.* Wright, 10 Beav.
aster of the rolls said: "Noth-
ink, can be more clear than
re there are two trustees and
, and one dies, and the sur-
uses to act, the persons benefi-
terested in the estate are en-
he protection of this court and
ver."
re misunderstanding between
utors is not a sufficient ground
ppointment of a receiver. Fair-

bairn *v.* Fisher, 4 Jones Eq. (N. Car.) 390.

3. In Bainbrigge *v.* Baddeley, 3 M. & G., 414, Lord Truro said: "When the parties are litigating the right to property, and the litigation depends upon questions then to be decided at law, what are the circumstances in which the jurisdiction is to be exercised and is properly applicable in granting a receiver? There are, I apprehend, two grounds, and two only; first, that there is a reasonable probability of success on the part of the plaintiff; and secondly, that the property, the subject of the suit, is in danger. This motion, however, is made against a party who is in possession; that possession is not shown to have been obtained by violence or wrong, using the word "wrong" in the sense of being without color of title, but under the sanction of the court. What, under such circumstances, is it proper for me to presume? What is the *prima facie* case, as far as concerns his title? Am I warranted in presuming that the will under which he claims is bad or good? I apprehend I ought to presume, until I have the case so before me as to enable me judicially to form an opinion upon the subject, that the will is good. This court ought not, in any case, to disturb the possession of a party who stands upon his legal title, without a reasonable probability that the plaintiff will ultimately succeed. I consider, therefore,

that one indispensable ground for the exercise of the jurisdiction is the reasonable probability shown to the court, that the parties claiming to disturb the possession will ultimately establish a title to it. I do not see any such reasonable probability here; not all using that expression to prejudice the plaintiff's title, or to express any opinion upon it. His case may be the strongest that ever was presented; it may, when it comes to be laid before the proper tribunal, entitle him to a verdict without any doubt or hesitation; but I have not the materials before me to warrant me in coming to that conclusion."

See also Chicago, etc., Oil, etc., Co. *v.* U. S. Petroleum Co., 57 Pa. St. 83; Davis *v.* Duke of Marlborough, 1 Swanst. 74; Scott *v.* Scott, 13 Ir. Eq. 212; Kipp *v.* Hanna, 2 Bland (Md.) 26; Wilson *v.* Wilson, 2 Keen 249; Mayo *v.* McPhaul, 71 Ga. 758.

On motion for the appointment of a receiver of the property of a decedent in possession of one claiming to be his son and heir, complainants alleged that they were the next of kin and collateral heirs of decedent, who died without lineal heirs, and that defendant was his illegitimate son. Defendant answered that he was his legitimate son and heir, and there was evidence showing that decedent had lived for many years with defendant's mother, recognizing her as his wife, and defendant as his son. After living thus together, defendant's mother entered into illicit intercourse with another man, and was repudiated by decedent, and afterwards both he and the woman stated that they had never been married. Decedent deeded all his property to defendant and the deeds were attacked by complainants as invalid. *Held*, that as defendant could suffer no great harm by holding that complainants had established a *prima facie* right to the estate, defendant would be appointed receiver on giving bonds until final hearing. Robinson *v.* Taylor, 42 Fed. Rep. 803.

In Cole *v.* O'Neill, 3 Md. Ch. 174. it was held that where the plaintiff shows an equitable title to a part of the property in controversy and a legal and equitable title to the remainder and the defendant shows no title legal or equitable, a receiver will be appointed. See also Jones *v.* Pugh, 8 Ves. 71.

The court will not appoint a receiver unless it is manifest that the property is being mismanaged and in danger of being lost or that it is in the possessio of an insolvent or unfit person. Ven able *v.* Smith, 98 N. Car. 523; Chase' Case, 1 Bland (Md.) 213; 17 Am. Dec 277; but where the property is alread in the possession of the court, the re ceiver will be continued in possessio until the rights of the parties are ascer tained. State *v.* Allen, 1 Tenn. Ch. 51

The general rule that equity will no interfere where there is an adequat remedy at law is strictly applied in thi class of cases. Empire Paving, etc., C *v.* Robinson, 58 Hun (N. Y.) 603; Mc Cool *v.* McNamara, 19 Abb. N. Ca (N. Y.) 344; Rollwagen *v.* Rollwage 59 Hun (N. Y.) 625; Clay *v.* Cla (Ga. 1890), 12 S. E. Rep. 1064; Walte *v.* Walters (Ill. 1890), 23 N. E. Re 1120; Carrow *v.* Ferrier, L. R., 3 Cl App. 719; Earl Talbot *v.* Hope Scot 4 K. & J. 97; Pfeltz *v.* Pfeltz, 14 M 376; Chases Case, 1 Bland (Md.) 20 17 Am. Dec. 277; Lloyd *v.* Passing ham, 16 Ves. 59; Vause *v.* Woods, Miss. 120; Mordaunt *v.* Hoofer, Amb 311; Gregory *v.* Gregory, 33 N. Supr. Ct. 1; Cofer *v.* Echerson, 6 Iow 502; Owen *v.* Homan, 3 M. & G. 37 Lancashire *v.* Lancashire, 9 Beav. 12 Skinners Co. *v.* Irish Soc., 1 Myl. & 162; Municipal Com. *v.* Lockhart, 3 Eq. 515; Chicago, etc., Oil, etc., Co. U. S. Petroleum Co., 57 Pa. St. 8 Parkin *v.* Seddons, L. R., 16 Eq. 3 Clark *v.* Ridgely, 1 Md. Ch. 70; Wi lis *v.* Corlies, 2 Edw. Ch. (N. Y.) 28 Cremen *v.* Hawkes, 8 Ir. Eq. 15 Schlecht's Appeal, 60 Pa. St. 172; Ma *v.* McPhaul, 71 Ga. 758.

Lis Pendens.—Where the plaintif interest in the land in controversy secured by a *lis pendens* and the so vency of the defendant affords reaso able security against loss of the mes profits, the refusal to grant an inte locutory injunction and to appoint receiver is not an abuse of judicial di cretion. Clay *v.* Clay (Ga. 1890), S. E. Rep. 1064; Gregory *v.* Grego 33 N. Y. Super. Ct. 1.

Over What Property Receiver Is A pointed.—A receiver may be appoint over property escheated to the Sta People *v.* Norton, 1 Paige (N. Y.) 1 over crops, Williams *v.* Green, 37 G 37; over a benefice charged with debt, White *v.* Bishop of Peterborou 3 Swanst. 109; Silver *v.* Bishop of N wich, 3 Swanst. 112; over an est which may be extended by *eleg* Davis *v.* Duke of Marlborough, Swanst. 74; over a bankrupt's esta

BETWEEN LESSOR AND LESSEE.—Where a person is vith title and possession under a lease, and is in the en- of rights apparently legal, a receiver will not be appointed ıe plaintiff shows a clear right with such attending cir- ces of danger to the rents and profits as will move the ce of a chancellor to interfere.[1]

PROCEEDINGS TO AVOID FRAUDULENT CONVEYANCE.— edings to avoid a fraudulent conveyance of real estate, appears that the grantor was of weak intellect and that ideration was grossly inadequate, a case is made out for ointment of a receiver.[2]

Shannon, 9 Nat. Bank. Reg. ean *v.* Lafayette Bank, 3 U. S.) 503; Hollis *v.* Bryant, 2.

ence.—He who applies for a ver real estate must use due Hager *v.* Stevens, 6 N. J.

hicago, etc., Oil, etc., Min. 5. Petroleum Co., 57 Pa. St. 1. (Pa.) 521, the bill prayed e of forfeiture of an oil lease e defendants, and for the ap- of a receiver for the lessee's e oil. The court refused the , Agnew, J., saying: "The ose is to take into custody will be mesne profits in the establishing the forfeiture. e case in any direction, and n it is to obtain our assist- ving effect to an alleged for- l to restrain the defendants xercise of their legal rights ease, while the plaintiffs are ı experimenting at law for re. It is not for the protec- clear and well defined right, vent an irremediable injury ensue if we do not intervene, e ordinary case of one who quitable right in the subject and asks the court to inter- security until the termina- ation. The appointment of s the exercise of a power in oceeding in equity, and is the ound discretion. The court nvinced that it is needful and opriate means of securing a . Such an appointment is a sure, and not to be exercised . Where a party is clothed and possession such as are by a lease in writing, and is rment of rights apparently eiver will not be appointed er urgent and peculiar cir- cumstances. The plaintiff must show a clear right in such a case, or a *prima facie*, with such attending circumstances of danger or probable loss as will move the conscience of a chancellor to interfere. Finding no such elements in this case the bill is dismissed, and the costs ordered to be paid by the plaintiff." See also Taylor *v.* Emerson, 6 Ir. Eq. 224; Whitelaw *v.* Sandys, 12 Ir. Eq. 393; Fetherstone *v.* Mitchell, 9 Ir. Eq. 480; Huerstel *v.* Lorillard, 7 Robt. (N. Y.) 251; Cremen *v.* Hawkes, 8 Ir. Eq. 503; Nesbitt *v.* Turrentine, 83 N. Car. 535; Marmer *v.* Chamberlain, 21 Wis. 251; Emerson's Appeal, 95 Pa. St. 258.

Where a minor is threatened with eviction for nonpayment of rent, a receiver may be appointed. Whitelaw *v.* Sandys, 12 Ir. Eq. 393. And also where an insolvent tenant wrongfully holds over. Nesbitt *v.* Turrentine, 83 N. Car. 535.

2. In Stilwell *v.* Wilkins, Jac. 282, Lord Eldon, said: "I am ready to admit that I do not remember any instance of a receiver being so appointed; but still the question is, whether there may not be a case where it ought to be done. If the case stated be true, and it is more than probable that it is true, the inadequacy was so monstrous, the situation of the young man and the state of his intellect were such that it is hardly possible to suppose that the transaction can stand; and I think, therefore, that this is a case where such an order may be made, though it is not the general habit of the court." See also Huguenin *v.* Baseley, 13 Ves. 105; Mitchell *v.* Barnes, 22 Hun (N. Y.) 194.

After a decree in an action to subject property fraudulently conveyed, a receiver may be appointed, though not prayed in the bill, where the circumstances justify it. Shannon *v.* Hanks (Va. 1891), 13 S. E. Rep. 437.

d. FOR THE PROTECTION OF DOWER.—In a proceeding b widow to have her dower interest set aside, if it appears that t person in possession is insolvent and that there is great risk the rents and profits being lost, a receiver will be appointed.[1]

e. IN CASES OF TRUSTS AND WILLS.—In proceedings to force a testamentary trust or a devise, a receiver may be appoint if the court is satisfied that the intention of the testator has be disregarded and that the rents and profits are in peril.[2]

In an action by a judgment creditor to set aside, as fraudulent, conveyances made by the judgment debtor to her sister, and by the latter to defendant, a motion for an injunction to restrain the defendant from collecting the rents, and for the appointment of a receiver, was made on allegations of fraud in the complaint and affidavits, on a general statement of information only, and on an affidavit alleging admission by defendant, and also by one who held mortgages on the property, and who was alleged to be a party to the fraud. The allegations were positively denied in the answer and affidavits, and the alleged admissions which were very improbable, were also denied in the affidavits, which further stated facts showing the conveyance to defendant to have been taken by him for the protection of the holders of mortgages on the property, which were valid incumbrances, and that defendant had managed the property in good faith and as well as it could be done, for the benefit of all concerned. Plaintiff's judgment was subsequent to all the mortgages, and to the deed of defendant. *Held*, that the motion for an injunction and a receiver should be denied. Empire Paving, etc., Co. *v.* Robinson, 58 Hun (N. Y.) 603.

In a suit to set aside, as against a subsequent grantee, a deed absolute in form, on the ground of a trust in favor of the grantor, a receiver of rents and profits *pendente lite* will not be appointed. McCool *v.* McNamara, 19 Abb. N. Cas. (N. Y.) 344.

1. Chase's Case, 1 Bland (Md.) 206; 17 Am. Dec. 277; Knighton *v.* Young, 22 Md. 359; Rollwagen *v.* Rollwagen, 59 Hun (N. Y.) 625; Bryan *v.* Moring, 94 N. Car. 694.

2. Hamburgh Mfg. Co. *v.* Edsall, 7 N. J. Eq. 298; 8 N. J. Eq. 141.

When a tenant for life neglects to pay the taxes from the rents, and make the necessary repairs, a receiver will be appointed to collect the rents and discharge the tenant's liabilities. Murch *v.* J. O. Smith Mfg. Co. (N. J. 1890) Atl. Rep. 213; Cairns *v.* Chabe Edw. Ch. (N. Y.) 312; Hart *v.* Tul Hare 611; Brigstocke *v.* Mansel Madd. 47 (1st Am. ed.); King *v.* K 41 N. Y. Super. Ct. 516; Carte Youngs, 42 N. Y. Super. Ct. 418; *I* Fowler, L. R., 16 Ch. Div. 723. In onymous, Ambl. 311, note 1, a rece was appointed against a tenant hold over from a term under a tenant for

Where there are disputes am trustees and the property is ther imperiled, a receiver will be appoin Wilson *v.* Wilson, 2 Keen 249.

In Podmore *v.* Gunning, 5 Sim. a receiver was appointed where holders of the legal estate were ac in disregard of the testator's intenti

In Rollwagen *v.* Rollwagen, 59 (N. Y.) 625, plaintiff had an estate life in certain real property in wh defendant had an estate in dower, ject to plaintiff's life estate, and o parties owned the fee, subject to life interests. Defendant was in p session, and collected the rents by c sent of the parties. *Held*, that plai was not entitled to the appointmen a receiver of the rents and profits, cause taxes had not been paid prom by defendant where all taxes, with terest had been paid before suit brought, and plaintiff was not aske contribute to the interest; nor beca defendant failed to keep the prem in repair, so that the board of he filed complaints, it appearing that property consisted of tenement-hou that the character of the compla was not unusual, and that all compla made before the action had been c plied with; nor for delay in render accounts and paying plaintiff her pro tion of the rents, the character of occupants being such that it was possible to collect rents promptly that the delay did not appear to be reasonable or willful.

Receivers are sometimes appoin pending contests over wills. Fin *v.* Blake, 1 Moll. 158; but the rule u

) PROTECT ANNUITANTS.—Where it appears that an annu-
ged on land is in arrears and that the property is an in-
t security for its payment, a receiver may be appointed.[1]

AID OF EJECTMENTS.—A court of equity will not, ex-
extreme cases, interfere to appoint a receiver, pending
n of ejectment. If, however, the plaintiff shows a *prima*
se and, at the same time, it appears that the defendant
ssion is insolvent or is mismanaging the property, and that
s and profits are in peril, the court may at its discretion
and appoint a receiver for the protection of the property.[2]

AID OF CREDITORS HAVING AN EQUITABLE LIEN.—
an equitable incumbrancer or creditor obtains a decree
sale of real estate, or shows by his bill a clear case enti-
n to enforce his claim out of real estate, he may be pro-
s to the rents and profits accruing during the litigation,
ppointment of a receiver.[3]

BETWEEN VENDORS AND VENDEES.—Upon a bill in
o enforce the specific performance of a contract for the
real estate, a receiver may be appointed, if it appears
vendee is insolvent and that he is about to assign the

ils that the legal title must
tablished by showing the va-
e will before equity will inter-
bbin *v.* Adams, 8 Ir. Eq. 157;
s Appeal, 60 Pa. St. 172;
v. Daniel, 3 Hare 207;
. Duplessis, 2 Ves. 360; Clarke
Russ. & M. 103; Jones *v.*
Madd. 1.

den *v.* Shearman, 2 Ir. Ch.
; Kelly *v.* Butler, 1 Ir. Eq.
e *v.* Lockwood, 2 Mol. 498.
Rollwagen *v.* Rollwagen, 59
Y.) 625; Lord D'Alton *v.*
on, 2 Dr. & War. 531; Sollory
, L. R., 9 Eq. 22; Buxton *v.*
se, Coop. 41; Beamish *v.*
Ir. Eq. 361; Mayor of Balti-
Chase, 2 Gill & J. (Md.) 376;
v. Probasco, 30 N. J. Eq. 108;
Small, 22 Beav. 72; Milhous
m, 78 Ala. 48.

le *v.* Mayor, etc., of N. Y., 10
(N. Y.) 111.

one of two claimants of land
to mine, and, probably, to
waste, and his solvency is
a receiver may be appointed
ffs showing that the two are
rs and devisees, and that the
harged with the payment of
estator. But defendant should
an opportunity to give secu-
e the property is taken from
. Stith *v.* Jones, 101 N. Car.
360. See also Whitney *v.* Buchman, 26 Cal. 447.

3. In Pritchard *v.* Fleetwood, 1 Meriv. 54, it was held that if a purchaser of the legal estate in land subject to an equitable rent-charge, refuses to pay the rent-charge, a receiver will be appointed. The lord chancellor said: "When a person takes a conveyance of a legal estate subject to equitable interests, he must satisfy those interests, or submit to the appointment of a receiver. It seems reasonable that the arrears and growing installments of the two annuities to which the title is not disputed should be paid to the plaintiff, and that the arrears and growing installments of the other annuity should be paid into court. I cannot, in this stage of the cause, make an order for such payments, unless by consent. But, if Mr. Fleetwood consents to such an order, I shall refuse the application for a receiver." See also Shee *v.* Harris, 1 J. & L. 91; Webb *v.* Van Zandt, 16 Abb. Pr. (N. Y.) 314.

But a husband who spends money upon his wife's realty will not be entitled to a receiver of the rents and profits to enforce his claim for a repayment of the money Wiles *v.* Cooper, 9 Beav. 294; and this is also the case where a husband claims that his wife's fortune has been charged upon defendant's real estate. Drought *v.* Perceval, 2 Mol. 502.

property in controversy together with all of his other propert to a trustee for the benefit of creditors.[1] The relief is als granted in favor of the vendee where the vendor has fraud lently repossessed himself of the property.[2]

1. In Hall *v.* Jenkinson, 2 Ves. & B. 125, in a suit for the specific performance of a contract for the sale of land the plaintiff moved for the appointment of a receiver, alleging in an affidavit, that, since the bill was filed, he had discovered that the defendant was insolvent; and that all his real and personal estate, including the estate which was the subject of a contract, were to be conveyed and assigned to trustees for the benefit of his creditors. The court granted the motion. The lord chancellor said: "Under the peculiar circumstances of this case a receiver ought to be appointed. From the long correspondence that passed between the parties, they seem to have dealt with more liberality than occurs in the caution usually observed between vendor and vendee. The purchaser, having given his bill of exchange for the deposit, which, though not paid when it became due, was taken up sometime afterwards, was let into possession; not exclusively, but it was a sort of mixed possession; the greater portion of it being in the vendee, but the vendor not being entirely out of possession. On these grounds, therefore, that, if the contract can be carried into execution the vendor has a lien on the estate for the remainder of the purchase money; that, if it cannot be executed the purchaser has a lien to the extent of the money paid by him on account of his purchase; that the purchaser is insolvent; that by attempting to sell and convey the estate the title would be embarrassed, and, lastly, that the possession has never been a clear and exclusive possession of the purchaser, but a mixed possession of both. Under these circumstances I am of opinion that a receiver ought to be appointed."

In McCaslin *v.* State, 44 Ind. 151, the court, by Buskirk, J., said: "There seems to be no room to doubt that the cutting down and removing of valuable timber from the land in controversy, and especially where defendant only claimed the title and possession of such land under a title bond, the purchase money being unpaid, and it being alleged and proved that the defendant was insolvent, would be such material injury as would justify the court in appointing a receiver to take charge and preserve such land during the lit gation."

In Boehm *v.* Wood, 2 J. & W. 2 there was a motion for the appoi ment of a receiver in a suit for the sp cific performance of a contract for t sale of land. Counsel for the plaint stated that the appointment of a r ceiver was particularly called for, as t property consisted of buildings and fices on which it would be necessary effect insurance, and of ornamen grounds which required considerab expenditure and attention; and that defendant's objections to the title h been answered, but that some ti must elapse before the cause could heard. The counsel for the defenda opposed the motion on the ground th all the objections to the title had been removed, and that the expense a receiver, if one was appointed, oug to be borne by the vendor, whose du it was to have his title ready. T lord chancellor made an order a pointing a receiver, but reserving t question, at whose expense it should See also Boehm *v.* Wood, T. & R. 3

Purchasers of real estate claimi against an adverse party in possessi may have a receiver appointed pendi a bill to quiet title. Metcalfe *v.* Pulv toft, 1 Ves. & B. 200. Receivers w be appointed to protect purchasers judicial sales out of possession. Co coran *v.* Doll, 35 Cal. 476; Mays Rose, Freem. (Miss.) 703.

A son agreed to cultivate his fathe farm for him during the latter's li and the father agreed to leave the fa to his son at his death. The son c tivated the farm, as agreed, until death, which occurred before that his father. *Held*, that his son's wid and heirs could not, in a suit for spe fic performance, have the farm plac in the hands of a receiver during t father's life. Walters *v.* Walters, Ill. 467.

2. In Dawson *v.* Yates, 1 Beav. 3 an agreement was entered into Yates for the sale of an estate to W son to be completed and the purcha money to be paid on or before the piration of five years, and in the me time interest on the purchase-mon

ivers are frequently appointed in favor of the purchasers ing properties. In such cases the peculiar character of perty and the necessity that the mines should be kept in on, make it proper that the purchaser should be afforded nal relief.[1]

ROCEDURE.—The order appointing a receiver over real should describe the property.[2] Where the emergency is e the order may be made on the bill and affidavits, and answer;[3] but the person in possession of the property or whom the receivership is sought should be a party.[4]

one receiver will be appointed of the same property. If re several applications, the receivership may be extended.[5]

UTIES AND POWERS OF A RECEIVER OVER REAL PROP-—The principal duty which the receiver of real estate is d to perform, is to collect the rents and profits of the To enable him to perform this duty, where the real estate er lease, an order of court may be made, requiring the s to pay their rent to the receiver.[6]

receiver may ordinarily distrain for rents in arrear with-special order of court. If, however, the arrears are for han a year, or there is a question as to who is entitled to t, an order of court should be obtained.[7]

e paid half yearly by the pur-the vendor reserved a right of the contract in case the inter-ld be in arrears twenty-one o enable Wilson to pay the in-en in arrear, Dawson advanced money on mortgage of Wil-erest in the property, and the fterwards verbally agreed with to extend the term for the pay-the half yearly interest. The became afterwards in arrear in ay that Yates by the original nt had a right to annul the con-ut he had no such right he varied agreement. Yates ed as for a forfeiture. The the application of Dawson ap-a receiver over the property.

l *v.* Taylor, 22 Cal. 191; Gibbs l, L. R., 20 Eq. 373; Carter *v.* 4 N. Car. 348.

ow *v.* Wood, 13 Beav. 271. odyatt *v.* Gresley, 8 Sim. 180. ys *v.* Wherry, 3 Tenn. Ch. 34. se *v.* Ashe, 1 Ir. Eq. 210; Kelly dge, 8 Ir. Eq. 228.

Hobson *v.* Sherwood, 19 Beav. chard held part of the prop-controversy under a lease. A of the property having ppointed, Pritchard several aid rent to him, but after-refused to make any further payment. The court made an order directing Pritchard to pay the arrears of rent to the receiver. See also Commissioners *v.* Harrington, 11 L. R. (Ir.) 127; Reid *v.* Middleton, Turn. & R. 455; Hobhouse *v.* Holcomb, 2 De G. & S. 208; McDonnel *v.* White, 11 H. L. Cas. 271; Garr *v.* Hill, 5 N. J. Eq. 639.

The receiver usually serves a notice of his appointment upon the tenant, who from the date of the service must pay the rents to the receiver. Russell *v.* Baker, 1 Hog. 180; Holler *v.* Hedges, 2 Ir. Ch. N. S. 370; Hunt *v.* Wolfe, 2 Daly (N. Y.) 298; McLaughlin *v.* Longan, 4 Ir. Eq. 325; Beechey *v.* Smyth, 11 L. R. (Ir.) 88; McDonnel *v.* White, 11 H. L. Cas. 271.

7. Pitt *v.* Snowden, 3 Atk. 750, is reported as follows: "Lord Hardwicke said in this case, that receivers appointed by this court have a power, where they see it necessary, to distrain for rent, and need not apply first to this court for a particular order for that purpose; and that he had often wondered at their doing it, as it gave the tenant an opportunity of conveying his goods off the premises in the meantime, for the court never makes an immediate order for a distress, but allow on such applications a future day for a tenant to pay. If there should be any doubt who had a legal right to the rent,

If an order has been made directing a tenant to pay rent t the receiver, and the tenant disobeys the order, the proper pr ceeding to enforce the order is by an attachment.[1]

The receiver may without a special order of court make r pairs,[2] invest money paid to him for rents,[3] or pay rents due t a superior landlord.[4] He may, by a special order of court, leas the land,[5] institute proceedings to prevent waste,[6] or in certai cases sell the land to pay incumbrances.[7]

then the receiver, as he must distrain in the name of the person who has that right, would very properly make an application to the court for an order." See also Anonymous, 1 Hog. 335; Mills *v.* Fry, 19 Ves. 277; Nugent *v.* Nugent, 1 Hog. 169; Raincock *v.* Simpson, cited in note in Dick. 120 n.; Sturgeon *v.* Douglas, 1 Hog. 400.

In Brandon *v.* Brandon, 5 Madd. 473, a motion was made on behalf of one Powell, a receiver appointed in the cause, that it might be referred to the master to inquire and state whether it would be for the interest of the parties interested in the rents and profits of the testator's estate that the receiver should be at liberty to make distresses, or to take any other proceedings against the tenants in arrear; and that in case the master should be of opinion that it would,then that the receiver might be at liberty to make such distress, or take such other proceedings in the name of the trustees; and that the expenses attending the same might be allowed him in his accounts. The vice-chancellor: "The registrar states that the practice is for a receiver to distrain upon his own discretion for rent in arrear within the year; but if in arrear for more than a year, then an order is necessary."

1. Thomas *v.* Thomas, F. & K. 621; Brown *v.* O'Connor, 2 Hog. 77; Mason *v.* Mason, F. & K. 429; Nason *v.* Blennerhassett, 1 Hog. 402; Pread *v.* Lewis, 2 Mol. 369.

2. Macartney *v.* Walsh, Hayes 29; Wood *v.* Gaynon, Ambl. 395; but see Wyckoff *v.* Scofield, 103 N. Y. 630.

3. Foster *v.* Foster, 2 Bro. C. C. 616.

4. Balfe *v.* Blake, 1 Ir. Ch. N. S. 365; Walsh *v.* Walsh, 1 Ir. Eq. 209.

5. Sealy *v.* Munns, 1 Ir. Eq. 332; but such a lease cannot be made to bind a remainderman or an infant. Gibbins *v.* Howell, 3 Madd. 469 (Am. ed.).

Upon the removal of a trustee for mismanagement, receivers were appointed to take charge of the property, and rent it in accordance with the terms of the trust. *Held*, that a lease made by them, in good faith, for the i terest of the beneficiaries, under whi the lessees had expended money improvements and given up other bus ness, could not be rescinded by t court upon the appointment of anoth trustee. Bayly *v.* Gaines, (Va. 188 2 S. E. Rep. 739; 12 Va. L. J. 78.

6. Mangle *v.* Lord Fingall, 1 Ho 142; Cronin *v.* M'Carthy, F. & K. 4

7. In De Visser *v.* Blackstone, Blatchf. (U. S.) 235, a receiver of re estate, brought a suit in equity agai persons who claim to have pre-existi liens, to have the rights of such perso determined by the court, and if adjud cated in their favor, paid out of t proceeds of the sale of such real est by the receiver. The court made interlocutory order requiring the d fendants to release their liens, and s ting apart to be paid into court, out the proceeds of the sale to be made such real estate by the receiver, a su cient sum to discharge such liens, wi the costs of the suit, and ten per cent. addition, to be held as a fund applicat to the payment of such liens, if th should be established by the decree the court to be prior in right to t claims of the plaintiff. See also Stel *v.* La Rose, 79 Ind. 435; Walker *v.* Mo ris, 14 Ga. 323; Esterlund *v.* Dye, Ga. 284; Drake *v.* Goodridge, Blatchf. (U. S.) 531.

A purchaser at a receiver's sale not bound to examine all the proce ings in the case in which the receiv is appointed. It is sufficient for him see that there is a suit in equity, or w one, in which the court appointed a r ceiver of property; that such receiv was authorized by the court to s the property; that a sale was ma under such authority; that the sale w confirmed by the court, and that t deed accurately recites the property interest thus sold. If the title of t property was vested in the receiver order of the court, it would in that ca revert to the purchaser. Koontz Northern Bank, 16 Wall. (U. S.) 196.

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he general principles of law de- the jurisdiction and powers of of equity, in a proper case, to t a receiver, together with the thereby conferred, and the du- nposed upon such officer; the and extent of his liability, per- and official; the status of the ty during the receivership; the nsation allowed such receiver; and the grounds or reasons for his removal on sufficient cause shown, or his discharge when the object of his appointment shall have been accomplished, have been fully set forth in the article RECEIVERS. This article will, therefore, be confined to those points which are peculiar to the receivers of railroads, and, in this respect, supplement the general article RECEIVERS.

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I. DEFINITION.—A receiver is an officer of the court through whom the court by virtue of its jurisdiction, equitable or statutory, takes possession of property which is the subject of a suit, preserves it from waste or destruction, secures and collects the proceeds, and ultimately disposes of them according to the rights or priorities of those entitled thereto, whether regular parties in the cause or only coming before the court in a reasonable time and in the due course of proceeding to assert and establish their pretensions.[1]

The term receiver of a railroad is applied, in *England*, to one

1. Beverley *v.* Brooke, 4 Gratt. (Va.) 187. See RECEIVERS—*Definition;* High on Rec., § 1; Beach on Rec., § 1.

In Rice *v.* St. Paul, etc., R. Co., 24 Minn. 464, where, by special provision of its charter, the company was empowered to confer upon its mortgagees the right of possession of its mortgaged property upon the common-law conditions, or upon any other conditions that may be agreed upon and stated in the mortgage, the ninth article of the trust deed authorized the trustees, upon the company's default, to take possession of the mortgaged property, and to have, hold, and use the same, "operating by their superintendents, managers, receivers, or servants, or other attorneys or agents," it was held that the "receivers" here mentioned are not technical receivers to be appointed by the court, but the receivers of the trustees.

receives the tolls and applies them to the payment of debts; loes not sell or provide for the current expenses; if he has to money and carry on the business he is a manager.[1]

. **Appointment—1. Jurisdiction and Power of Appointment.**— court, by its prerogative right and power over the parties subject-matter of controversy within its jurisdiction, lays its cial hand upon the property, which is the subject of claim controversy, and brings into court, and holds, controls, and ad- isters such property through its agent or instrument, the re- er—the possession and acts of such instrument being the pos- ion and acts of the court.[2] But some courts have denied the erent power of equity, without legislative power thereto cially conferred, to appoint a receiver of a railroad corpora-

English Receivers and Managers.— distinction between "receiver" 'manager," as understood in *Eng-* is drawn by Jessel, M. R., in *In* Manchester, etc., R. Co., L. R. 14 Div. 653. He says: "Receiver is a which was well known in the t of chancery as meaning a person receives rents or other income ng ascertained outgoings, but who not, if I may say so, manage the erty in the sense of buying or sell- or anything of that kind. We were familiar with the distinction in case of a partnership. If a re- er was appointed of partner- assets, the trade stopped immedi- . He collected all the debts, sold stock in trade and other assets, and , under the order of the court, the s of the concern were liquidated, the balance divided. If it was ed to continue the trade at all, it necessary to appoint a manager, receiver and manager, as it was rally called. He could buy and and carry on the trade. The same nction was well known also in the ing of mines. If a receiver was appointed, the working of nine was stopped, but if it was de- to continue the working of the , a receiver and manager was nec- y. So that there was a well- vn distinction between the two. receiver merely took the income, paid necessary outgoings, and the ager carried on the trade or busi- in the way I have mentioned. . Manager may include manag- n the plural."

Langdon *v.* Vermont, etc., R. Co., t. 593; 11 Am. & Eng. R. Cas.

the object of the appointment of receivers of a railroad is to preserve the property for the benefit of creditors, the court has no other function to exercise than that which will assist in carrying out this object. The court will not, upon the petition of the company filed in the suit in which receivers were appointed, take jurisdiction of and decide a question as to the propriety of postponing a meeting called for the election of officers, which question has no relation to the objects for which the receivers were appointed. Taylor *v.* Philadelphia, etc., R. Co., 7 Fed. Rep. 381; Farmers, etc., Nat. Bank *v.* Philadelphia R. Co., 7 Fed. Rep. 381; 1 Am. & Eng. R. Cas. 627.

Where the appointment of a receiver is asked to displace the exercise of corporate authority over a railroad, courts of equity act with extreme caution and require a clear case of right, and of pressing necessity to induce their interference; but when the corporation itself has been declared bankrupt, with interest having accumulated on its bonds exceeding the value of the property mortgaged to secure them, and purchasers of the equity of redemption at the assignees sale are in possession of the road and property mortgaged, receiving the incomes, profits, and earnings of the road, which the mortgagee is entitled to take, and is using the property for their own exclusive use and benefit, a clear case is presented for the appointment of a receiver; and such appointment would not be an interference with the corporate power and authority over the road, or a disturbance of corporate possession, but merely of that of the purchasers, who are using it for their own exclusive benefit. Kelly *v.* Alabama, etc., R. Co., 58 Ala. 489.

tion to displace the board of directors and thus oust them of the management and control of the railroad with which, by the act of incorporation, they have been charged.[1]

a. OF EQUITABLE ORIGIN.—The remedy, by appointment of receiver, is of purely equitable origin, having originated and been employed from a very early time in the court of chancery in *England*.[2] Indeed, it is one of the very oldest equitable remedies, and grows out of the inherent power of a court of equity to afford relief where the remedies to be obtained in the courts of ordinary jurisdiction are inadequate.[3]

From its source in English chancery, where all the leading principles in relation to its exercise were well established long

1. In Gardner *v.* London, etc., R. Co., L. R., 2 Ch. 201, it was held, Sir H. M. Cairnes, L. J., delivering the opinion of the court, that when Parliament, acting for the public good authorizes the construction and maintenance of a railway, it confers powers and imposes duties upon the company of the largest and most important kind, which cannot be delegated or transferred, but must be discharged by the company. Accordingly, it is impossible to suppose that the court of chancery can, without any Parliamentary authority, make itself or its officer the hand to execute these powers. And all the more impossible, since it is obvious that there can be no real and correlative responsibility for the consequences of any imperfect management. The effect of this decision was remedied by section 4, of The Railway Companies' Act, 1867, which empowered a court of equity to appoint a receiver and manager of a railway corporation.

The court in Stevens *v.* Davison, 18 Gratt. (Va.) 819, adopted, as a reason for the reluctance of a court of equity to appoint a receiver and manager to take charge of and manage a railroad, the reason assigned in Gardner *v.* London, etc., Co., L. R., 2 Ch. 201, for the denial of such power in a court of equity.

2. The practice of appointing sequestrators and receivers of rents and profits, which was very common in the reign of Elizabeth, seems to have begun in the reign of Edward VI, since, in that reign, the first bill is to be met with for restraining a party from receiving the rents and profits. 1 Spence Eq. Juris., p. 673, note f; Savill *v.* Romsden, Cal. 1, p. 131; Jordan *v.* Armes, Reg. lib. 5 P. & M., fol. 48. In this latter case the property was sequestered into the hands of the chamberlain of London and one of the aldermen, pending the trial of the right at law, and on May 20, 1588, a sequestrator or receiver of real estate was appointed.

In Reg., lib. A, 1590, fol. 109, is an order, unless cause shown, for a receiver of a moiety of the profits of a theater claimed by the plaintiff. The defendant had put in a demurrer, and it had been overruled.

3. The protective remedy by appointment of a receiver has thus been extensively employed from a very early time, it being one of the very oldest in the court of chancery. Hopkins *v.* Worcester, etc., Canal Proprietors, L. R., 6 Eq. 447, and founded on the inadequacy of the remedy to be obtained in courts of ordinary jurisdiction. Bispham's Prin. Eq. (4th ed.), § 578.

The court, by Bland, Chancellor, in Williamson *v.* Wilson, 1 Bland (Md.) 420 (1826), in asserting the power of a court of equity to appoint a receiver, said: "There have been, of late, many applications to this court for the appointment of a receiver. The power of making such an appointment, by some, has been contemplated as, at least, a new exhibition of the jurisdiction of this court. It seems to have been considered in the argument as one of an unsettled and questionable nature. That it is a power which has not, until of late, been very frequently resorted to may be admitted; but there can be no doubt of its being an authority properly belonging to this court. In an order, passed about twenty years ago, the then chancellor speaks of the power as one which rightfully belonged to the court, and respecting which there was no question whatever."

ore our Revolution, the power to create a receivership has urally and regularly descended to, and become one of the erent powers of all courts exercising an equitable jurisdiction.[1] ut in respect of receiverships of railroads, this statement uires some qualification; for, while receivership as a protective preventive remedy is, within the past few years, one of easing importance and widening range of application,[2] yet, as medy for the relief of lien creditors of an insolvent railroad poration it is granted, if at all, with greater reluctance by rts of equity than in any other case.[3] Indeed, in some juris- ions the inherent power of a court of equity in such case has n denied, and in others limited; but in these instances, such ect of power is usually supplied by statute. And wherever n statutes exist their interpretation and construction is accord- to the equitable principles developed in the High Court of ncery.

The appointment of receivers is a er of the court of chancery of *land* which appears to have been frequently called into action dur- nore than a century past. All the ng principles in relation to it were established there long before our olution; and it was then and has since been considered, there and as a power of as great utility as which belongs to a court of chan- Williamson *v.* Wilson, 1 Bland) 420; Skinner *v.* Maxwell, 66 Car. 45; Battle *v.* Davis, 66 N. 255; Folsom *v.* Evans, 5 Minn. U.S. Trust Co. *v.* New York etc., R. 101 N. Y. 478; 25 Am. & Eng. R. 601. In the last case, the court, ndrews, J., following Hollenbeck onnell, 94 N. Y. 342, said: "The er of a court of chancery to ap- a receiver *pendente lite* in fore- re cases is a part of its incidental diction, not depending upon any te; and which it exercises, when- by reason of the insufficiency of ecurity or other reason, equity re- d that the rents and profits of the gaged property, pending the liti- n, should be impounded and re- d, to be applied upon the debt, to iscertained by the final judg- ."

The general subject of receivers is which has assumed not a little im- nce during the past few years; and necessity for such a preventive dy has not only led to the frequent position of courts of chancery, but also induced legislation in very y States of the Union, by which the same object is attained through statutory forms, in the interpretation and practice relating to which, the principles of the court of chancery in respect to receivers are looked to for guidance. Bispham's Prin. Eq. (4th. ed.), § 576.

3. "Undoubtedly," says the court by Caldwell, D. J., in Overton *v.* Memphis, etc., R. Co., 10 Fed. Rep. 866, "there are cases in which a court of equity may, through the receiver, take possession and control of the business of corporations and individuals. But it is a jurisdiction to be sparingly exercised. None of the prerogatives of a court of equity have been pushed to such extreme limits as this, and there is none so likely to lead to abuses. It is not the province of a court of equity to take possession of the property, and conduct the business of corporations or individuals, except where the exercise of such extraordinary jurisdiction is indispensably necessary to save or protect some clear right of a suitor, which would otherwise be lost or greatly endangered, and which cannot be saved or protected by any other action or mode of proceeding. Overton *v.* Memphis, etc., R. Co., 10 Fed. Rep. 866; Stevens *v.* Davison, 18 Gratt. (Va.) 819.

Operation of Railroads by Receivers.—While receivers are frequently appointed to operate railroads and keep them going concerns either until their financial embarrassments are removed or they can be conveniently sold for the benefit of all concerned. Davis *v.* Gray, 16 Wall. (U. S.) 203; Kennedy *v.* St. Paul, etc., R. Co., 2 Dill. (U. S.)

b. As Affected by Statute. — In some jurisdictions, the inherent powers of a court of equity to appoint a receiver of a railroad corporation has been denied, and such defect of power is supplied by special legislation to create receiverships of railroads in particular, or it is embraced in the general control given by statute over corporations. In other jurisdictions where equity as a distinct court has been abolished, or its power modified and restricted, authority has also been given by statute to appoint receivers of railroads.[1] The effect of the decision in a leading case denying the power of the court of chancery to appoint a receiver and manager of a railway company, gave rise in *England* to "The Railway Companies' Act, 1867."[2] And the power of courts of equity in the *United States* to appoint receivers of insolvent railroad corporations is variously affected and modified by the statutes of the different States.

448; Brown *v.* New York, etc., Co., 19 How. Pr. (N. Y.) 84; Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 46 Vt. 792.

There are several cases in which courts have of late taken the opportunity to limit this doctrine and to disclaim an intention to assume the responsibility of operating railroads indefinitely. Gardner *v.* London, etc., R. Co., L. R., 2 Ch. 212; Taylor *v.* Philadelphia, etc., R. Co., 9 Fed. Rep. 1; 3 Am. & Eng. R. Cas. 177.

And in Taylor *v.* Philadelphia, etc., R. Co., 9 Fed. Rep. 1; 3 Am. & Eng. R. Cas. 179, the court by Butler, J., in dismissing a petition of receivers for authority to create a car trust, said: "The modern practice prevailing to some extent, elsewhere, of transferring corporate property to the custody of the courts, to be thus held and managed for an indefinite period of years, to suit the convenience of parties, whereby general creditors and stockholders are kept at bay, I regard as a mischievous innovation. I have no doubt the petitioners are fully satisfied of the wisdom of the measure they suggest, and that they are actuated by a sincere desire to promote the best interests of the road. We do not, however, agree with them in this matter, and must be governed by our own judgment." See following note.

1. Gardner *v.* London, etc., R. Co., L. R., 2 Ch. 211; Pond *v.* Framingham, etc., R. Co., 130 Mass. 194; 9 Am. & Eng. R. Cas. 551; Attorney Gen'l *v.* Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371; Attorney Gen'l *v.* Bank of Niagara, Hopk. (N. Y.) 354. See *infra*, this title *In State Courts.*

2. Gardner *v.* London, etc., R. Co., L. R., 2 Ch. 211. See *infra*, this title, *In England.*

English Railway Companies' Act, 1867.—The effect of the decision in Gardner *v.* London, etc., R. Co., L. R., 2 Ch. 212, was to deny the power of the court of chancery to appoint a manager of a railway, was remedied by the Railway Companies' Act, 1867.

The grounds, briefly stated, for denying that power to the court of chancery are two: first, that it was not the practice of that court to appoint a manager with a view of continuing the business, and that would be one of the objects of appointing a manager of the railway company's business; second, that the powers conferred by Parliament upon the directors of a railway company to manage its affairs cannot be delegated or transferred to a manager. . . . "It is impossible to suppose that the court of chancery can make itself or its officer, without any Parliamentary authority, the hand to execute these powers.

By section 4 of the Railway Companies' Act, 1867, power was specially conferred upon the court of chancery to appoint a manager, or a manager and receiver, of a railway. This power was thus conferred not only with a view of supplying the power which it was supposed the court of chancery had, previously to Gardner *v.* London, etc., R. Co., L. R. 2 Ch. 211, but also to provide a new remedy for a judgment creditor in lieu of execution on the personal property of the company by which he was deprived by the Act.

But in addition to the general princi-

In England.—The Railway Companies' Act, 1867,[1] confers the High Court of Chancery the power, which a recent

t the court of chancery will not case assume the permanent ment of a business or undertak- e is that peculiarity in the under- hich would make it improper for rt of chancery to assume the ment of it at all. When Parlia- cting for the public interest, au- the construction and mainte- f a railway, both as a highway public and as a road on which pany may themselves become of passengers and goods, it con- vers and imposes duties and re- ilities of the largest and most nt kind, and it confers and im- hem upon the company which ent has before it, and upon no ody of persons. These powers executed and these duties dis- by the company. They can- delegated or transferred. The y will, of course, act by its serv- or a corporation cannot act se, but the responsibility will of the company. The com- ould not by agreement hand e management of the railway to re holders. It is impossible to that the court of chancery ke itself, or its officer, without liamentary authority, the hand to these powers, and all the more ble when it is obvious that there no real and correlative respon- for the consequences of any im- management. It is said that the company did not object to the or a manager. This may well But in the view I take of the order would be improper, even le on the express agreement quest of the company. Lord s in Gardner *v.* London, etc., R. R., 2 Ch. 212.

n the court appoints a manager siness or undertaking, it in effect s the management into its own for the manager is the servant cer of the court, and upon estion arising as to the character ils of the management, it is the hat must direct and decide. The stance that in this particular e persons appointed were previ- he managers employed by the ny is immaterial. When ap- by the court they are responsi- the court, and no orders of the company, or of the directors, can interfere with this responsibility.

The management is an *interim* management; its necessity and its justification spring out of the jurisdiction to liquidate and sell; the business or undertaking is managed and continued in order that it may be sold as a going concern, and with the sale the management ends. Gardner *v.* London, etc., R. Co., L. R., 2 Ch. 212.

1. 30 & 31 Vict., ch. 127, § 4.

"The Railway Companies, [*Scotland*] Act, 1867," 30 & 31 Vict., ch. 126, § 4, makes essentially similar provisions for the appointment of a judicial factor in *Scotland;* and § 4 in each act was made perpetual by 38 & 39 Vict., ch. 31, § 1. But this last act was repealed by 46 & 47 Vict., ch. 39.

Section 4 of the Railway Companies' Act, 1867, provides that engines, tenders, carriages, trucks, machinery, tools, fittings, materials, and effects, constituting the rolling stock and plant used or provided by a company for the purposes of the traffic on their railway, or of their stations or workshops, shall not, after their railway or any other part thereof is open for public traffic, be liable to be taken in execution at law or in equity at any time after the passing of this act, and before the first day of September, one thousand eight hundred and sixty-eight, where the judgment on which execution issues is recovered in an action on a contract entered into after the passing of this act; but the person who has recovered any such judgment may obtain the appointment of a receiver, and, if necessary, of a manager, of the undertaking of the company, on application by a petition in a summary way to the court of chancery in *England* or *Ireland*, according to the situation of the railway of the company; and all money received by such receiver or manager shall, after due provision for the working expenses of the railway and other proper outgoings in respect of the undertaking, be applied and distributed under the direction of the court in payment of the debts of the company, and otherwise according to the rights and priorities of the persons for the time being interested therein; and on payment of the amount due to every such judgment creditor as aforesaid the court

may, if it think fit, discharge such receiver or such receiver and manager."

Section 4, of the Railway Companies' Act, 1867, takes away from the judgment creditor of a railway company the right of taking in execution the rolling stock and plant of that company, but gives him new rights, which are independent of the fact whether such company has or has not rolling stock or plant to be taken in execution. *In re* Manchester, etc., R. Co., L. R., 14 Ch. Div. 645.

Wherever the judgment creditor of a railway company is unpaid, the appointment of a receiver, or manager, is a matter of right. And where the debtor company is carrying on its business in the ordinary way, conducting its own traffic arrangements, the appointment of a manager is "necessary" within the meaning of the 4th section, ch. 127, of the Railway Companies' Act, 1867. *In re* Manchester, etc., R. Co., L. R., 14 Ch. Div. 645.

As a general rule, the directors, or secretary, or some of them, will be appointed by the court managers where they are acting fairly, and the order for appointment of a manager will be made without prejudice to any application on the part of the directors to propose themselves, or some of their number, to act as managers. *In re* Manchester, etc., R. Co., L. R., 14 Ch. Div. 645.

Section 4, of the Railway Companies' Act, 1867, had two objects to effect: The one was to protect the rolling stock and the plant of railway companies which were actually working, from being taken in execution at law or in equity at the instance of judgment creditors; and the other was to confer upon the judgment creditors another, and in some respects a compensating benefit for that of which they had been deprived by the earlier part of that section.

Now, the protecting part was simply this: that the rolling stock and the plant should not be taken in execution at law or in equity at any time after the passing of that act at the suit of a judgment creditor. Down to the time of the passing of the act, the judgment creditor had that remedy; the act deprived him of it, and we have to consider what is the compensating advantage conferred upon him by the act. Previously to its passing, the appointment of a receiver deprived the partners in any business of their rights to interfere in its management; in most cases it practically stopped the continuance of the business. On the other hand, it was not the practice of the court of chancery to appoint a manager of a business unless with a view to winding up its affairs. But a practice had grown up of appointing not only a receiver, but in some instances a manager also of a railway, subject to certain rules and conditions.

The practice here referred to was that which was considered in Gardner *v.* London, etc., R. Co., L. R., 2 Ch. 201, given by the court of appeal in chancery just shortly before this act was passed. *In re* Manchester etc., R. Co., L. R., 14 Ch. 657.

It is not necessary to establish a case of mismanagement; "if necessary," means if it is necessary to carry on the business. A mortgagor has no right to possession or to management against his mortgagee or judgment creditor. *In re* Manchester, etc., R. Co., L. R., 14 Ch. Div. 648.

In construing the term "necessary," in § 4, Bragallay, L. J., said: "If we have regard to the effect which the appointment of a manager would have had, we shall readily see what benefit it was intended to confer on the judgment creditor when he was deprived of his right to take the rolling stock and plant in execution.

"It is this: that he may apply to the court, if he thinks fit, for the appointment of a receiver, and, if necessary, of a manager. If the appointment of a receiver of the affairs of the railway company were to have the same effect as the appointment of a receiver of the profits of the business of a partnership, it would be to stop the concern.

"At the same time there had been a duty imposed on the directors of continuing the concern. Therefore, in order to get over the difficulties that were felt in the case of Gardner *v.* London, etc., R. Co., L. R., 2 Ch. 211, the act went on to provide that 'if necessary,' that is, if the appointment of a receiver would lead to a stoppage of the concern, a manager should be appointed, and that, notwithstanding that, by virtue of the original act of Parliament, the power of managing the affairs of the company had been vested in the board of directors, such power should be vested in the manager so appointed; and then the act goes on to provide, as the Master of the Rolls pointed out, in what way the money

n had denied to that court, to appoint a receiver and man-
f a railroad corporation.[1] And by the Supreme Court
ure Act, 1873, the jurisdiction of the High Court of
ry was transferred to and conferred upon the chancery

ould come to the hands of the
or manager should be applied,
ating this: that the manager
appointed, with full power of
g and carrying on the business
company, with those powers
had been supposed the court
ery had power to confer on
ious to the decision in the case
I have referred.
pears to me, therefore, if a
company is to be continued a
ncern, when a receiver is ap-
there must be conferred on
rson or persons the power of
ng or carrying on the busi-
the company. That is the
which I attribute to the use
words 'if necessary.' The
t creditor may appoint a re-
ith all the consequences of the
nent of a receiver alone,
might be to deprive him of
source from which the possi-
ultimate payment would be
If the business of the com-
o be continued as a going con-
s 'necessary' to have a man-

the unpaid vendor of land
a railway company has com-
n action against the company
e his lien, the court will not
n injunction or a receiver
he company before judgment
obtained in the action, even
he company admit their lia-
A receiver could only be for
cular portion of the line pur-
from the plaintiff. What
do with that? He could not
he line; he could not receive
All he could receive would
roportion of the net profits of
ll portion of the line after pay-
e working expenses and other
s. Such an order cannot be
ore judgment. And an inter-
application to restrain a rail-
running its trains is monstrous.
v. Aylesbury, etc., R. Co., L.
Div. 385.
dner *v.* London, etc., R. Co.,
Ch. 211 was an appeal from an
pointing a receiver of the tolls
d. The court by Cairnes, L.J.,

said: "The orders now under appeal, so far as they appointed managers of various undertakings of the London, Chatham and Dover Railway Company, were discharged by us at the conclusion of the arguments in the case, because we were clearly of opinion that the orders were in this respect beyond the authority and at a variance with the practice of this court.

"When the court appoints a manager of a business or undertaking, it in effect assumes the management into its own hands; for the manager is the servant or officer of the court, and upon any question arising as to the character or details of the management, it is the court that must direct and decide. . . . Now, I apprehend that there is nothing better settled than that this court does not assume the management of a business or undertaking except with a view to the winding up and sale of the business or undertaking. The management is an *interim* management; its necessity and its justification spring out of the jurisdiction to liquidate and to sell; the business or undertaking is managed and continued in order that it may be sold as a going concern, and with the sale the management ends."

The judgment of Lord Justice Cairnes in this case was based on two grounds: first, upon the ground that it was not the practice of the court of chancery to appoint a manager with a view to the continuance of a business, and that that would be one of the objects of appointing a manager of the railway company's business. And the second ground was this: that powers had been conferred on the directors of managing the railway for certain purposes. "These powers," it was said, "must be executed and these duties discharged by the company. They cannot be delegated or transferred. The company will, of course, act by its servants, for a corporation cannot act otherwise; but the responsibility will be that of the company. The company could not, by agreement, hand over the management of the railway to the debenture holders. It is impossible to suppose that the court of chancery can make itself or its officer, without any Parlia-

division of the High Court of Justice;[1] and by this act the syste of equitable practice pertaining to receiverships as it originate and grew up in the English court of chancery was preserved an enlarged.[2]

(2) *In United States Courts.*—The Federal courts exercise onl such equity jurisdiction as is conferred upon them by the ac of Congress.[3] This jurisdiction is the same that the High Cou of Chancery in *England* possesses, and is exercised in accor ance with the equitable principles developed therein.[4] Amor

mentary authority, the hand to execute these powers, and all were impossible when it is obvious that there can be no real and correlative responsibility for the consequences of any imperfect management."

See, also, further extracts from this case, cited, *supra*, notes to this section.

1. 36 & 37 Vict., § 3; L. R., 8 Stats. 307.

2. 36 & 37 Vict., § 25, sub-sec. 8; L. R., 8 Stats., p. 321.

By this section, the practice regulating the appointment of receivers was preserved in the following language: "A mandamus, or an injunction, may be granted, or a receiver be appointed by an interlocutory order of the court in all cases in which it shall appear to the court to be just or convenient that such order should be made, and any such order may be made either unconditionally, or upon such terms and conditions as the court shall think just."

3. The courts of the *United States* cannot exercise any equity powers except those conferred by acts of Congress, and those judicial powers which the High Court of Chancery in *England*, acting under its judicial capacity as a court of equity, possessed and exercised, at the time of the formation of the Constitution of the *United States*. Powers not judicial, exercised by the chancellor merely as the representative of the sovereign, and by virtue of the king's prerogative as *parens patriæ*, are not possessed by the circuit courts. Fontain *v.* Ravenel, 17 How. (U. S.) 384.

U. S. Const., art. 3, § 2, declares that "the judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the *United States*, and treaties made, or which shall be made under their authority."

Chancery jurisdiction is conferred on the courts of the *United States*, with the limitation "that suits in equity shall not be sustained in eith of the courts of the *United Stat* in any case where plain, adequate, a complete remedy may be had at law The rules of the High Court of Cha cery of *England* have been adopt by the courts of the *United Stat* And there is no other limitation to t exercise of a chancery jurisdiction these courts, except the value in co troversy, the residence or character the parties, or a claim which aris under a law of the *United States*, a which has been decided against i State court.

In exercising this jurisdiction t courts of the Union are not limited the chancery system adopted by a State, and they exercise their fu tions in a State where no court chancery has been established. T usages of the High Court of Cha cery in *England*, whenever the jur diction is exercised, govern the p ceedings. This may be said to be t common law of chancery, and sin the organization of the government has been observed. Pennsylvania Wheeling, etc., Bridge Co., 13 Ho (U. S.) 563.

It has long since been settled in t courts of the *United States*, that equ jurisdiction and equity jurisprude administered in the courts of the *Uni States*, are coincident and coext sive with that exercised in *Engla* and are not regulated by the muni pal jurisprudence of the particu State where the court sits. Fletc *v.* Morey, 2 Story (U. S.) 567; *cit* Robinson *v.* Campbell, 3 Wheat. (S.) 220; U. S. *v.* Howland, 4 Whe (U. S.) 108.

4. In Payne *v.* Hock, 7 Wall. (U. 425, the court by Davis, J., said: "T equity jurisdiction conferred on t Federal courts is the same that t High Court of Chancery in *Engla* possesses; is subject to neither limi tion nor restraint by State legislati

edial agencies afforded by that system is the creation of rships, and the remedy is frequently invoked; but the jurisdiction thus conferred and exercised is subject to limitation nor restraint by State legislation, and is uni- roughout the States of the Union.[1]

n State Courts.—The system of the *English* court of y was also adopted by the courts of equity of the vari- tes of the Union, and the practice was, and still remains, ormity therewith except where it has in very many States hanged by statute. These statutory changes have, in stances, extended merely to an enlargement or modifica- the powers so adopted; in others, to a total abolition of urts of equity as separate and distinct courts, and the rence of their powers to courts of general jurisdiction, by ans, giving the latter courts cognizance of suits, equita- well as those strictly legal in their nature. But notwith- g this attempt to unify the forms of action at law and in the jurisdiction of those courts with powers thus enlarged spect of the appointment of receivers, distinctly equita- d, in its exercise, is still controlled and regulated by the les and practice of courts of equity.[2]

niform throughout the differ- es of the Union." To the ect are Robinson *v.* Campbell, (U. S.) 222; Barber *v.* Bar- How. (U. S.) 605; Pratt *v.* n, 5 Mason (U. S.) 105.

courts of the Union have a jurisdiction in every State, judiciary act confers the same powers on all, and gives the e of decision; its jurisdiction me in all the States. U. S. *v.* d, 4 Wheat. (U. S.) 115; Pratt am, 5 Mason (U. S.) 105.

jurisdiction exercised by the urts may have been conferred ss legislative grant; or it may n assumed by those tribunals, iesced in from considerations enience, or from mere tolera- t whether expressly conferred e State courts or tacitly as- y them, their example and cannot be recognized as sources rity by the courts of the *United* The origin and the extent of their ion must be sought in the laws *nited States* and in the settled d principles by which these e bound them. Barber *v.* Bar- How. (U. S.) 605.

ch on Rec., § 10.

progress and growth of equity on it has become usual to clothe such officers with much larger powers than were formerly conferred. In some of the States they are by statute charged with the duty of selling the affairs of certain corporations, when insolvent, and are authorized expressly to sue in their own names. It is not unusual for courts of equity to put them in charge of the railroads of companies which have fallen in financial embarrassment, and to require them to operate such roads until the difficulties are removed, or such arrangements are made that the roads can be sold with the least sacrifice of the interests of the concern. In all such cases, the possession of the receiver is the possession of the court whose jurisdiction is invoked.

As regards the statutes, we see no reason why a court of equity in the exercise of its undoubted authority may not accomplish all the best results intended to be secured by such legislation without its aid. Davis *v.* Gray, 16 Wall. (U. S.) 203.

In *Alabama*, a court of equity has authority, without the aid of a statute, to take charge of, manage and operate by its receivers a railroad, which is the subject of litigation, when such a course is indispensable to secure the rights of creditors and others to prevent a failure of justice. But where a court has

been compelled to take possession by its receiver of a railroad, its whole power over it is confined to making necessary repairs and protecting the property. As from the nature of the property, it must be continued in operation and sold as a going concern, to prevent serious injury and impairment in value, the court may continue the running of trains and the usual business of the road, with a view to its economical conservation; and if the income is insufficient for that purpose, may provide the requisite means by creating charges upon the property. Meyer *v.* Johnston, 53 Ala. 237.

In *Massachusetts*, a court of equity, in the absence of statutory authority, has no peculiar jurisdiction over the affairs of corporations, to restrain them in the exercise of their powers, or control their action, or prevent them from violating their charter, in cases where there is no fraud or breach of trust alleged as the foundation of the claim for equitable relief. Pond *v.* Framingham, etc., R. Co., 130 Mass. 194; 9 Am. & Eng. R. Cas. 551.

In *New York*, while the power of a court of chancery to appoint a receiver *pendente lite* in foreclosure cases is a part of its incidental jurisdiction, not depending upon any statute, and which it exercises whenever, by reason of the insufficiency of the security or other reason, equity required that the rents and profits of the mortgaged property, pending the litigation, should be impounded and retained, to be applied upon the debt, to be ascertained by final judgment (Hollenbeck *v.* Donnell, 94 N. Y. 342), yet it was held at an early day in this State in an exhaustive opinion by Mr. Chancellor Kent, that the jurisdiction of chancery did not extend to the sequestration of the property of a corporation by means of a receiver, or to the winding up of its affairs, or to control or restrain the usurpation of franchises by corporate bodies, or by persons claiming without right to exercise corporate powers. Attorney Gen'l *v.* Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371; Attorney Gen'l *v.* Bank of Niagara, Hopk. (N. Y.) 354.

This refusal of the court of chancery to entertain jurisdiction of corporate bodies, at the instance of creditors, or to wind up their affairs in case of insolvency, led to the enactment by the legislature in 1825, of the act. chapter 325, of the laws of that year. This act conferred jurisdiction on the court chancery to sequestrate the property a corporation upon the application of judgment creditor, after the retu of an execution, "unsatisfied," and appoint a receiver of its proper (§ 15).

The provisions of the act of 1825, e larged and extended, were incorporat into the Revised Statutes, in t article entitled: "Of Proceedin against Corporations in Equity" Rev. Stat. 462), and a complete stat tory system was enacted for the win ing up of the affairs of a corporati against which an execution had been turned "unsatisfied," at the instance the creditor in the execution.

The court was authorized to appoi receivers of the corporate proper Their powers and duties are specifi in the statute in great detail, and it declared that receivers so appoint shall be vested with all the esta real and personal, of such corporatio and they are declared to be trustees such estate, for the benefit of such c poration and its stockholders.

The system inaugurated by the act 1825 and incorporated into the Revis Statutes has been continued in t codes, and for fifty years prior to t act of 1883 had been the statutory s tem of procedure for the winding up the affairs of corporations, throu receivers appointed by the court, by virtue of its inherent jurisdicti but under statutory authority, statute which authorized their appoi ment also prescribing with gr minuteness their powers and dut U. S. Trust Co. *v.* New York, etc., Co., 101 N. Y. 478; 25 Am. & Eng. Cas. 601.

The provisions of the *New Jer* Suppl. Rev., p. 834, pl. 42, authoriz the chancellor to appoint a receive the railroad neglects to run daily trai confers such power upon the court chancery and not upon the chancel in his personal capacity. The chanc lor can refer, in the ordinary cou such matters to a vice-chancellor to a master for hearing and an advis opinion. A vice-chancellor cannot tertain jurisdiction over a case exc when referred to him by general special order, but when the case heard by the vice-chancellor with objection, and the chancellor adop his advice and signed a decree, it too late to raise on appeal the quest as to the vice-chancellor's right to h

. Delaware Bay, etc., R. Co. *v.* y, 45 N. J. Eq. 139; 37 Am. & . Cas. 421. Notwithstanding that a railroad company has corporated under the *New Jer-* eral railroad law, and has de- its purpose of doing a general s in the transportation of freight sengers, it is (if its road other- swers the description) within view of the act of March 3, which declares that the act of y 12, 1874, which authorizes the ment of a receiver of any road as not operated its road for ten all not apply to any railroad y whose road is constructed at aside resort, does not exceed les in length, and is built and d merely for the transportation er travelers and tourists. The March 3, 1880, is retrospective in ation, and applies not only to ds thereafter constructed but al- ads in operation at the time of its ent. This statute is not un- tional as a special act confer- orporate privileges, since the which it applies form a dis- ss. Delaware Bay, etc., R. Co. kley, 45 N. J. Eq. 139; 37 Am. & . Cas. 421.

s been held in *North Carolina* code, which specified certain which a receiver may be ap- "does not materially alter the le jurisdiction" of the courts of ate. Skinner *v.* Maxwell, 66 N. ; Battle *v.* Davis, 66 N. Car.

urt commissioner has no juris- to appoint a receiver. Quiggle nbo, 56 Cal. 626.

eorgia it has been decided that *pro hac vice* has jurisdiction to se including an application for ver. Landrum *v.* Chamberlin, 727.

Visconsin it has been held that a court having no original juris- of equitable actions may ap- receiver, or employ other equi- emedies, in aid of a suit or a nt at law; the code of that having expressly adopted such of procedure as a part of the in every civil action. Second Bank *v.* Upmann, 12 Wis. 499. power is rarely exercised by of appellate jurisdiction; and t becomes necessary for such o appoint a receiver, in order to their powers as courts of ap- peal, and for the due administration of justice, they must have jurisdiction of the suit by appeal and of the person against whom the remedy is sought. Kerr *v.* White, 7 Baxt. (Tenn.) 394; Allen *v.* Harris, 4 Lea (Tenn.) 190; West *v.* Weaver, 3 Heisk. (Tenn.) 589. See, also, Pacific R. *v.* Ketchum 95 U. S. 1.

South Carolina act of 1869, § 5, authorizes the comptroller-general to take possession of a railway in the event of a default for six months in the payment of interest on its debt which had been guarantied by the State; the fact that the road, on petition of creditors, had passed into the hands of a receiver, and an advisory board did not bar proceedings by the comptroller-general under the act, and the exercise of his power did not conflict with the rights of creditors of the road nor impair the obligation of the contract between the State and the holders of the guarantied bonds. *Ex parte* Dunn, 8 S. Car. 207.

The *South Carolina* act of 1869 authorizing the comptroller-general on a certain contingency to take possession of a railroad is not repealed by the act of 1871 directing proceedings for foreclosure to be taken against all railroad companies which had failed to pay the interest due upon bonds which had been guarantied by the State. *Ex parte* Dunn, 8 S. Car. 207.

Texas statutes in force, regulating the appointment of receivers provide that, "upon the dissolution of any corporation already created . . . unless a receiver is appointed . . . the president and directors or managers . . . shall be trustees of its property." *Texas* Rev. Stats., art. 606. The court "may appoint a receiver to take charge of the affairs of the defendant corporation until such time as the said corporation shall be reorganized and in condition to be operated." Acts 1885, p. 66, § 4. A receiver may be appointed in cases where a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights. Acts 1887, p. 120, § 1, subd. 3. And his powers and duties are therein fully defined. There is nothing in this legislation violative of the right of any person or corporation. The property will go into the hands of such person as may be appointed receiver, subject to all just claims to it or upon it, and these may be adjusted in accordance with the well-settled rules appli-

b. WHAT HAVE BEEN HELD SUFFICIENT GROUNDS.—Th following have been held sufficient grounds to induce a court equity to appoint a receiver of a railroad corporation: Default payment of mortgage obligations;[1] insolvency of the railro

do with it.' When these two points were answered the third point was, Is the interest of the debtor in the land such that it cannot be reached at law? If that was answered in the affirmative it seems to me that the order should be, of course." See, also, Hopkins *v.* Worcester, etc., Canal Proprietors, L. R., 6 Eq. 437.

Undoubtedly there are cases in which a court of equity may, through its receiver, take possession and control of the property and business of corporations and individuals. But it is a jurisdiction to be sparingly exercised. None of the prerogatives of a court of equity have been pushed to such extreme limits as this, and there is none as likely to lead to abuses. It is not the province of a court of equity to take possession of the property and conduct the business of corporations or individuals, except where the exercise of such extraordinary jurisdiction is indispensably necessary to save or protect some clear right of a suitor, which would otherwise be lost or greatly endangered, and which cannot be secured or protected by any other action or mode of proceeding. If the loss or danger can be averted by the lawful action of the suitor, or those he represents, he cannot successfully invoke the exercise of the extraordinary powers of a court of equity on the ground that such a course would be more agreeable or convenient. Overton *v.* Memphis, etc., R. Co., 10 Fed. Rep. 866; Sage *v.* Memphis, etc., R. Co., 18 Fed. Rep. 571; 17 Am. & Eng. R. Cas. 361.

1. See RECEIVERS OF CORPORATIONS—*When Appointed.* "The most frequent ground," says Mr. High, "for invoking the extraordinary aid of equity by the appointment of receivers over railway corporations, is for the protection of mortgagees and bondholders, whose securities are a lien upon the road, upon the failure of the corporation to pay the principal or interest upon its obligations thus secured. And, in actions for the foreclosure of railway mortgages, given to secure bonds issued by railway companies for purposes of construction and equipme the courts, upon an application fo receiver in behalf of the mortgage proceed upon the usual principles g erning applications for receivers aid of the foreclosure of mortgag and in conformity with such prin ples, inadequacy of the mortgage curity, coupled with insolvency of mortgagor, may be regarded as su cient ground for the relief." High Rec. (3d ed.), § 376; 2 Redfield Railways; Kelly *v.* Alabama, etc., Co., 58 Ala. 489; Whitney *v.* N York, etc., R. Co., 32 Hun (N. 164.

It is proper to appoint a receive a railway company in behalf of mo gage bondholders, when the inte upon the mortgages has been long paid, and when it is apparent that mortgaged property will not br sufficient to satisfy the indebtedn Pullan *v.* Cincinnati, etc., R. Co Biss. (U. S.) 35.

The rule in courts of equity in gard to appointing a receiver of mo gaged property, is, that it will granted in all cases where the inco of the estate is required to meet incumbrance, and is at the pres time being so applied as not to be gally applicable to reduce the incu brance. 2 Redfield on Railways, 363.

Under such circumstances a rece will be appointed during the pende of a bill filed by the mortgagee, to put in possession of the mortga property. Dow *v.* Memphis, etc. Co., 20 Fed. Rep. 260; 17 Am. & E R. Cas. 324. As against a prior mo gagee or incumbrancer in possess a receiver will not, as a gen rule, be appointed. Kerr on Re 34; Daniel's Ch. Pl. & Prac. 1665, 1

Railroad Mortgages — Foreclosur Appointment of Receiver. — Whe railroad 1,600 miles long is mortga for $28,000 a mile, the interest in rear being $1,000,000, and the busi being on the decrease, and appare liable to further decrease, there be a lack of harmony as to its mana ment among the owners, a rece will be appointed upon a foreclo

a second mortgage. Mercan-
ıst Co. *v.* Missouri, etc., R. Co.,
. Rep. 221; 36 Am. & Eng. R.
).

to Receiver on Foreclosure Suit.

right to foreclosure does not
ith it the right to a receiver.
are many considerations that
on that question. Every case,
se, stands on its own merits.
ifficult to formulate any rule
briefly stated, will control in all
It should appear that there is
ınger to the property: that its
ion, its preservation, the inter-
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should be appointed. It does
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If, looking at the situation of
ating parties, and of the prop-
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d appear to a court that they
be benefited, that their inter-
uld be subserved by the ap-
ent of a receiver, why no court
gh a matter resting, as it is
in its discretion) could refuse
the appointment. Mercantile
Co. *v.* Missouri, etc., R. Co., 36
ep. 221; 36 Am. & Eng. R. Cas.

en *v.* Dallas, etc., R. Co., 3 Woods
316, a trust deed by which a
corporation mortgaged its in-
nd profits as well as its other
property had been executed in
o secure the payment of the
l and interest of its bonds, and
zed the trustees, in the event of
t in the payment of interest, to
ssession of the mortgaged prop-
l apply the income to the pay-
f the interest, it was held in
case that it is the right of the
lders, under the terms of the
trust, and upon the application
rustees, to have a receiver ap-
to take possession of the trust
y.

company, by its charter, ob-
large grant of land, but with
viso that unless twenty miles of
were completed and in running
efore a certain date, it should
oth the grant and charter. Up to
one month of the expiration of
e thus fixed, only two of the
miles of its road remained to be
ed. The company was insolvent
able to procure the means to complete the remaining two miles of road; the contractor had failed and abandoned his contract, and there was imminent danger of the forfeiture of the grant and charter of the company. The court, by Woods, J., said: "In this case the trust deed pledged the income and receipts of the railroad property for the payment of the principal and interests of the bonds. It declared that after three months' default in the payment of the principal or interest on the bonds, or any part of either, upon the written request of one tenth of the holders of the bonds, it should be competent and lawful for the trustees to enter upon and take possession of the trust property, and upon the written request of one-tenth of the holders of the bonds, it should be the duty of the trustee to enter upon and take possession of the trust property, and to use and employ the said railroad and the property and appurtenances proper for its use, to make all necessary repairs, pay all proper expenses of the management thereof, including taxes, and to apply the proceeds to the payment *pro rata*, of the principal and interest due on the bonds. These provisions were inserted in the deed of trust to give credit to the bonds, to enhance their value and induce capitalists to purchase them. They constituted a part of the consideration which the railroad company offered to purchasers of its bonds. A mere default in the payment of the debt is no ground for the appointment of a receiver, but it is not true where there is a stipulation in the mortgage that the mortgagee shall have the rents. Whitehead *v.* Wooten, 43 Miss. 523; Morrison *v.* Buckner, 1 Hempst. (U. S.) 442. Are all these provisions of the deed of trust to be disregarded? If not, are the rights of the bondholders impaired by the fact that the trustees, instead of taking possession of the trust property, as they had a right, and it was their duty to do, have applied to this court to assist them in the execution of the trust whose duties they had assumed? These trustees might, as is sometimes done, have first taken possession of the trust property, under the authority of the trust deed, and upon written demand of one-tenth of the bondholders, and afterwards filed their bill, asking the court to protect their possession and aid and instruct them in the discharge of their trust. Such a course would have been perfectly proper and competent. But having chosen to

file their bill in the first instance, neither they nor any bondholders has lost any right, and it is the clear duty of the court to give them all the rights conferred by the deed of trust." And the court added that, "independent of the peculiar terms of the trust deed, the situation of the trust property, as shown by the evidence, was such as, in my judgment, justify and require the appointment of a receiver." See, also, Dow *v.* Memphis, etc., R. Co., 20 Fed. Rep. 260; 17 Am. & Eng. R. Cas. 324; Shepley *v.* Atlantic, etc., R. Co., 55 Me. 395; McLane *v.* Placerville, etc., R. Co., 66 Cal. 606; 26 Am. & Eng. R. Cas. 404; Kennedy *v.* St. Paul, etc., R. Co., 2 Dill. (U. S.) 448.

If the trustees fail to do their duty in taking possession of the trust property, the court will, upon the application of one or more of the bondholders, appoint a receiver to act in their stead. The application for a receiver in such case is founded on a right independent of any probable deficiency of the trust property to pay the debts secured by the deed of trust, and is simply a demand by the beneficiaries of the deed that the trust be executed according to its terms. Shaw *v.* Norfolk Co. R. Co., 5 Gray (Mass.) 162; Wilmer *v.* Atlanta, etc., R. Co., 2 Woods (U. S.) 409; Sacramento, etc., R. Co. *v.* Superior Ct., 55 Cal. 453; Rice *v.* St. Paul, etc., R. Co., 24 Minn. 464.

In Sage *v.* Memphis R. Co., 125 U. S. 361; 35 Am. & Eng. R. Cas. 40, the application of a judgment creditor for the appointment of a receiver was granted, his bill alleging in substance that the property of the company was so heavily mortgaged that if he should attempt to enforce payment of his debt by seizure and sale on execution, there would be no bidders at more than a nominal amount, while if the property were placed by the court in the hands of a receiver to be preserved, there would be a large surplus each year for the payment of his debt. The court in passing upon the application said: "We do not mean to say that a single judgment creditor or any number of such creditors of a railroad company are entitled, as a matter of right, to have its property put into the hands of a receiver merely because of its failure or refusal to pay its debts. Whether a receiver shall be appointed is always a matter of discretion, to be exercised sparingly and with great caution in the case of *quasi* public corporations operating a public highway, and alwa with reference to the special circu stances of each case as it arises. that we say in this connection is th under the circumstances presented this case, the appointment of a recei is within the power of the court."

But the existence of a reasonable d pute as to whether the conditions the mortgage have been broken is su cient to cause the court to refuse a ceiver; for one ought not, dinarily, to be appointed unless right of foreclosure is clear and ind putable, and this upon the gene ground that one lawfully and by contract of parties in possession of property should not be disturbed that possession except in a clear c of a right to do that. American L T. Co. *v.* Toledo, etc., R. Co., 29 F Rep. 418.

The appointment of a receiver is a matter of course in all cases upo default and a bill to foreclose, nor i appear that the company may exc the default, or the plaintiff be estop by contract or otherwise from rely on it. American L. & T. Co. *v.* Tole etc., R. Co., 29 Fed. Rep. 418.

Under section 3893 of the Compi Laws of *Kansas* no order for the s of railroad property mortgaged wit waiver of appraisement can be m by the court until the expiration six months after the decree of fo closure. This statute regulates transfer of land within the State, is therefore binding upon the Fede courts.

After such foreclosure the incom the road, being the property of bondholders for the liquidation their claims, should be received b disinterested trustee until the tim the sale; and the fact that certain the bondholders are in possession the exclusion of others, is a suffici reason for the appointment of a ceiver, unless the interval between decree and the sale is very brief. Be dict *v.* St. Joseph, etc., W. R. Co. Fed. Rep. 173; 14 Am. & Eng. Cas. 609.

Mortgage Bondholders — Remedy Right to Seize Earnings of Company.— long as a railroad company is a go concern, mortgage bondholders wh bonds are made a general charge the undertaking by statute, have right, even although interest on bonds is in arrear, to seize the ea ings of the company deposited in

any;[1] where the security for the mortgage debt is inade-
;[2] fraud and misconduct of the railroad officials;[3] dispute

Their only remedy is the ap-
ent of a receiver. Phelps *v.*
tharines, etc., R. Co., 19 Ont.
1; 46 Am. & Eng. R. Cas. 336.
solvency means a general ina-
pay one's accruing debts, or
in the general course of busi-
e liabilities existing and capa-
eing enforced. Sewell *v.* Cape
c., R. Co. (N. J.), 30 Am. & Eng.
155.
re a railroad corporation is en-
nsolvent, although no default
en place in the payment of its
, which is, however, imminent
anifest, and the corporation is
to pay its floating debts, unable
the sums due its connecting
nable to borrow money, and is
l of the breaking up and de-
n of its business, a temporary
r will be appointed, upon the
tion of one or more of its bond-
, to preserve the property of
lroad corporation. Brassey *v.*
ork, etc., R. Co., 19 Fed. Rep.
Am. & Eng. R. Cas. 285.
re, for ten years, there has been
in the payment of interest on
st mortgage bonds, and the
of the company which has
hanged hands, refuse to exhibit
oks to the bondholders and
s of the mortgage, a receiver of
ilroad property will be ap-
l. Pullan *v.* Cincinnati, etc.,
4 Biss. (U. S.) 35.
ceiver will also be appointed
a railroad corporation has been
d bankrupt and the accumula-
interest, on its bonds exceeds
ue of the property mortgaged
re them, and purchasers of the
of redemption at the assignees'
e in possession of the property,
it for their own exclusive use
nefit and appropriating the in-
to which the mortgagee is
l. Gest *v.* New Orleans, etc.,
30 La. Ann. 28; Kelly *v.* Ala-
etc., R. Co., 58 Ala. 489; *Ex-*
Brown, 58 Ala. 536.
re, in addition to the insolvency
railroad company, its property
e hands of parties who deny the
f the petitioner, a stockholder,
er stockholders as well to share
management of the property,
will, in order to afford relief to

such stockholders, appoint a receiver to take possession of the property. Bill *v.* New Albany, etc., R. Co., 2 Biss. (U. S.) 390.

But as a general rule, it is only an extreme case that will move a court of equity to exercise its extraordinary power to afford relief by the appointment of a receiver of the property of a railroad corporation. Pullan *v.* Cincinnati, etc., R. Co., 4 Biss. (U. S.) 35.

Allegations in a bill that the company is insolvent, and has suspended its business for want of funds to carry on the same, are not sufficient to have a corporation declared insolvent and a receiver appointed. The facts and circumstances must be set out from which the insolvency shall appear. Newfoundland R. Const. Co. *v.* Shack, 40 N. J. Eq. 222.

Where a petition alleges insolvency of the defendant and asks that a receiver be appointed, it is proper to grant the relief asked and to order a sale of the property, the proceeds being held in court until the equitable owners of the bonds could set up their title thereto. *Held*, such equitable owners were not made parties to the suit. Texas Western R. Co. *v.* Gentry, 69 Tex. 625; 33 Am. & Eng. R. Cas. 46.

2. Where the property affected by the lien of the mortgage is inadequate security for the mortgage debt and the railroad company is insolvent and appropriating its earnings to its own use, a receiver will be appointed during the pendency of a bill filed by the mortgagee to be put in possession of the mortgaged property. Cheever *v.* Rutland, etc., R. Co., 39 Vt. 653; Dow *v.* Memphis, etc., R. Co., 20 Fed. Rep. 260; 17 Am. & Eng. R. Cas. 324; Ruggles *v.* Southern Minn. R. Co., 5 Chic. L. N. 110; Keep *v.* Mich. L. S. R. Co., 6 Chic. L. N. 101.

3. Where the money paid by bondholders for the bonds of a corporation is, with the connivance of the directors, being squandered and embezzled by its officers instead of being used for the purpose to which it was pledged, and thereby the bondholders, as well as the *bona fide* stockholders, are in danger of losing all their money by such fraudulent conduct of the officers and agents of the corporation, and

among several railroad companies, tenants in common of an ease ment, consisting of a right of passing through a tunnel;[1] con

the latter has been rendered insolvent thereby, a receiver will be appointed. Forbes *v.* Memphis, etc., R. Co., 2 Woods (U. S.) 323.

It is a proper case for the appointment of a receiver, where the board of directors of a railroad company make a lease of a railroad and the property of the corporation, without authority of law and without the sanction of stockholders in a meeting lawfully convened. Stevens *v.* Davison, 18 Gratt. (Va.) 819.

Where certain persons inaugurated a system of management which they had wrongfully combined to obtain, and wrongfully turned the same to the benefit of the managers and their associates, the court, upon the application of stockholders, appointed a receiver. Fisher *v.* Concord R. Co., 50 N. H. 200.

In Stevens *v.* Davison, 18 Gratt. (Va.) 828, the court by Jones, J., in annulling a lease, made by the directors of a railroad company in violation of a by-law forbidding the making of any contract on their part, involving the franchises of the road, said, in granting the application of a stockholder for the appointment of a receiver: "The court is further of the opinion, that while, for the reasons assigned in the case of Gardner *v.* London, etc., R. Co., L. R., 2 Ch. 201, a court of chancery will be reluctant to appoint a receiver to take charge of and manage a railroad, it is competent to do so where such a course is indispensable to secure the rights of the legitimate stockholders, and to prevent a failure of justice. . . . But the court is of opinion that it was not proper to enjoin the directors and officers of the railroad company from acting as directors and officers or doing any act as such; such order not being necessary to accomplish the object of the principal order."

1. Under *New Jersey* Acts of March 4 and 11, 1858 (P. L. 204, 312), the Delaware, Lackawanna and Western Railroad Company have a right of way through the Bergen tunnel, and a consequent right to connect their tracks with those running through the tunnel. And under the act of 1858, the Erie Railway Company's trains of every description have the right of precedence over those of th Delaware, Lackawanna and Wester Railroad Company through the sam tunnel. But a contract of Nov. 1, 185 between the Long Dock Company an the Hoboken Land and Improvemen Company (the grantors of the defen ants and complainants, respectively limits the trains having preceden through the tunnel to those run i conformity with the time tables. Th Erie R. Co. filed an original bill compel the D., L. & W. R. Co. to pa tolls for the use of the railro through the tunnel, and the D., L. W. Co. filed a cross-bill praying injunction and the appointment of receiver.

The court by Beasley, C. J., sai "In the case before me, these parti possess a community of interest in th property. They are tenants in com mon of an easement, and if this cou cannot protect the one against the i justice of the other, the party who rights are invaded is clearly witho any adequate remedy, for it is certa that either of these companies, th situated, can so act with respect to t common easement as to render worthless to the other, and thus bri upon the latter incalculable mischi The general cognizance of equity cases of this kind, where property is e joyed in common, will not, it is pr sumed, be disputed by any one, and I c perceive no reason why this pow would not exist where two railroa are such tenants in common as well in other cases. In truth, as these co panies, although technically priva corporations, are in some measure pu lic agents, there exists in such cases the present an additional reason wh judicial control should be extended far as possible over their conduct t wards each other. I have no doubt as the jurisdiction of this court over th subject, and shall not scruple, therefo to exercise it to the fullest extent that t circumstances of the case may now at any time hereafter appear to requir Delaware, etc., R. Co. *v.* Erie R. C 21 N. J. Eq. 298; Russell *v.* E Anglican R. Co., 3 M. G. 125; Friff Chard R. Co., 11 Hare 259. In Shrew bury R. Co. *v.* Chester R. Co., 14 T. 217–433, where two railroad co panies agreed to use a railway stati

f interest leading to hostility and unnecessary expense in anagement of the railroad property,[1] and that the defendorporation have something to be received.[2]

WHAT HAVE BEEN HELD INSUFFICIENT GROUNDS.—The ving have been held insufficient grounds for the appointof a receiver of the property of a railroad corporation: lt in mortgage obligations where there is a dispute as to er the conditions of the mortgage have been broken;[3]

no doubt seems to have been ined that the court of chancery wer to prescribe rules for such and to appoint a receiver. See idland Ry. Co. *v.* Ambergate 10 Hare 359.

eier *v.* Kansas Pac. R., 5 Dill. 476. In this case a single dised receiver was appointed to rewo receivers who were originalpinted as representatives of differerests, which afterwards became thus leading to dissensions and ssary expense in the managef the railroad property.

order to have a receiver ap, it is essential that the defendrporation have something to be d. Hence when the sole assets rporation in respect to which a could be made consisted of a or damages against another corn, which claim was held to be ble, a bill for the appointment of ver will be dismissed. Bigelow on Freight R. Co., 137 Mass. Am. & Eng. R. Cas. 425. To ne principle may be referred *In* ningham, etc, R. Co., 8 Ch. Div. Am. & Eng. Corp. Cas. 616, in it was held that a railway comwhich has never commenced to e the lands or construct the railauthorized by this act is not an rtaking" within the meaning of of the Railway Companies' Act, f which a receiver can be apd under that section.

enever the judgment creditor of a y company is unpaid, the apent of a receiver or manager this section is matter of right. Manchester, etc., R. Co., L. R., 14 iv. 645. For a good illustration principle, see St. Louis, etc., R. Dewees, 23 Fed. Rep. 519, in it was held that where the title unused railroad track is in disand both parties to the controclaim possession, and neither is in physical possession, a court of equity will not interfere in a suit to quiet title by appointing a receiver, even where the defendant has attempted to take forcible possession, until the right to possession is established at law.

3. See RECEIVERS OF CORPORATIONS—*When Not Appointed.* Where the interest due upon the coupons has been in default, and strictly according to the terms of the mortgage there has been a breach of its conditions; but where there are other facts connected with this, which, if they do not excuse that breach and amount to an extension of payment of the coupons, certainly furnish abundant reason for a refusal by a court of equity to appoint, a receiver pending the dispute whether the plaintiff is entitled to a foreclosure because of it. Indeed, the very existence of a reasonable dispute as to whether the conditions of the mortgage have been broken is sufficient to cause the court to refuse a receiver; for one ought not, ordinarily, to be appointed unless the right of foreclosure is clear and indisputable, and this upon the general ground that one lawfully and by the contract of parties in possession of the property should not be disturbed in that possession except in a clear case of a right to do that. American L. & T. Co. *v.* Toledo, etc., R. Co., 29 Fed. Rep. 421.

Railroad mortgages are sometimes used as an instrumentality of adventurous speculation rather than a safe security for money advanced; and while the courts should use every possible endeavor to save to the utmost the value of the security, when properly called on to do so, they should not suffer themselves to become likewise an instrumentality of adventurous speculators seeking to use the courts as weapons of offense in the warfare that goes on among themselves. Courts should be confined strictly to the domain of courts of law and equity engaged only in the business of settling,

mere insolvency without more;[1] participation in a corporate meeting by part of the stockholders where they had been pro-

according to the established rules of law and equity, the controversies that arise and come within the workshop of jurisprudence, but not those that lie outside and within the arena of gladiatorial struggles for business advantages and speculations. American L. & T. Co. *v.* Toledo, etc., R. Co., 29 Fed. Rep. 421.

In no case of a mortgage ought a receiver to be appointed if it is clear that on a foreclosure the mortgaged property will bring enough money to pay the debt, interest and costs. Such power of appointment is generally in the sound discretion of the court to be exercised only in strong cases. Pullan *v.* Cincinnati, etc., Air Line R. Co., 4 Biss. (U. S.) 35.

1. Insolvency of a railroad corporation is not always a sufficient reason for the appointment of a receiver of its property; but the granting of such an application rests in the sound discretion of the court, which is controlled, of course, by well-settled legal principles applicable to such cases. Pond *v.* Framingham, etc., R. Co., 130 Mass. 194; 9 Am. & Eng. R. Cas. 551; Smith *v.* Port Dover, etc., R. Co., 12 Ont. App. 288; 25 Am. & Eng. R. Cas. 639; Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 27 Fed. Rep. 146; 24 Am. & Eng. R. Cas. 166; Denike *v.* New York, etc., Lime, etc., Co, 80 N. Y. 599. See, also, *supra*, this title, *What Have Been Held Sufficient Grounds.*

In *Massachusetts*, where a court of equity, in the absence of special statutory authority, has no jurisdiction except where fraud or breach of trust is alleged, over the affairs of corporations to restrain them in the exercise of their powers or control their action, or prevent them from violating their charter, a bill in equity by creditors of a railroad corporation alleging that the company is insolvent; that all its property is mortgaged to trustees for the benefit of one class of creditors; that it owes large amounts to other creditors, one of whom has attached all its property; that it is about to execute a lease to the attaching creditor for a long term of years at a rental which would not pay the interest upon its indebtedness; and that the execution of the lease will be injurious to the interests of its creditors and stockholders, such a bill does not state a case within the equity jurisdiction of the court, where its prayer is for an injunction to restrain the corporation from further prosecuting its business and for the appointment of a receiver. Pond *v.* Framingham, etc., R. Co., 130 Mass. 194; 9 Am. & Eng. R. Cas. 551; Treadwell *v.* Salisbury Mfg Co., 7 Gray (Mass.) 393; 66 Am. Dec 490.

A *Massachusetts* act incorporating a railroad company repealed the charter of an existing railroad company and authorized the new one to take the tracks of the old and make provision for the payment of compensation therefor. The tracks were taken, and a petition for damages was duly filed Pending this petition, the three years allowed by *Massachusetts* Gen. Stats ch. 68, § 36 for a corporation whose charter is annulled to close its business expired; and, no receiver having been appointed under § 37, the petition was dismissed. Before the expiration of the time allowed for filing a petition for damages, a stockholder of the old company brought a bill in equity to restrain the new one from doing business. After the dismissal of the petition for damages, but within a year after the bill in equity was decided a creditor of the old company brought a bill in equity against the new one for the appointment of a receiver to prosecute the claim for damages by reason of the taking of the tracks. *Held*, that the bill could not be maintained, and that the Gen. Stats. Ch. 63, § 30, did not apply. Bigelow *v.* Union Freight R Co., 137 Mass. 478; 20 Am. & Eng R. Cas. 425.

The *Colorado* corporation act (Gen Stats., § 258), conferring upon State courts the power to close up the affairs of corporations and appoint receivers for them, contemplates an adversary and not an *ex parte* proceeding; consequently an application by a corporation itself for the appointment of a receiver on the ground of its insolvency will be denied. Jones *v.* Bank of Leadville, 10 Colo. 464.

In *New Jersey*, a statute (Revision p. 182) confers upon the court power to appoint, upon the application of a creditor or stockholder, a receiver of an insolvent corporation. Accordingly a bill alleging that the company is insolvent and has suspended its busi

from so doing by injunction ;[1] where the judgment did rant the expense ;[2] where the interference of the court o no harm ;[3] where a receivership was sought to accomplish nother railroad was required by statute to do ;[4] where the tment of a receiver was sought on an *ex parte* application litors to wind up an insolvent railroad corporation, and g the decision on a demurrer whereby the right to file a bill t in issue ;[5] to recover money advanced for certain shares

funds to carry on the same present sufficient ground for pintment of a receiver. The l circumstances must be set which the insolvency of the ion shall appear. Newfound- Constr. Co. *v.* Schack, 40 N. 22.

will a receiver be appointed notice to the defendant, unless ay required to give such ould result in irreparable loss. ti, etc., R. Co. *v.* Jewett, 37 649; 8 Am. & Eng. R. Cas.

eceiver will only be appointed e amount of the judgment the expenses, and there is fair suppose that there is some- receive. W. N. (Eng.) (1884)

ay be laid down as an admit- iciple that where the court nterpose usefully it should not at all, and it should interfere ar as it can interfere usefully. *v.* Ottawa, etc., R. Co., 1 Ch. Rep. 126. There is no case the court appoints a receiver ecause the measure can do no Orphan Asylum Soc. *v.* Mc- 1 Hopk. Ch. (N. Y.) 429; im *v.* Moore, 11 Md. 365; Port Dover, etc., R. Co., 12 p. 288; 25 Am. & Eng. R. Cas.

ere the plaintiff, a judgment of the Port Dover and Lake Railroad Company, in his ac- have a receiver appointed in enable him to obtain equita- ution of his judgment by re- the P. D. & L. H. R. Co.'s share arnings of the Lake Erie R. ch had put it in possession of nd Trunk R. Co. as lessees, le surplus earnings of the P. H. R. Co. being by statute plicable, and were being ap- the G. T. R. Co. towards re- he incumbrances, the interest on which, such earnings were insufficient to pay, the application for a receiver was refused, and this judgment was affirmed on appeal by Osler, J. A.:

1. Because it is neither just nor convenient that one should be appointed to receive the income of the road, merely to do with it just what the Grand Trunk Co. are bound to do, and are doing with it.

2. Because there is no reason to suppose that there is anything to receive in which the plaintiff can be interested. It was hardly attempted to be denied that the only way in which the plaintiff expected the appointment of a receiver to be useful to him was that the defendants would possibly pay his claim rather than submit to interference with their arrangements.

3. Because the utmost that can be said for making the appointment is that it will do no harm.

4. Because, though the bondholders are not in actual possession, the whole income of the principal defendants is legally applicable, and is being applied towards reduciug the incumbrances, and is insufficient to pay the interest thereon; and

5. Because the judgment debtors are not the owners of or in possession of the road, which has become the property of another company and is in possession of their lessees. Smith *v.* Port Dover, etc., R. Co., 12 Ont. App. 288; 25 Am. & Eng. R. Cas. 639.

6. A receiver cannot be appointed *ex parte* in a proceeding by creditors to wind up an insolvent corporation, and pending the decision on a demurrer whereby the right to file the bill is put in issue. Cook *v.* Detroit, etc., R. Co., 45 Mich. 453; 12 Am. & Eng. R. Cas. 459.

Courts of equity are exceedingly unwilling to appoint a receiver on an *ex parte* application, and will do so only in case of urgent necessity. Bisson *v.* Curry, 35 Iowa 72; Blondheim *v.* Moore, 11 Md. 365; Triebert

of stock issued in violation of the charter and contrary to law consent of both parties in an improper case;[2] the existence of complete remedy at law.[3]

3. **Who May or May Not be Appointed.**—A receiver is strictly a solely the officer of the court. It is the duty of that agent so conduct the business as that the lawful rights and legal intere of all persons in the property and in the business shall be pr tected as far as possible with equal and exact justice. This much more likely to be done by a receiver who has no interest the capital stock of the road, none in its debts, and no oblig tions to those who have. Such a person acting under the co trol of the court, seeking its advice, as he would be inclined do in all doubtful questions of duty, and bound in a sufficie

v. Burgess, 11 Md. 452; Voshell *v.* Hynson, 26 Md. 83; Verplanck *v.* Mercantile Ins. Co., 2 Paige (N. Y.) 438; Sandford *v.* Sinclair, 8 Paige (N. Y.) 373; People *v.* Albany, etc., R. Co., 7 Abb. Pr., N. S. (N. Y.) 265; Whitehead *v.* Wooten, 43 Miss. 523; Rogers *v.* Dougherty, 20 Ga. 271; Devoe *v.* Ithaca, etc., R. Co., 5 Paige (N. Y.) 521; Maynard *v.* Railly, 2 Nev. 313; McLean *v.* Lafayette Bank, 3 McLean (U. S.) 503.

When a corporation has become extinct by legislative enactment, and its powers and property transferred to a new corporation substituted for it, the courts have no power on an *ex parte* application to appoint a receiver of the assets of the defunct corporation; such order properly cannot be made except in a proceeding to which its successor or substitute is a party. Young *v.* Rollins, 85 N. Car. 485; 12 Am. & Eng. R. Cas. 455.

1. A bill was filed against a corporation by the holder of alleged shares of its capital stock, claiming that they have been illegally issued, the same having been issued by the conversion into stock of bonds issued by the corporation, and praying that their legality might be inquired into, and that, if they should be held illegal, the plaintiff might be repaid the amount paid by him for such alleged shares, and that the corporation might be enjoined, pending the suit, from disposing of so much of its property as would indemnify the plaintiff, and that a receiver of that amount might be appointed. It appearing that the moneys received by the corporation, on the issue of the bonds, had not been kept separate from its general funds, and could not be traced and identifi *held*, that the injunction could not granted or the receiver appoint Whelpley *v.* Erie R. Co., 6 Blatc (U. S.) 271.

2. An order for a receiver cannot made in an improper case even wi the consent of both parties, more pecially where the rights of thi persons may be concerned. Whelpl *v.* Erie R. Co., 6 Blatchf. (U. S.) 2

3. In Rice *v.* St. Paul, etc., R. C 24 Minn. 464, where, by special pr vision of its charter, the company w empowered to confer upon its mo gagees the right of possession of t mortgaged property under commo law conditions, or upon any other co ditions that may be agreed upon a expressed in the mortgage, the app cation was for a receiver to in foreclosure, the prayer of the b being that, pending the suit, the co forthwith appoint a receiver to ta immediate possession, control, a management of the line of railro from St. Paul to Watab, and of all t appurtenances, rolling stock, lan and other property belonging or pertaining to said line of road, a covered by said mortgage of $1.200,0 and that full power and authority given to him to hold, use, mana control, and operate the same with usual power of a receiver in such cas It was held that, upon the foregoi facts the case is one in which t plaintiffs have a complete and adequ remedy at law in respect to the v matters on account of which the pointment of a receiver is sought, a that therefore the plaintiffs are entitled to have such receiver pointed.

for the faithful performance of his duty, is the proper such an office.[1] Accordingly, stockholders and directors nsolvent railroad company should not be appointed receiv- less the case is exceptional and urgent, and then only on t of the parties whose interests are to be intrusted to their .[2] And the court, when called upon to appoint for a corpo- that is totally insolvent, a receiver who is to be the mere t or instrument of the court, upon whose fidelity and abil- nust rely to manage during the pendency of the suit the ty intrusted to him, ought not to be expected to appoint on under whose charge and control the resources of the ad been exhausted, its property seized upon execution, e necessity for a receiver brought about.[3] Lessees of a

the article RECEIVERS, vol. 1. Meier *v.* Kansas Pac. R. ill. (U. S.) 476. "On the other adds the court in this same hile it may be true that a ersonal interest may stimu- activity and direct the vigi- f the receiver, it is equally t such vigilance, whenever offers, will be directed un- advancing that personal in- nd that activity to securing advantages." Atkins *v.* Wa- c., R. Co., 29 Fed. Rep.

iver should be impartial be- he parties; consequently a the cause should not be ap- receiver. Bolles *v.* Duff, 54 . Y.) 215; Young *v.* Rollins, ar. 485; 12 Am. & Eng. R. ; Baker *v.* Backus, 32 Ill. 79; ies to the cause may, in some ree upon a person to be ap- as appears from the language ourt by Brewer, J., in Mer- Trust Co. *v.* Missouri K. & T. 6 Fed. Rep. 221; 36 Am. & Cas. 259: "If the parties pon a receiver, of course I oint whoever you agree up- ot, I will hear any suggestions of the parties in interest, and or or against any person to be y one side or the other."

ins *v.* Wabash, etc., R. Co., 29 . 161.

d creditors cannot dictate who appointed a receiver. He is of the court, and the interest rs of every grade will be con- in making the appointment. *v.* Chesapeake, etc., R. Co., (U. S.) 28.

An officer of an insolvent corporation is not generally appointed receiver. Attorney-Gen'l *v.* Bank of Columbia, 1 Paige (N. Y.) 511; *In re* Empire City Bank, 10 How. Pr. (N. Y.) 498; Baker *v.* Backus, 32 Ill. 79. But this rule is, in modern times, departed from more frequently. Cook *v.* Detroit, etc., R. Co., 45 Mich. 453; 12 Am. & Eng. R. Cas. 459.

Under action pending in the name of the State for the foreclosure of a mortgage upon the property of a railroad corporation, and the appointment of a receiver, and on the motion of the attorney-general for such appointment, an order was passed by the court in the words following: "As the State cannot be required to give security as other plaintiffs, it is ordered, that the president and directors of the Greenville and Columbia Railroad Company, under the order of and subject to this court, continue in possession and management of the property of all kinds of the said company, of its earnings and profits and expenditures, to the end that such orders may, from time to time, be moved for, as may be necessary and proper for the protection of the property of the said company, and the interests of all parties concerned, pending litigation." *Held*, that this order constituted the president and directors of the corporation receivers, and that they continued in the management of the road and its business, as officers of the court and not of the company. *In re* Fifty Four First Mortgage Bonds, 15 S. Car. 304; 9 Am. & Eng. R. Cas. 739; Gibbes *v.* Greenville, etc., R. Co., 15 S. Car. 304.

3. Richards *v.* Chesapeake, etc., R. Co., 1 Hughes (U. S.) 32.

railroad may in some cases be appointed receivers to manage th affairs of the road *pendente lite*.[1]

4. Security and Bond Required.—The principles and practic regulating the bond and security of a receiver of a railroad fo the faithful performance of his duty, are the same as those whic prevail in the case of receivers in general.[2]

5. Practice to Secure Appointment.—The practice to secure th appointment of a railroad receiver does not differ from that c receivers in general.[3]

6. Appeal from Order of Appointment.—The practice relating t appeal from an order appointing a receiver of the property of railroad corporation does not differ from that of receivers in ge eral, fully treated elsewhere.[4]

III. Effect of Appointment—1. Status of Railroad Compan During Receivership.[5]—The appointment of a receiver does n interfere with the existence of the corporation as such, nor wit the continuance of such of the corporate franchises as are n exercised by the receiver.[6] It does not work a dissolution, the co

1. Stevens *v.* Davison, 18 Gratt. (Va.) 819.

2. See Receivers—*Bond Required.*

3. See Receivers—*Procedure Concerning Appointment.*

4. See Receivers—*Appeal from Decree or Order of Appointment.*

5. **Status of Corporation During Receivership.**—The status and liability of the corporation during the receivership has received treatment under various other sections of this article as well as in the article Receivers. See Receivers, *In Particular Cases, Receivers of Corporations; infra*, this title, *Liability of Railroad Receivers, Damages Arising from Negligence and Torts During Receivership; Liability of Corporation.*

6. "The mere fact that a receiver has been appointed, and that the property of the company with its revenues and franchises has been sequestered by him does not destroy the existence of the company as a body corporate, nor its capacity of being sued." Wyatt *v.* Ohio, etc., R. Co., 10 Ill. App. 289. In Louisville, etc., R. Co. *v.* Cauble, 46 Ind. 277, the effect of the appointment of a receiver on the corporation as such is thus laid down: "The whole effect of the decree is to take the custody, control and management of such corporation out of the hands of the persons who were controlling and managing the same, and to place the same in the custody and under the control and management of the receiver for a specified time a for a special purpose. The corpora existence of the appellant was left i tact. The corporate powers and fra chises which had been exercised by t officers of the company were conferre for the time being, upon the receiv The power and authority of the r ceiver to manage and control the co pany and its operations depended the corporate existence. If that h been taken away, the power and a thority of the receiver would ha ceased and terminated, for no cou Federal or State, can confer corpor powers and franchises upon an in vidual. Such powers can be creat and conferred by the legislative c partment only."

In Ohio, etc., R. Co. *v.* Russell, Ill. 52; 23 Am. & Eng. R. Cas. 149, t court by Scott, J., says: "Notwi standing the appointment of the ceiver, the corporation is clothed w its franchises and such corporati still exists. The effect of the appoi ment of the receiver is simply to g him the temporary management of t railroad under the direction of t court, instead of the manager appoi ed by the directors of the corporati It is that and nothing more. As t corporation still exists, it may still ercise, as before, its franchises, so does not interfere with the right management of the road by the ceiver, so far as his duties are defi by the court appointing him.

ion still remains in being, capable of suing and being sued,[1] ervice of process on an agent or employé of the receiver

it may do many corporate acts, tainly it can do all things nec- to preserve its legal existence, hstanding the appointment of ceiver to which the temporary ement of the road is given. wise the appointment of the re- would be tantamount to a disso- of the corporation. It is a prin- vell understood, that all railroads er corporations transacting busi- its nature public, are subject to onable police regulations deemed ary for the common welfare. ere fact that its property may be rarily in the hands of a receiver ot relieve a corporation from eration of such regulations any han a private citizen is released the duty to observe the law, be- his property may be sequestered order of a court for the benefit creditors. But the duty of the ation in this regard need not be r discussed on principle. It is nt if the statute has imposed the ought to be enforced against the ation, and it must be obeyed."

'hiladelphia, etc., R. Co. *v.* Com., . St. 80; 13 Am. & Eng. R. Cas. e court held that the mere fact that perty and franchises of a corpo- are in the hands of receivers, ap- d by a United States court, does fect the liability of the corpo- to pay State taxes accruing on receipts." In this case the e court sustained the conclu- f law of Simonton, P. J., which as follows: "We may safely that the defendant is still the of all the franchises, privi- and property, real and personal, were by the decree put into nds of the receivers, and which not since been sold; that it re owns railroads, canals, and levices for the transportation of and passengers, and hence that ross receipts of said company' able if there be any such gross s within the fair sense and mean- the law. It is argued . . . e taxability or otherwise of the eceipts depends upon the rela- f the taxing act to those into hands they come; in other that the expression, 'gross re- of said company,' means that the gross amount received by said company, and that as the company, as such, received nothing, it has no gross receipts. We do not so understand the act. As we construe it, 'gross receipts' is equivalent to 'gross increase or gross earnings,' and we think their origin and ownership, rather than the hands into which they come, must be considered in determining the question whether they are taxable or not. The franchises and privileges, the railroads and canals, the property of every kind, real and personal, though exercised, operated and used by the receivers, were owned by the corporation defendant. It was then the exercise, operation, and use of the property of defendant that produced the gross receipts, and these went into the hands of the receivers simply because they were receivers of the property and assets of the defendant. They (the receivers) were acting for it (the defendant) and at its expense and not for themselves, and the product of the exercise and use of its franchises and property belonged to it as much as the franchises and property themselves."

1. People *v.* Barnett, 91 Ill. 422; Ohio, etc., R. Co. *v.* Russell, 115 Ill. 52; 23 Am. Eng. R. Cas. 149; State *v.* Merchant, 37 Ohio St. 251: 9 Am. & Eng. R. Cas. 516.

In Jones *v.* Bank of Leadville, 10 Colo. 464, the court by Macon, Ch., observes: "The doctrine that the appointment of a receiver is *ipso facto* and *de jure* a dissolution of the corporation, is utterly unsound. The appointment of a receiver does not dissolve the corporation either in law or in fact." See also Taylor *v.* Columbian Ins. Co., 14 Allen (Mass.) 353.

Effect on Directors' Duty to Make Annual Report.—See Huguenot Nat. Bank *v.* Studwell, 74 N. Y. 621, where the court held that a corporation is so far dissolved by the appointment of a receiver that thereafter no duty longer devolves upon the trustees or directors to make the annual report required by statute.

When Receiver Displaces Directors.—A receiver when appointed of the property of a corporation, displaces the directors or other body, that by its charter are authorized to manage its affairs, and, under the direction of the court by whom he is appointed, has

will not give jurisdiction over the corporation.[1] When t sanction of the court has been obtained, the company may, seems, enter into contracts and issue bonds, as well during t receivership as at any other time.[2] And it has been held th the appointment of a receiver does not deprive the company the right to elect its officers and board of directors at the tir and in the manner provided by its charter.[3]

the sole control of its property and effects, and, when authorized so to do, the executive power to use its franchises. Rochester *v.* Bronson, 41 How. Pr. (N. Y.) 78.

Restraint Upon Directors.—Upon the appointment of a receiver of all the property and effects of a corporation, for the purpose of closing up its affairs, it is proper that the court should make it a part of the order, that the directors and officers of the corporation be restrained from collecting any debts or demands due to the company, and from paying out, assigning, or delivering any of the property, moneys, or effects of the corporation to any other person, and from incumbering the same. Morgan *v.* New York, etc., R. Co., 10 Paige (N. Y.) 190; 40 Am. Dec. 244.

Compare Stevens *v.* Davison, 18 Gratt. (Va.) 819, where the court held that, though it is proper under some circumstances to appoint a receiver to take charge of and manage the road, the court should not enjoin the directors of the company from doing any act as such.

1. **Service of Process—Railroads Operated by Receivers and Trustees.**—In Health *v.* Missouri, etc., R. Co., 83 Mo. 617, the court held that service on the agent of a receiver operating the railroad gave no jurisdiction over the company; and where the State had seized a railroad for nonpayment of its bonds, and the receiver appointed by the court retained the employés in office, it was held that such employés were not the agents of the railroad company for the purposes of service. Cherry *v.* North & South R. Co., 59 Ga. 446. But where a Georgia railroad was operated in connection with an Alabama railroad which was in the hands of receivers appointed by the Alabama court, and a suit was brought in Georgia against the Georgia company, the court held that service was properly made on an agent of the Georgia company in Georgia, although he was in the e ploy of the foreign receivers and ma remittances to them which were aft wards distributed under a contr with the Georgia company, and t such service was especially good wh it was supplemented by service the sole resident director of the Geor company. Georgia Southern R. C *v.* Bigelow, 68 Ga. 219.

2. McCalmont *v.* Philadelphia, e R. Co., 7 Fed. Rep. 386; 3 Am. & E R. Cas. 163.

3. State *v.* Merchant, 37 Ohio 251; 9 Am. & Eng. R. Cas. 516.

Where, upon the appointment of receiver, an injunction is issued straining the company from exercis its corporate powers, and subsequer on petition of a stockholder this junction is so modified as to per the holding of an election for offic the court will, on application, obl the old board of directors to ca such an election to be held in a m ner which shall conform as nearly possible to the provisions of the laws. Lehigh Coal, etc., Co. *v.* Cen R. Co., 35 N. J. Eq. 349; 9 Am. & E R. Cas. 512. In this case, the court Runyon, Ch., says: "Justice dema that in the case of an insolvent cor ration whose affairs are in the hand this court for administration, the sto holders shall have the choice of agents by whom the franchises ar be exercised, so far as this court p mits such exercise in their behalf. clear that if the corporation exi though only for certain purposes, stockholders may lawfully elect rectors. The property in the hand the court in this case is valued about $50,000,000. By statute court is required to operate the r for the benefit of the public. *New Jersey* Rev., p. 196, § 106. And, with the statute, the same action would taken in view of the obvious neces of thus keeping the trust property proper condition, and making it productive as possible. There

VHERE RECEIVER HAS CONTROL, COMPANY NOT LIABLE ORTS OR CONTRACTS OF CARRIAGE.[1]—The weight of au- is decidedly to the effect that the relation of princi- d agent, or master and servant, does not exist between the ny and the receiver, and that consequently the company liable for the torts or contracts of the receiver in control road.[2] Some courts, however, are disposed to hold that

very important respects in he action of the board as rep- ives of the company may xceedingly useful to the court inistering the trust; and in f such matters, the future of pany, after it shall have passed he hands of the court, may be aterially affected by the action board. It is, therefore, emi- proper that the board should representatives of the stock- , and, therefore, that a proper nity should be afforded to the make selection of their agents. er, should the court deem it le to turn over the property to pany, the stockholders must re- by the hands of the board. re, there must be directors; uch case, as well as generally, rd should be the true and law- esentatives of the stockholders property they are to control inister."

infra, this title, *Liability of d Receivers.*

eiver Not the Agent of the y.—In Metz *v.* Buffalo, etc., R. N. Y. 61; 17 Am. Rep. 201, the by Grover, J., says: "In this defendant (the railroad com- by act of the law, has been d of the possession of the road ll control over those engaged ating it; and by like act, the on and control has been given s. The defendant had not, er, anything to do with operat- road. True, if profits were thereby, they would inure to efit of the defendant by becom- ets for the payment of debts, did not make it liable for the of those in no sense its em- or servants. The employés ook to those who employed or compensation; and those ntracted with the receiver or must also look to him. He le for the breach of contracts him and for injuries sustained by his negligence or that of his employés in their performance." See, also, Rogers *v.* Wheeler, 43 N. Y. 598; Meara *v.* Holbrook, 20 Ohio St. 137; 5 Am. Rep. 633.

See, however, Bartlett *v.* Keim, 50 N. J. L. 260; 35 Am. & Eng. R. Cas. 15.

In Safford *v.* People, 85 Ill. 558, an injunction was granted by a State court restraining a railway company from obstructing a public street, etc. *Held*, that it was binding upon a receiver of the company subsequently appointed by a United States court. The court by Walker, J., observes: "In this case the injunction was against the corporation as a legal entity, and its agents, servants, etc. When the receivers were appointed by the Federal court, there was no change in the corporate body. Its existence was intact, with its legal functions unimpaired, but simply its acts were performed by agents appointed by the court, and not by the corporation. The agents appointed by the court to perform its duties and exercise its functions, are legally its agents, although they are under the direction of the court appointing them, within the limits of its charter. The court only authorizes the receiver to exercise the privileges and perform the duties prescribed by the charter. The court does not, nor could it if attempted, enlarge or restrict the powers and duties conferred by the charter. When it appoints the receiver, the court assumes the management of the corporation under and in accordance with the charter, and is bound by its provisions to the same extent that are the directory, and the agents appointed by the court are required by it to act within the limits of the charter, and to perform all duties imposed thereby."

In Ohio, etc., R. Co. *v.* Davis, 23 Ind. 553; 85 Am. Dec. 477, the court by Ray, C. J., observes: "While we are not required to determine that a corporation which has received special powers and privileges from the legis-

lature, and assumed certain duties and liabilities to the public, may, while retaining her charter franchise relieve herself from her liability by a lease of her road to other parties, we regard it as very clear, upon principle, that she cannot be held liable for the act of any servant of a receiver appointed by the court. It may be argued that the possession of the lessee is but to the public, that of the lessor. The possession of the receiver cannot, however, be regarded as the possession of the railroad company, but is in every view antagonistic thereto. The receiver is under the control of the court that appointed him, and his possession is the possession of the court. (Angel *v.* Smith, 9 Ves. 335; Wiswall *v.* Sampson, 14 How. (U. S.) 52.) The acts of the receiver are not the acts of the corporation, nor can she control either the receiver or his employés. An attempt to exercise such authority would be resisted by the courts. It would be a severe rule which would render the railroad company responsible for the negligence of the agent of the court that had deprived her of the possession and enjoyment of her roadbed, track, and equipments. We have been referred to no decision, and are aware of no principle of law which would impose such a liability. . . . It cannot be insisted that any special hardships result to the appellee from this ruling; for it must not be assumed that a party who suffers from the negligent act of the servants of a receiver is without remedy. The court cannot permit her possession to result in wrong to one without fault, but, upon sufficient proof, will grant the relief to which the sufferer may be entitled. To that forum his petition should be addressed. As the application of the principles we have considered, to the case of a corporation whose property is in the possession of a receiver, involves important consequences, and the question is before the court for the first time, we have felt it proper to press the examination of authorities beyond the limits of the decisions with which counsel have favored us, and have therefore reviewed at some length the application of the rule to the various cases presented in other courts."

In Ryan *v.* Hays, 62 Tex. 42; 23 Am. & Eng. R. Cas. 501, the court, by Stayton, J., says: "The sole liability of a receiver, except in cases in which he is personally at fault, is official; and when his official character ceases, and the proper through which alone his official liabili may be discharged, has passed from hands, in pursuance of the orders of court that appointed him, and he been by that court discharged from trust, then no judgment can be render against him; for with the terminati of his official existence, ends his offic liability. There is no question but t the railway was in the exclusive co trol and management of the receiver the time the plaintiff was injured, an remains to consider whether the re tionship of the receiver to the railw company was such as to render it lia for an injury resulting from the ne gence of his servants; or whether, der the resolution of the stockhold of the company, and the other fa which may have existed, any liabi on the part of the company exists. relationship of a receiver to a railw company, of whose property he is pu possession by order of a court of co petent jurisdiction, is not in all resp clear, and especially so when, by the der appointing a receiver, he is direc with the property of the company discharge, as was the duty of the way company, to the public the du of a common carrier. It has been in many cases that the relation of m ter and servant does not exist in s case between a railroad company the receiver, and that when the rece has the exclusive control of the op tion of a railway placed in his ha the company to which it belongs is liable for injuries resulting from negligence of the receiver and his ployés. Ohio, etc., R. Co. *v.* Davi Ind. 553; 85 Am. Dec. 477; *v.* Indianapolis, etc., R. Co., 53 Ind Metz *v.* Buffalo, etc., R. Co., 58 N 64; 17 Am. Rep. 201; Pierce on R roads 285; High on Receivers Rogers *v.* Mobile, etc., R. Co. (Te 12 Am. & Eng. R. Cas. 442. That is technically true cannot be con verted; but the fact remains that company is indirectly, through the bility of its property or the profits o come thereof while in the hands receiver, made responsible for the s faction of claims for injuries resul from the negligence of a receiver o employés, and it is exceedingly diff to see upon what ground this ca accomplished in ordinary receivers if we entirely exclude the idea tha receiver is in some sense the serva the company whose property he h

agents or servants of the receiver are legally the agents or ants of the company.[1]

operates and whose franchises he ises. . . . In many cases it has held that a railway company is for breach of duty imposed by te, even though the injury which de the basis of the claim occurred ime when the railway was in the sive management and control of a ver, and this even when due care e part of the receiver would have led the injury. The line of dis- on is exceedingly shadowy which an action against a railway com- for the negligence of a receiver ting its railway, by reason of the hat the duty, the non-performance hich constitutes negligence, is im- l by statute, which is but a written The class of cases referred to, in declaring what constitutes negli- e, when, under identically the same the same relief is denied under nwritten law, which as fully im- the duty and liability. Kansas, R. Co. *v.* Wood, 24 Kan. 619; 6 & Eng. R. Cas. 582; McKinney hio, etc., R. Co., 22 Ind. 99; In- polis, etc., R. Co. *v.* Ray, 51 Ind. "In the present state of the law, we ne to lay down a rule so broad as ggested above, and deem it more stent with proper judicial action to w the rules fixed by an almost un- en line of decisions, made by courts ent for their learning, by which ordinary rules for the determina- whether the relation of master and nt exists, have been applied, in in which receivers had been ap- ed with powers to operate and to build railways. Moreover, are some difficulties, technical to extent though they be, which in- us to follow, unless the legislature by statute otherwise provide, the which the great weight of adjudi- cases seems to establish, which is neither a receiver nor his em- s are ordinarily the servants of a ay company operated by such per- ppointed by a court. There are, ver, cases in which the rule can- e applied."

Ohio, etc., R. Co. *v.* Anderson, 10 pp. 313, the court by Casey, P. J., ves: "Receivers of a railroad any are vested with its absolute ol and management, and are thus in their representative capacity for injuries resulting from operating the road to the same extent that the company itself might have been liable. It would seem to be clear upon principle, and in the absence of absolute liability created by statute, that the corporation itself cannot be held responsible for the negligence of the servants of a receiver operating the road over whom it has no control. The receiver's possession is not the possession of the corporation, but is antagonistic thereto, and the company cannot control either the receiver or his employés.

See also Schular *v.* Hudson River R. Co., 38 Barb. (N. Y.) 653; Weyant *v.* New York, etc., R. Co., 3 Duer (N. Y.) 360; Felton *v.* Deall, 22 Vt. 170; 54 Am. Dec. 61; Ladd *v.* Chotard, Minor (Ala.) 366; Wiswall *v.* Sampson, 14 How. (U. S.) 52; Klein *v.* Jewett, 26 N. J. Eq. 474.

1. The learned judges who favor this view, have always based it upon the fact that in some instances the company is liable for claims against the receiver, and have reasoned that, unless the status of the company was either that of master or principal, it could not be liable in any case. That the liability is based upon reasons having no relation whatever, either to master and servant or to agency is, however, clearly shown elsewhere (see *infra*, this title, *Liability of Railroad Receivers; Damage Arising from Torts and Negligence During Receivership; Liability of Corporation*). In some of the cases the notion has been advanced that the relationship either of master or principal must exist, otherwise there would be no authority to take corporation property and apply it to the receiver's expenses. A careful examination of the cases, however, would seem to justify a doubt as to the correctness of this reasoning.

Special Receiver or Assignee in Bankruptcy.—Where such an officer is appointed in an adverse bankruptcy proceeding, and he takes sole possession and control, the company is not responsible for the negligence of his servants or agents. Metz *v.* Buffalo, etc., R. Co., 58 N. Y. 61; 17 Am. Rep. 201.

Officers of Company as Receivers.—

b. As Regards Actions.—There is nothing in connection with actions which is peculiar to railroad receiverships, and the general treatment elsewhere of the topics connected with this subject is in all respects applicable to receivers of railroads.[1]

c. As Regards Liability of Company for Receiver's Acts.—The general rule that the person or corporation over whose property a receiver is appointed is not liable for the acts of the receiver applies with full force to receivers of railroads.[2] An apparent exception exists, however, where an absolute duty is imposed on the corporation by statute, or where a damage occurs during the receivership by reason of a default of the company which took place prior to the appointment.[3]

2. On Contracts of Company.—See *infra*, this title, *Powers of Court and Receiver; Contracts Made Before Appointment.*

IV. Control of Property—1. Receiver's Title and Possession.—The rules of law applicable to the receiver's title and possession are precisely the same in the case of receivers of railroads as in other receiverships, and are fully considered elsewhere.[4]

Where, pending foreclosure proceedings, the president and directors of the company are ordered by the court to continue in possession and to operate the road as theretofore, they are to be considered as its receivers, and the corporation is not responsible for accidents occurring during their administration. *Ex parte* Brown, 15 S. Car. 518; 9 Am. & Eng. R. Cas. 723.

Tickets.—Where a railroad company permits its tickets to be issued to passengers in the same form after the receiver has taken possession as before, it is liable for an injury occasioned to said passenger, at least where there is nothing to show that the latter had a knowledge of the receiver's appointment. The contract of carriage is to be considered as having been entered into between the passenger and corporation. Washington, etc., R. Co. *v.* Brown, 17 Wall. (U. S.) 445.

1. See, in general, Receivers, vol. 20, pp. 228, 248.

In regard to the effect, on pending actions, of the appointment of a receiver, see Receivers, vol. 20, p. 283. As to the effect of appointment on the right to bring actions by or against the company, notwithstanding the receivership, see Receivers, vol. 20, p. 235.

2. See *infra*, this title, *Liability of Railroad Receivers; Damage Arising from Negligence and Torts During Receivership; Liability of Corporation.* See, also, Receivers, vol. 20, p. 279.

3. See *infra*, this title, *Liability of Railroad Receivers; Damage Arising from Negligence and Torts During Receivership; Liability of Corporations; Corporation Liable for Statutory Duty.*

4. See Receivers, vol. 20, p. 126.

Receivers, vol. 20, p. 137, where all questions relating to the title which the receiver takes, the limitations and claims to which such title is subject, the receiver's right of possession, the protection which the court gives such possession, and the punishment of interference therewith, are treated in detail.

Strikes.—Where a railroad is in the hands of a receiver, and the employés of another road who have struck, or any other persons, prevent the employés of the receiver from working they commit a contempt of court and are to be treated in as summary a manner as the contempt were committed in the actual presence of the court. Secor v. Toledo, etc., R. Co., 7 Biss. (U. S.) 513; King *v.* Ohio, etc., R. Co., 7 Biss. (U. S.) 539; *In re* Doolittle, 23 Fed. Rep. 544; *In re* Wabash R. Co., 2 Fed. Rep. 217; *In re* Higgins, 27 Fed. Rep. 443. If the employés of a railroad company that is in the hands of a receiver appointed by the court are dissatisfied with the wages paid by the receiver, they may abandon the employment; and by persuasion or argument

Conflict of Receiverships.—See RECEIVERS.[1]

As Affected by Territorial Limit of Jurisdiction.—See RE-ERS.[2]

As Affected by Removal of Causes from State to Federal Courts.—rules of judicial comity which commonly cause a Federal to refuse to interfere with property in the custody of a State , does not prevent the removal from a State court to a Fed-court, under the *United States* Judiciary Act of 1875, of a n equity in which the State court has appointed a receiver.[3] neral as to the effect on receiverships of the removal of the from a State to a Federal court, see the note below.[4] A ver appointed before the removal of the cause, remains in ssion until himself removed, and may be required to nt in the Federal court.[5] Ordinarily a receiver can only moved by the court which appointed him, but where a cause noved from a State into a Federal court, the Federal court remove the receiver therein appointed by the State court.[6] eceiver sues or is sued, his own citizenship is the test as to urisdiction of the Federal court, and not the citizenship of n he represents.[7]

POWERS OF RAILROAD RECEIVERS—**1. Enlarged Scope of Railroad vership—Power of Court to Appoint.**—It is well known that *nglish* courts of chancery were reluctant to apply their pro-e and administrative powers before the Railway Companies' of 1867, to the management of railroads.[8] The power of ourt to place a railroad in the hands of its receiver was held ring entirely out of the jurisdiction to liquidate and sell the ad as a going concern, and could be exercised only for the ng up and sale of the business.[9]

the *United States* this power of the courts to take a railroad f the hands of its directors has been gradually enlarged, but is still a great variety in the decisions as to the extent of ower of a court of equity in the absence of statute. In the r cases the power was held strictly "incidental and subsidi-o the function of ascertaining and enforcing the rights of the

other employés to do the same; they resort to threats or violence ce the others to leave, or accom-his purpose, without actual vio-by overawing the others by pre-ted demonstrations of force, and revent the receiver from operat-e road, they are guilty of a con-of court, and may be punished ir unlawful acts. U. S. *v.* Kane, . Rep. 748; 25 Am. & Eng. R. 08.

ol. 20, pp. 65, 67, 89.

ol. 20, pp. 65, 67, 241, 250.

re Iowa, etc., Const. Co., 10 Rep. 401.

4. Consult in general Foster's Federal Judiciary Acts; Foster's Federal Practice; Dillon on Removal of Causes. See REMOVAL OF CAUSES.

5. Hinckley *v.* Gilman, etc., Co., 100 U. S. 153; Mack *v.* Jones, 31 Fed. Rep. 196.

6. Texas, etc., R. Co. *v.* Rust, 17 Fed. Rep. 275.

7. Davies *v.* Lathrop, 12 Fed. Rep. 353.

8. See *supra*, this title, *Appointment.*

9. Gardner *v.* London, etc., R. Co., L. R., 2 Ch. 201.

persons concerned, and to uphold the rights of creditors and others, and the obligation of contracts."[1]

1. In reviewing earlier American decisions on the power of courts of equity over a railroad in the hands of a receiver in Meyer *v.* Johnston, 53 Ala. 237, the court by Manning, J., said: "A court of equity in this country may, in certain cases, interpose and appoint a receiver when a company receiving tolls and income more than sufficient to pay the expenses of an economical administration, refuses to apply the surplus to payment of a judgment or mortgage creditor. Covington Drawbridge Co. *v.* Shepherd, 21 How. (U. S.) 112, presents an instance of the exercise of this power. The receiver in it was also directed, out of the tolls and income of the bridge, to keep it in repair.

"In Stevens *v.* Davison, 18 Gratt. (Va.) 819, a board of directors, some of whom 'had been concerned in the fraudulent issue of a very large amount of spurious stock, greatly exceeding in amount the lawful stock of the company,' on the very day when their term of office was to expire, and the annual meeting of the stockholders, which the directors failed to call, should have been regularly held, made a lease of the railroad of which they were directors, for a period of ten years, at an inadequate rent, without authority from the charter to do so, and in violation of a by-law adopted by the stockholders. Some of the lawful stockholders filed a bill to have the issue declared void and for other relief. And a receiver was appointed to take possession and control of the road and operate it under directions contained in the decree. The court of appeals of Virginia, reviewing the proceedings, said: 'While for the reasons assigned in Gardner *v.* London, etc., R. Co., L. R., 2 Ch. 201, a court of chancery will be reluctant to appoint a receiver to take charge of and manage a railroad, it is competent to do so, when such a course is indispensable to secure the rights of the legitimate stockholders, and to prevent a failure of justice. And the court is of opinion that under the circumstances of this case it was proper for the court to appoint a receiver to take charge of and manage the railroad until it can be ascertained by a proper inquiry to be made in this cause, who are the legitimate stockholders of said company, to whom the custody and management of said railroad should be committed.'

"As bearing upon the main question of the power of the court, the court discusses the question whether a railroad company which has executed a first mortgage of its railroad, constructed and to be constructed, and thereby raised a large amount of money to aid in the building of it, can afterwards give a credit to another even to one who is engaged to build an unfinished part of it, that shall have precedence of the older one and consider it as settled in the negative. Dunham *v.* Cincinnati, etc., R. Co., Wall. (U. S.) 254; Galveston, etc., R. Co. *v.* Cowdrey, 11 Wall. (U. S.) 48 and argue that if the railroad company itself, the corporation created by the State to build, equip, and operate a work useful to the public or belonging to the company, cannot when its enterprise is about to fail, and its labor and expenditures to be lost, give to those who shall then come to its aid and help to complete it, obligations which, like those given by the master of a vessel abroad and in distress, shall have priority over others previously contracted—what prerogative of a court of equity entitles the chancellor to step in and do so instead of the company? The company may not do so, because, holding that contracts should be inviolable, the law will not permit the obligation of them to be impaired. The Constitution of the United States inhibits even a State from doing an act which shall have that effect. And, certainly, a court which is a portion of the government of a State, cannot have a power which is denied to the State in convention assembled. If, therefore, the action of a chancellor, in this cause goes to the extent of taking the property of the defendant corporation into his hands for the purpose, through his appointees, of completing an unfinished work, or of enlarging or improving a finished one, beyond what is necessary for its preservation, and to that end—of raising money by charging the railroad and its appurtenances with liens which are to supersede older ones, without the co

many subsequent cases the foundation of this power has enlarged by the added consideration of the public nature of interests involved.[1] In some cases fraud and insolvency t appear.[2] In others, as in *Massachusetts*, it is held that a t of chancery has no peculiar jurisdiction over corporations estrain them in the exercise of their powers or prevent them violating their charter in cases where there is no fraud or ch of trust alleged as the foundation for the claim of equit- relief. To this rule it is there held that railroads are no ex- ion.[3] In another group of cases the line is drawn at the ssity for the protection of some clear right of the suitor. courts interfere when they can do so usefully.[4] In other

of the holders of these, he has ertently passed beyond the bound- of a chancellor's jurisdiction. ur opinion no such power is d or resides in any judicial trib- '

In the case just quoted from, r *v.* Johnston, 53 Ala. 237, the entered at length into this ques- See, *infra*, this title, *Powers of vers, Outlays.*

See Newfoundland R. Construc- Co. *v.* Schack, 40 N. J. Eq. 222. as held that mere allegation of vency was insufficient. Facts ircumstances must be set out.

In Pond *v.* Framingham, etc., R. 130 Mass. 194; 9 Am. & Eng. R. 551, the court by Morton, J., said: is a bill in equity the substantial ations of which are, that the plain- re creditors of the defendant cor- ion; that the corporation is insol- that all its property is mortgaged stees for the benefit of one class editors; that it owes large amounts er creditors, one of whom has at- d all its property; that it is about ecute a lease to said attaching tor, for the term of nine hundred inety-nine years, at a rental which not pay the interest upon its in- dness, and that the execution of lease would be injurious to the in- of its creditors and stockholders. prayer is for an injunction to re- the defendant from further pros- ng its business, and for the ap- ment of receivers.

here is no statute giving this court y jurisdiction in such a case as and the bill does not state a case n the general equity powers of a of chancery. As is stated in dwell *v.* Salisbury Mfg. Co., 7 (Mass.) 393; 66 Am. Dec. 490: 'It is too well settled to admit of question that a court of chancery has no peculiar jurisdiction over corporations to restrain them in the exercise of their powers or control their action, or prevent them from violating their charter, in cases where there is no fraud or breach of trust alleged as the foundation of the claim for equitable relief.'

"The plaintiffs cannot maintain this bill, unless upon this ground, that any creditor can maintain a bill in equity against an individual debtor upon like allegations. But there is no allegations of fraud or breach of trust, or any other ground of jurisdiction which brings the case within the general equity powers of a court of chancery. The bill is an attempt by a creditor to restrain his debtor from making what is alleged to be an improvident contract. The rights of the parties are governed by the rules of the common law. The plaintiffs as creditors might by an attachment have obtained security which would take precedence of the contemplated lease; but if they could not, the court has no power to restrain the debtor from making a disposition of his property which is permitted by the common law, unless fraud or a breach of trust is alleged and shown.

The allegation that the defendant corporation is insolvent does not aid the plaintiffs. In the absence of any statute giving the power, this court has no authority to act as a court of insolvency for the liquidation of the affairs of an insolvent railroad corporation."

4. Simpson *v.* Ottawa, etc., R. Co., 1 Ch. Chamb. Rep. 126; Orphan Asylum Soc. *v.* McCartee, 1 Hopk. Ch. (N. Y.) 429; Blondheim *v.* Moore, 11 Md. 365. See Myers *v.* Estell, 48 Miss. 403; Bank of Ogdensburg *v.* Arnold, 5 Paige (N. Y.) 39; Clason *v.* Corley, 5

cases the power is held to be a discretionary one, "to be exercised only on good cause shown, such as need of interference for the protection of creditors and stockholders from breach of trust by the directors."[1]

Obviously, the question of the source of the power of the court is largely involved in the question of the causes for which an appointment would be made.[2] It is also clear that questions treated both as to the outlays and contracts which the court may authorize rest on the same grounds as this original power to appoint a receiver.[3]

In some States statutes provide for the appointment of a receiver of a railroad.[4]

Sandf. (N. Y.) 447; Schreiber *v.* Carey, 48 Wis. 213. A receiver will also be appointed in those cases where circumstances of fraud or bad faith on the part of the mortgagor are shown (Haas *v.* Chicago Bldg. Soc., 89 Ill. 498), and those cases where there are other facts involved in the action, which would render the denial of a receiver inequitable and unjust. Haas *v.* Chicago Bldg. Soc., 89 Ill. 498; Bloodgood *v.* Clark, 4 Paige (N. Y.) 577; Vann *v.* Barnett, 2 Bro. C. C. 157; Metcalf *v.* Pulvertoft, 1 Ves. & B. 180. See Mercantile Trust Co. *v.* Missouri, etc., R. Co., 36 Fed. Rep. 221; 36 A. & E. R. Cas. 268, note. See, also, Taylor *v.* Philadelphia R. Co., 7 Fed. Rep. 381; 1 Am. & Eng. R. Cas. 627.

1. Douglass *v.* Cline, 12 Bush (Ky.) 608; Jacobs *v.* Gibson, 9 Neb. 380; Nicholas *v.* Perry P. Co., 11 N. J. Eq. 126; Sea Ins. Co. *v.* Stebbins, 8 Paige (N. Y.) 565; Wiltsie on Mortgage Foreclosure, p. 781, § 657. See Mercantile Trust Co. *v.* Missouri, etc., R. Co., 36 Fed. Rep. 221; 36 Am. & Eng. R. Cas. 268, note. See especially, *supra*, this title, *Appointment*. In Farmers' L. & T. Co. *v.* Chicago, etc., R Co., 27 Fed. Rep. 146; 24 Am. & Eng. R Cas. 166, it was held that "insolvency may or may not be sufficient cause."

2. See, *supra*, this title, *Appointment, Jurisdiction and Power of Appointment*.

3. See, *infra*, the remaining divisions of this article, discussing Cowdrey *v.* Railroad Co., 1 Woods (U. S.) 334; Kennedy *v.* St. Paul, etc., R. Co., 5 Dill. (U. S.) 519; especially Fosdick *v.* Schall, 99 U. S. 235; Galveston, etc., R. Co. *v.* Cowdrey, 11 Wall. (U. S.) 459; Gilman *v.* Illinois, etc., Tel. Co., 91 U. S. 603; American Bridge Co. *v.* Heidelbach, 94 U. S. 798; Wood *v.* Guarantee Trust, etc., Co., 128 U. S. 418. See also, *supra*, this title, *Appointment, Jurisdiction and Power of Appointment*.

It is evident that all the cases in which the powers of a receiver are enumerated must involve corresponding powers of the court. See Cowdrey *v.* Railroad Co., 1 Woods (U. S.) 334, and other cases discussed below. But the converse of this does not follow. A receiver's acts may be annulled by the court, not for want of power, but because the receiver ought to have made a special application. See Bank of Montreal *v.* Chicago, etc., R. Co., 48 Iowa 518.

4. **New Jersey.**—See Vanderbilt *v.* Central R. Co., 43 N. J. Eq. 682; 35 Am. & Eng. R. Cas. 18. See also *New Jersey* Rev. 189, § 70; National Bank *v.* Sprague, 21 N. J. Eq. 538; Sewell *v.* Cape May, etc., R. Co. (N. J.), 30 Am. & Eng. R. Cas. 155.

In Delaware Bay, etc., R. Co. *v.* Markley, 45 N.J. Eq. 139; 37 Am. & Eng. R. Cas. 421, it was held that the statute (Supp. Rev., p. 834, pl. 42) authorizes the chancellor to appoint a receiver if a railroad neglects to run daily trains, confers such power on the court of chancery and not upon the chancellor in his personal capacity.

New York.—*New York* Code Civ. Proc. 712. In Fellows *v.* Heermans, 1 Abb. Pr. N. S. (N. Y.) 1, it was held that the provisional remedies therein enacted are inclusive, being incidental and not essential to the jurisdiction of the court. But in U. S. Trust Co. *v.* New York, etc., R. Co., 101 N. Y. 478; 25 Am. & Eng. R. Cas. 601, it was decided that the power of a court to appoint a receiver *pendente lite* in foreclosure proceedings is inherent and does not depend upon statutory authorization.

Extent of the Power of a Court Over a Railroad in the Hands of eceiver.—Strictly speaking, the power of the court and the r of the receiver are identical, for the receiver has no r except such as he derives from the authority of the court; n the management of a railroad there is a line of functions ı are necessarily left to the discretion of the receiver, in pur- e of the terms of the order of court under which he These are more conveniently separated in their treatment the scope of the power of the court itself. This distinction dered important by the fact that the court will refuse to ion certain acts of the receiver solely on the ground that ission ought to have been applied for.[2]

ile, therefore, the question of the power of the court is ved in every act of the receiver (and will be treated in a speci- on of such acts), there arises, on the other hand, the separate ssion of the limits of the power which courts will exercise management of railways.

the earlier cases, this power was restricted to those acts ı are necessary for the custody and preservation of the rail- These objects necessarily included all acts required to keep oad in repair and to continue its operation, in order to its s a going concern. But the line was at first strictly drawn airs; the completion of an unfinished portion of the road eld to be beyond the powers of the court.[3]

'eople *v.* O'Brien, 111 N. Y. 1; & Eng. R. Cas. 78, it was held here, under the laws in force at e of the dissolution of a corpo- the property vested immedi- ı its directors, who took as trus- r the stockholders and creditors, quent statute providing for the tment, without making the di- parties to the action, of a re- of the property of the dissolved ation, and for a transfer of its to him by force of the statute, e title had become vested in the rs, is in violation of the consti- l prohibition against the taking vate property without due pro- law.

ı **Carolina.**—It was held in r *v.* Maxwell, 66 N. Car. 45, e provision of the Code "does terially alter the equitable juris- of the court." See, also, Battle is, 66 N. Car. 252.

s.—See *Texas* Rev. Stat., art. Acts 1885, p. 66, § 4; Acts 1887, § 1, subdiv. 3. In East Line, . Co. *v.* State, 75 Tex. 434; 40 Eng. R. Cas. 574, it was held statute which provides for the appointment of a receiver upon judgment dissolving corporations is valid, although it contains no provision for bringing the stockholders and creditors of the company into court.

1. See *infra*, this title, *Discretion of the Receiver*—where the limit of this discretion is shown by enumerated cases, and relation of court and receiver is set forth. See, also, Cowdrey *v.* Railroad Co., 1 Woods (U. S.) 334.

2. Bank of Montreal *v.* Chicago, etc., R. Co., 48 Iowa 518; Cowdrey *v.* Galveston, etc., R. Co., 93 U. S. 352; Bayles *v.* Kansas Pac. R. Co., 13 Colo. 181; 40 Am. & Eng. R. Cas. 42. See *infra*, this title, *Discretion of the Receiver*.

3. In Meyer *v.* Johnston, 53 Ala. 237, the court inquired whether a chancellor who takes property in litigation, by his receivers and managers under the charge of the court, is competent to raise money when necessary for the expense of its custody and preservation, by issuing certificates of indebtedness that shall constitute first liens? The court by Manning, J., said: "It was not necessary that the question of the power of a court to authorize

In more recent cases, while the courts have transcended this limit and have undertaken to build unfinished portions, there has yet been no departure from the principle early established. Such operations have been entered into only under an "overwhelming necessity" to preserve the road as a going concern—never as a speculative enterprise.[1]

the issue of first lien certificates of indebtedness to enable a receiver to raise the money he might need, should be decided before the introduction of railroads. But these properties, with their appurtenances, vast in extent and value, yet very perishable if unused and neglected, existing as the estates of private individuals associated into corporations, but essentially public works, in whose operations the public at large and the State are concerned, when drawn into litigation, must be dealt with by the courts according to the nature and circumstances of the subject. And any one can understand that the best and cheapest mode of conserving a railroad may be by operating trains thereon, and keeping it in repair for their use. To preserve its value, it must generally be continued in operation, and be sold as a going concern. If it were not for the public quality belonging to them, or the injury that would be done to the interests of whole communities that have become dependent on a railroad for accommodation in a thousand things, a chancellor might say to the parties most interested: Unless you furnish means for the protection of this property which does not itself afford an adequate income for the purpose, it may become a dilapidated and useless wreck. But the inconvenience and loss which this would inflict on the population of large districts, coupled with the benefit to parties who perhaps are powerless to take care of themselves, of preventing the rapid diminution of value, and derangement and disorganization that would otherwise result, seem to require—not for the completion of an unfinished work, or the improvement, beyond what is necessary for its preservation, of an existing one,—but to keep it up, to conserve it as a railroad property, if the court has been obliged to take possession of it, that the court should borrow money for that purpose if it cannot otherwise do so in sufficiently large sums, by causing negotiable certificates of indebtedness to be issued constituting a first lien on the proceeds of the property, and redeemable when it is sold or disposed of by the court.

"Finally," the court adds, "the case ought to be one of the greatest urgency in which a court should appoint a receiver to manage and operate a railroad at all. It might, instead, be sometimes expedient to require the earnings of the road to be paid over to and to be disbursed by a receiver, on its appointment, and to prevent by injunction any interference of others with the management, in the meantime."

See *infra*, this title, *Relative Priority of Claims*. See, also, Baker *v.* Backus, 32 Ill. 79; Voshell *v.* Hynson, 26 Md. 83; Leddel *v.* Starr, 19 N.J. Eq. 159; Sanford *v.* Sinclair, 8 Paige (N. Y.) 372; Gibson *v.* Martain, 8 Paige (N. Y.) 481; Blondheim *v.* Moore, 11 Md. 36.

See, also, Gibert *v.* Washington City, etc., R. Co., 33 Gratt. (Va.) 586; 1 Am. & Eng. R. Cas. 473, where it was held that "a court of equity which has assumed control of a railroad, for the benefit of all concerned, by the hand of an efficient receiver, is authorized to do all acts that may be necessary to preserve the property and give it additional value, not only for the benefit of the lien creditors, but also for the benefit of the company whose possession the court has displaced by taking into its own hands the property, rights, works, and franchises of the company. Any act which would seem necessary for the protection and preservation of the property, is a legitimate and proper act, and whatever is manifestly appropriate to such preservation, or to the enhancement of the value of the property, not in excess of the powers of the corporation, will always be upheld and enforced by the courts."

1. In Kennedy *v.* St. Paul, etc., R. Co., 5 Dill. (U. S.) 519, there was an application by the receiver for authority to complete the unfinished portion of the railroad and to issue debentures to raise the means of construction. A commission appointed by the court

ascertained the wishes of the holders. The court, by Dillon, ented "in the fullest manner to roposition that a court of equity t not to enter upon the work of r operating or building a railway s can possibly be avoided without ndering a great sacrifice of the s and securities of the parties in est;" holding that "such authority to complete the building of an ished line of railway and to issue itures for that purpose must not nferred without an overwhelm- resistible necessity. When such rity is conferred, it ought to be led with the utmost care." The granted the order authorizing ompletion of the road by the er out of moneys furnished by arties in interest, but refused to it the receiver to contract any or liability in excess of the money lly furnished to him.

, also, Hand *v.* Savannah R. o S. Car. 406; *Ex parte* Brown, Car. 531; 9 Am. & Eng. R. Cas. *In re* Fifty-four First Mortgage s, 15 S. Car. 304; 9 Am. & Eng. s. 739.

, further, as to the power of the to authorize contracts for the letion of the road, Smith *v.* llough, 104 U. S. 25; 3 Am. & R. Cas. 159; Tripp *v.* Boardman, va 410; Gibert *v.* Washington etc., R. Co., 33 Gratt. (Va.) 586; & Eng. R. Cas. 473; Bank of real *v.* Chicago, etc., R. Co., 48 518.

Ex parte Carolina Nat. Bank, 18 ar. 289, the statement of the s of receivers as applied to a made in Cowdrey *v.* Railroad 1 Woods (U. S.) 336, was em- d. A loan of $20,000 was ap- d.

dick *v.* Schall, 99 U. S. 235, is, to ain extent, a leading case on the on of the power of a court of in managing a railroad. The by Waite, C. J., here said, as to econd question: "We have no that when a court of chancery ed by railroad mortgagees to ap- a receiver of railroad property ng proceedings for foreclosure, urt, in the exercise of a sound al discretion, may, as a condition ing the necessary order, impose erms in reference to the pay- from the income during the re- ship of outstanding debts for labor, supplies, equipment, or permanent improvement of the mortgaged property as may, under the circumstances of the particular case, appear to be reasonable. Railroad mortgages and the rights of railroad mortgagees are comparatively new in the history of judicial proceedings. They are peculiar in their character and affect peculiar interests. The amounts involved are generally large, and the rights of the parties oftentimes complicated and conflicting. It rarely happens that a foreclosure is carried through to the end without some concessions by some parties from their strict legal rights, in order to secure advantages that could not otherwise be attained, and which it is supposed will operate for the general good of all who are interested. This results almost as a matter of necessity from the peculiar circumstances which surround such litigation." See, also, Galveston, etc., R. Co. *v.* Cowdrey, 11 Wall. (U. S.) 459; Gilman *v.* Illinois, etc., Tel. Co., 91 U. S. 603; American Bridge Co. *v.* Heidelbach, 94 U. S. 798. See, also, as distinguishing Fosdick *v.* Schall, 99 U. S. 235; Wood *v.* Guarantee Trust, etc., Co., 128 U. S. 416. The "vital distinction" was laid between a debt for construction and one for operating expenses, and the doctrine of Fosdick *v.* Schall, 99 U. S. 235, was held applicable wholly to the latter class of liabilities. It was likewise held that the doctrine of Fosdick *v.* Schall, 99 U. S. 235, has never yet been applied in any case except to that of a railroad. See also Cowdrey *v.* Galveston, etc., R. Co., 93 U. S. 352.

In Miltenberger *v.* Logansport R. Co., 106 U. S. 286; 12 Am. & Eng. R. Cas. 464, was considered the question of the power of a court to create claims which should take precedence of the lien of the mortgage. See, also, Wallace *v.* Loomis, 97 U. S. 146, where the court said by Bradley, J.: "The power of a court of equity to appoint managing receivers of such property as a railroad, when taken under its charge as a trust fund for the payment of incumbrances, and to authorize such receivers to raise money necessary for the preservation and management of the property, and make the same chargeable as a lien thereon for its repayment, cannot at this day be seriously disputed. It is a part of that jurisdiction, always exer-

Where the power of the court to appoint a receiver is derived from a statute it is settled that the power to operate the railroad and maintain its traffic and connections will be implied as necessary to the exercise of the powers expressly conferred.[1]

cised by the court, by which it is its duty to protect and preserve the trust funds in its hands. It is undoubtedly a power to be exercised with great caution, and, if possible, with the consent or acquiescence of the parties interested in the fund."

The claims considered in Miltenberger *v.* Logansport R. Co., 106 U. S. 286; 12 Am. & Eng. R. Cas. 464, were the purchase, by a railroad company insolvent on its first mortgage bonds, of rolling stock; the adjustment of liens on other rolling stock previously acquired, and the construction of a bridge and of an extension of the road.

1. New Jersey.—In Vanderbilt *v.* Little, 43 N. J. Eq. 669; 35 Am. & Eng. R. Cas. 18, the court by Beasley, C. J., held that the express power given by the act of Feb. 11, 1874 (*New Jersey* Rev. 196), to operate an insolvent railroad for the use of the public, is conferred on the receiver as an officer of the court, to be wielded under its directions; that "the implied power to manage the railroad so as to preserve its value is manifestly conferred upon the officer of the court who is therein subject to the directions of the court; . . . that by . . . statutes there has been conferred upon the court of chancery the same general powers over an insolvent railroad corporation which have been conferred on it over other insolvent corporations. In general these powers are such as suffice to enable the assets and property of the corporation to be turned into money and distributed among the creditors. . . . Without other express authority, it is plain that for the proper performance of the duties thus imposed on the court, and to be performed by its officer, the latter must take charge of all the property of the corporation, and so manage and preserve it as to enable it to be disposed of most advantageously. With respect to the property of ordinary corporations, this duty can be fully performed by merely storing, insuring and otherwise guarding the property and preserving its value until a sale can be judiciously made. Ordinarily, as well observed by the vice-chancellor, there is no necessity or propriety in continuing the business of such corporations, and an early conversion of their assets into money and its distribution among the creditors, is the plan of wisdom. But if the business of an insolvent railroad be arrested, and its operation stopped, it is clear that its property would not be preserved in a condition likely to realize its full value. On the contrary, a cessation of its business would be fatal to the interests of all concerned. In the absence of any express enactment, . . . the legislation which gives authority to deal with and convert into money such property, must be held to give, by implication, all needful authority to so run the road as to preserve its traffic and connections. The duty imposed requires the road to be so managed that, when ready to be disposed of, the lessees or purchaser will acquire not merely the road-bed, rails, locomotives and cars, but a going concern actually engaged in business. This view of a receiver's powers and duties was taken by the Supreme Court of the United States. Barton *v.* Barbour, 104 U. S. 126; 4 Am. & Eng. R. Cas. 1; Wallace *v.* Loomis, 97 U. S. 146."

See, also, Vanderbilt *v.* Central R. Co., 43 N. J. Eq. 669; 35 Am. & Eng. R. Cas. 18, and Hoover *v.* Montclair etc., R. Co., 29 N. J. Eq. 4.

New York.—In Moran *v.* Lydecker, 2 Hun (N. Y.) 582 (where an injunction was prayed for staying the receiver from completing the road on the ground of the insolvency of the corporation), it was said: "It is too late to question in this country the power of receivers to operate railroads or exercise other corporate franchises under the direction of the court."

As to the exercise of the power of court in specific classes of undertakings such as building a bridge, leasing other lines, etc., see *infra*, this title, *Contracts of the Receiver, Discretion of the Receiver.*

Limit of the Jurisdiction of the Court.—In Taylor *v.* Philadelphia, etc., R

iscretion of the Receiver—Outlays.—The powers of the r are confined to those derived from the order of court, which he acts. Strictly speaking, he has no powers im- rom such order. For authority to make contracts and s of magnitude, he must apply specially to the court. His ts are subject to the review of the court or its master.[1] extraordinary character, however, of the duties of ceiver of a railroad involve a certain discretion neces- or its preservation and operation. But the courts are of the exercise of this discretion in large outlays.[2]

ed. Rep. 381, the court refused, petition of the company filed it in which receivers were ap- to take jurisdiction of and question as to the propriety of ing a meeting called for the of officers, which question has on to the objects for which the s were appointed.

las *v.* Page, 106 N. Y. 439, it that if a mortgage upon a rail- oreclosed and sale had under court, the jurisdiction of the er the corporate property is not d, if the purchasers delay to the contract; and it is in the f the court, even after such sale, orize the receiver to continue ration of the road and to pur- olling stock therefor, and to at the price thereof should form en upon the mortgaged prop-

Bank of Montreal *v.* Chicago, Co., 48 Iowa 518, the court, by J., in discussing debt incurred eiver for sums of money bor- ays: "Ordinarily, the duties of r only 'comprise the operation agement of the road, the pay- current expenses, and the ap- of the residue of the earnings ipts to the extinguishment of ebtedness, to secure which the was appointed. The receiver n authorized to enlarge the op- of the company, or to extend of road, his functions being limited to the management operty in its existing condition, rotection of creditors, and sub- ays to the supervision of the

an order conferring extraor- powers, such as to complete of the line, put others in good nd to that end borrow money r indebtedness which becomes en of the entire railroad property, the court held, "the claimed right or power should appear in express terms; or, possibly it would be sufficient if it appeared by necessary implication." Further, that where the order authorizes him "to do and perform all the acts and things necessary to be done and performed to construct said line of railroad," and "for such purpose" the receiver is expressly authorized to issue certificates "for money borrowed, material furnished, labor performed, or on account of contracts made by him for or on account of the construction or completion of said road, or any part thereof," the means are fixed and defined. Therefore it was held he could not issue certificates which would constitute a first lien on the road, except for money borrowed, material furnished or labor performed. When the material was furnished or labor performed he was authorized to issue the certificates in payment therefor, and not until then. And if he made a contract for the construction of the road he might issue certificates as the material was furnished or the labor performed, and on the completion of the road he could issue his certificate in final payment. But the power is not conferred to issue certificates in payment for material not furnished and labor not performed. If the necessity existed for enlarged powers, they should have been applied for. Cases where courts have expressly authorized their receivers to issue negotiable securities are not applicable.

2. In Cowdrey *v.* Railroad Co., 1 Woods (U. S.) 334, the court by Bradley, J., defined the respective positions of receiver and master as officers of the court: "A receiver is an officer of the court, as well as a master; and states his own accounts and submits them to a master for inspection under the order of the court, the master acting in place of the

Its limits are best set forth in an enumeration of spec cases.[1]

court in a judicial rather than a ministerial capacity. Strictly speaking, exceptions to his report in such cases do not properly lie as they do to an account stated by himself. The duty of the court consists in reviewing the principles and rules adopted and followed by the master in allowing the receiver's accounts rather than in examining the items of the account in detail. . . .

"It may be laid down as a general proposition that all outlays made by the receiver in good faith in the ordinary course with a view to promote the business of the road and to render it profitable and successful are fairly within the line of discretion which is necessarily allowed to a receiver intrusted with the management and operation of a railroad in his hands. His duties and the discretion with which he is invested are very different from those of a passive receiver, appointed merely to collect and hold moneys due on prior transactions or rents accruing from houses and lands; and to such outlays in ordinary course may properly be referred, not only the keeping of the road, buildings and rolling stock in repair, but also the providing of such additional stock and instrumentalities as the necessities of the business may require, always referring to the court or to the master appoined in that behalf for advice and authority in any matter of importance which may involve the outlay of a considerable amount of money in lump. And except in extraordinary cases, the submission by the receiver of his accounts to the master at frequent intervals, whereby the latter may ascertain from time to time the character of the expenditures made, and disallow whatever may not meet his approval, will be regarded as a sufficient reference to the court for its ratification of the receiver's proceedings. In extraordinary cases, involving a large outlay of money, the receiver should always apply to the court in advance, and obtain its authority for the purchase or improvement proposed."

On appeal to the Supreme Court of the U. S. this opinion was subsequently affirmed. Cowdrey *v.* Galveston, etc., R. Co., 93 U. S. 352.

Where the receivers were directed for the care and protection of the property to take possession of the road with all its property, franchises, and rights cluding the earnings and income th of, and "to maintain and keep in re the said railroad and operate and c on the same or such part thereo may be practical and for the interes all parties concerned, and receive income from and earnings ther they are authorized to dismiss an the agents or servants of the corp tion and to employ others to make necessary contracts and disbursem for the purpose of carrying on the r and to make certain other paym particularly specified. They are quired to account for all receipts disbursements. Ellis *v.* Boston, R. Co., 107 Mass. 1.

The extent of the receiver's discre under the statutes of *New Jerse* set forth in Vanderbilt *v.* Little, 4 J. Eq. 669; 35 Am. & Eng. R. Cas which will be found quoted in the *infra*, this title, under *Contracts.* to *New York*, see Moran *v.* Lydec 27 Hun (N. Y.) 582.

1. See Hand *v.* Savannah, etc Co., 10 S. Car. 406, where in an acti wind up the affairs of an insol railroad company in which all cr ors have been made parties by p cation, held that an order direc the receiver to change the locatio part of the road and build a br with the income of the corpora should not be made upon the re mendation of a receiver and report of an engineer, but only the report of the master sho that necessity existed for the ch being made.

Rebatement.—Disbursements fo batement of freight, being a custo or at least usual thing necessar secure business for the railway tually proved effectual, were appr with the suggestion that it did n in the mouths of stockholders or itors reaping benefits therefro complain. Cowdrey *v.* Railroad Woods (U. S.) 334.

Truck and Horses.—The purcha a truck wagon and a pair of hors necessary and profitable, fairly w the discretionary powers of the rec in managing and carrying on the road with prudence and econ Cowdrey *v.* Railroad Co., 1 W (U. S.) 334.

yage and Wharfage.—The same ayage and wharfage. Cowdrey ilroad Co., 1 Woods (U. S.) 334.

nsel and Witness Fees.—As to ex-s, counsel and witness fees in ding himself against a motion s removal, if the receiver gave casion for that motion; if the ant had no ground, the receiver to be reimbursed either out of the y in his hands or by the defend-ho made the motion. Cowdrey ilroad Co., 1 Woods (U. S.)

Trustees of Internal, etc., Fund *v.* ough, 105 U. S. 536; 12 Am. & R. Cas. 345, the decision in Cow-*v.* Galveston, etc., R. Co., 93 U. , was approved. In the latter he court sustained an allowance 00 for counsel fees to be paid to el out of the proceeds of a rail-mortgage foreclosed (in the cir-ourt for district of Texas), being nount agreed by the trustees to d for instituting proceedings dis-ued by the intervention of the war. The court by Bradley, J., e former case added: "In the amount of litigation which has in this country upon railroad ages, where various parties have ened for the protection of their and the fund has been subjected control of the court, and placed e hands of receivers or trustees, been the common practice as n the courts of the United States hose of the State, to make fair st allowances for expenses and el fees to the trustees or other s, promoting the litigation and ng the due application of the rty to the trusts and charges to it was subject." The court, er, further on, admits that it be "very far from expressing" proval "of such large allowances stees, receivers, and counsel as sometimes been made and which justly excited severe criticism."

stee's Compensation—Mortgagor's el Fee.—When the trust deed pro-for the payment of the expenses eclosure proceedings as well as ensation for the execution of the an order will, on the applica-the trustee be entered directing eceivers to pay to the trustee a n account of the expenses and es.

however, Trustees of Internal, Fund *v.* Greenough, 105 U. S. 527; 72 Am. & Eng. R. Cas. 345. But when the mortgaged property will not realize sufficient upon sale to pay the mortgage debt, an allowance out of funds in the hands of the receivers for the payment of the mortgagor's counsel cannot be made. Mercantile Trust Co. *v.* Missouri, etc., R. Co., 41 Fed. Rep. 8; 43 Am. & Eng. R. Cas. 469.

Purchase of Rolling Stock—Operating Materials.—Where the court authorized the receiver of an insolvent railroad company to purchase rolling stock, and directed that the price should be a first lien "on the said mortgaged premises and all proceeds thereof which may come into this court, or are, or shall become subject to its jurisdiction or authority," it was held that, by such order, the price of the rolling stock became a first lien, not only upon the proceeds derived from the sale but also upon the mortgaged property itself. Vilas *v.* Page, 106 N. Y. 439. Miltenberger *v.* Logansport R. Co., 106 U. S. 386; 12 Am. & Eng. R. Cas. 464.

In Frank *v.* Denver, etc., R. Co., 23 Fed. Rep. 123, the court held that where the payment for rolling stock purchased by the receiver so absorbed the earnings of the road that the receiver was unable to execute the orders of the court relating to demands for labor and supplies, payment of the principal sums falling due under the rolling stock contracts ought to be postponed until the demands for labor and supplies had been satisfied, but that the interest thereon should be paid as it matured.

But while a receiver may, of course, purchase material essential for the operation of the road, he cannot bind the trust by a purchase of material not wanted, excessive in price and defective in quality. Lehigh Coal, etc., Co. *v.* Central R. of N. J., 35 N. J. Eq. 426; 9 Am. & Eng. R. Cas. 479.

A purchase of necessary articles at a fair price is not necessarily fraudulent because the receiver, in his personal capacity, is a part or even the sole owner thereof. Farmers' L. & T. Co. *v.* Central R. Co., 8 Fed. Rep. 60.

Repairs.—The receiver of a railway may be authorized to make repairs, the expenses to be charged as a lien prior to existing mortgages. Hoover *v.* Montclair, etc., R. Co., 29 N. J. Eq. 4.

Expenditure to Defeat Competing Line.—In an appeal in the United States Supreme Court, in Cowdrey *v.*

4. Contracts of the Receiver.—As regards the contracts which th receiver may make, and the extent to which they are bindi upon the trust, there is some uncertainty. But while it has bee held that such contracts have no binding force until sanction by the court,[1] the better opinion seems to be that if the contra

Galveston, etc., R. Co., 93 U. S. 352, it was held that a receiver was not authorized, without the previous direction of the court, to incur any expenses on account of property in his hands beyond what is absolutely essential to its preservation and use, as contemplated by his appointment; and that his expenditure to defeat a subsidy proposed from the city of Galveston to aid in the construction of a railroad parallel with the one in his hands, was properly disallowed, although such road, if constructed, might have diminished the future earnings of the road in his charge.

Payment of Promissory Note.—Where there was a specific clause in the order appointing the receiver authorizing him to pay the amount due and maturing for materials and supplies about the operation and for the use of the said road, it was held it could not properly be construed to include the payment of a renewed promissory note as finally made by the company in payment for such purchases. Brown *v.* New York, etc., R. Co., 19 How. Pr. (N. Y.) 84.

Creation of Car Trusts.—When the net earnings during a receivership are sufficient to purchase and keep in repair the necessary rolling stock, the court will not sanction the creation of a car trust merely in order to allow the earnings of the road to be applied to the payment of interest on the bonds. Taylor *v.* Philadelphia, etc., R. Co., 9 Fed Rep 1; 3 Am. & Eng. R. Cas. 177.

Lease of Other Railroads.—In McMinnville, etc., R. Co. *v.* Huggins, 3 Baxt. (Tenn.) 177, it was held that a receiver has no power to lease a road. A lease effected by him without the sanction of the court is void, and no compensation will be made to the lessee for improvements made by him in accordance with the terms of the lease. See, also, State *v.* McMinnville, etc., R. Co., 6 Lea (Tenn.) 359; 4 Am. & Eng. R. Cas. 95.

The court may, however, authorize the lease of another road where such a course is manifestly advantageous to the parties in interest. Gibert *v.* Washington City, etc., R. Co., 33 Gratt. (Va.) 586; 1 Am. & Eng. R. Ca 473.

When the business of a railroad co pany consists in part at least of t through transportation of freight fro a point beyond its terminus, it was he to be within the power of the court direct the receiver to lease a railro connecting with such point witho notice to the parties to the suit. Mc cantile Trust Co. *v.* Missouri, etc., Co., 41 Fed. Rep 8; 43 Am. & Eng. Cas. 469.

Unpaid Calls.—As to the power the receiver in getting in unpaid ca on the stockholders, see RECEIVER vol. 20, p. 235. See also *In re* Birmin ham, etc., R. Co., L. R., 18 Ch. D 155; 3 Am. & Eng. R. Cas. 616; a Freeman *v.* Winchester, 10 Smed. M. (Miss.) 577.

Loan.—In *Ex parte* Carolina Nat. Ba 18 S. Car. 289, a loan of $20,000 w approved, and it was held that mon necessary for the proper success management of a railroad, borrowed the officers of the road while acting receiver, under an order of co giving them power "to continue in t possession and management of t property," should be replaced out the fund in court, realized from the come of the road while in the receive hands. The court cited Cowdrey Railroad Co., 1 Woods (U. S.) 337; a *Ex parte* Brown, 15 S. Car. 531; 9 A & Eng. R. Cas. 723; and *In re* Fif Four First Mortgage Bonds, 15 S. C 304; 9 Am. & Eng. R. Cas. 739.

Further, in Bayles *v.* Kansas Pac. Co., 13 Colo. 181; 40 Am. & Eng. Cas. 42, it was held that where it is leged and admitted that the receiver a railroad company managed and co trolled the business of the company a operated the railway, a contract re tive to the carriage of goods will not held to be in violation of his autho until the authority conferred upon h by the court is shown.

1. See Lehigh Coal, etc., Co. *v.* Cent R. Co., 35 N. J. Eq. 426; 9 Am. & E R. Cas. 479, where the court by V Fleet, V. C., said: "The receiver n undoubtedly, appropriate moneys

not excessive or improvident, or if the contractor had no e of such excessive or improvident character, the court will llow the contractor to suffer actual loss in so far as the con- has been performed, although it may refuse to direct its cement.[1]

nds belonging to the trust, to urposes connected with the trust may think proper, always taking k that the court will finally ap- his action; but he has no au- to bind the trust by contract it the authority of the court. his contracts are approved and d by the court, the court is at to deal with them as to it shall to be just, and may either mod- m or disregard them entirely." urther: "All persons dealing with ers do so at their peril, and are to take notice of their incapa- conclude a binding contract it the sanction of the court." so, High on Receivers, § 390a, *In re* New Jersey, etc., R. Co, J. Eq. 67. But see Martin *v.* ork, etc., R. Co., 36 N. J. Eq. See also Tripp *v.* Boardman, 49 10.

Vanderbilt *v.* Little, 43 N. J. 9; 35 Am. & Eng. R. Cas. extent of the discretion of the r under the statutes of *New* was defined. The court con- that there is nothing in the s giving to the contracts of a r in running a railroad for the the public any greater force ntracts made by a receiver for servation of the property of an nt railroad.

court by Magie, J., said, in re- the discretionary power con- by such legislation: "I cannot the legislation in question any nance for the notion that the cts of a receiver, made under the implied or express author- ferred, may be revoked or an- at pleasure by the chancellor. ess the chancellor has power to in his hands the administration a trust, and to personally di- nd order each contract into the receiver should enter. But d obviously be impracticable to uch a course in running a rail- To select and employ the nec- subordinates; to fix the term of and the amount of wages; to t for and purchase materials and supplies, and to anticipate in these respects the future needs of one of these gigantic corporations by express orders in each case, would require the whole time of the chancellor, and could never have been intended by this legislation. It must have been contemplated that, in the performance of these multifarious duties, some degree of discretion might be accorded to the receiver. Whether a power to exercise such discretion would not be assumed to exist in every case, without a special order, need not be considered, for it is clear that the chancellor may accord such discretionary power to a receiver by a general order, such as was made in this cause. When a receiver has thus acquired discretionary powers to operate an insolvent railroad, his position is peculiar, and the contracts he makes for that purpose are *sui generis*. Such a receiver is not exempt from liability to answer for injuries inflicted by wrongdoing or negligence of those he employs in operating the railroad; yet the liability is not a personal one, but only falls on the receiver as the representative of the property and fund managed by the court, and damages recovered for such injuries are to be thus collected. Yet, upon such liability, no suit can be brought except by leave of the court which appointed the receiver. Such leave, however, cannot be denied unless the claim appears manifestly unfounded and vexatious Palys *v.* Jewett, 32 N. J. Eq. 302; Little *v.* Dussenberry, 46 N. J. L. 614; 25 Am. & Eng. R. Cas. 632; 50 Am. Rep. 445. Analogous principles should be applied to those acts of a receiver which constitute contracts with third persons in the operation of an insolvent railroad in his charge. The liability of a receiver upon such contracts is not personal, but as a representative of the trust. The enforcement of them, or the payment of damages for his non-performance of them, must fall primarily upon the property and fund in the hands of the court. Relief upon such contracts must in all cases be originally pur-

sued in the court of chancery. If the appropriate remedy is equitable, the court of chancery will be invoked to act in the ordinary mode. If the appropriate remedy is legal, the leave of that court to sue the receiver at law must be sought and obtained, and that leave will not be denied unless the claim appears to be without foundation. In whichever mode the court of chancery is approached, it is obvious that the first question to be determined is whether, if the alleged contracts exist, they are of a character to entitle the party applying to the relief asked. This determination is not to be reached upon the theory that the chancellor can disregard or annul such contracts at pleasure, but upon equitable principles applied to the management and winding up of an insolvent estate of this peculiar character.

"If the contract has been completely performed, and its performance accepted by the receiver, and the claim is merely for compensation, relief of that nature would seem necessarily to be awarded, unless the applicant should appear to have dealt fraudulently or collusively with the receiver, to the detriment of the trust. Even if, in the judgment of the chancellor, the contract was injudicious or improvident and unreasonable, unless the contractor should appear to have contracted with notice of the improper character of the contract, no just reason could be given for debarring him from the agreed-on compensation, which the receiver might, for his negligence or misconduct, be required to repay to the fund. But if the contract has not been performed, and the applicant seeks a direction for its performance, or damages for its non-performance, what course is to be taken if the contract be found to be improvident and unreasonable, although it does not appear that the contractor had notice that it was of that character?

"In such case, to direct the performance of the contract, or to award damages for its non-performance, would injure and despoil the trust for the mere benefit of the contractor. The course of equity, under such circumstances, seems plain. The contractor with a receiver must be assumed to know that, if he seeks to enforce his contract, it must come under the scrutiny of a court of equity, and, if it there appears to be injurious to the trust managed by that court it would be i possible for that court to carry it o He cannot complain, therefore, if t court decline to direct such a contr to be performed; or, if it has been pudiated by the receiver, to awa damages, in the ordinary sense of t term, for its non-performance. I if the contractor has, in good fai entered into a contract with a rece er, clothed with discretionary po ers, and before the unreasonab ness or improvidence of such contr has been brought to his notice, judicially determined, has made pr arations for its performance, a has therein expended money or co tracted obligations which, if the co tract goes on unperformed, he cann with reasonable diligence, be rei bursed or protected against, then would be obviously inequitable to tu him away to submit to such loss, to leave him to such redress as might be entitled to against the ceiver. If he has acted in good fai then, although he may not be entit to enforce his contract, because the ceiver has acted improvidently, yet ought not to be allowed to suffer act loss, but should be made whole; a since the receiver merely represe the fund, he should be made wh out of the fund. If the conduct of receiver require it, the court mi compel him to reimburse the fund what would thus be taken from See Moran *v.* Lydecker, 27 Hun Y.) 582.

In Martin *v.* New York, etc., R. C 36 N. J. Eq. 109; 12 Am. & Eng. Cas. 448, in a review of the gene principles relating to contracts of ceiver, it was said: "A receive appointed generally merely to ope and manage the road so as to keep it as a going concern. . . . He therefore no power and no right incur expenses or to make contr other than such as are necessary the maintenance of the roads in proper state of repair and efficiency, as to enable business to be carried and trains run in the ordinary mann The receiver is regarded as the agen the court, and ought, in strictness, act under the advice and control of court in every instance. Practica however, this is impossible." T court then referred with approval the decision in Cowdrey *v.* Railr Co., 1 Woods (U. S.) 331, of which opinion by Bradley J., has been quot

Contracts Made Before Appointment.—The receiver is not ıd to respect or continue a contract entered into before his ›intment. To do so on any grounds other than necessity for operation of the road, would be to divert the earnings from purposes for which the receivership was created. The re-er has the same discretion in continuing such contracts as in rring other expenditures and liabilities necessary for a suc-ful management. Claims for loss incurred by the refusal of receiver to fulfill such contracts remain on the same status ›ther debts of the company incurred before the receiver's ›intment.[1]

, this title, *Powers of Court Receiver—Discretion of the Re-r.*

, also, Kennedy *v.* St. Paul R. Dill. (U. S.) 448; Vermont, etc., o. *v.* Vermont Cent. R. Co., 46 92; Brown *v.* New York, etc., R. 9 How. Pr. (N. Y.) 84.

State *v.* Edgefield, etc., R. Co., 6 (Tenn.) 353; 4 Am. & Eng. R. 88, it was decided that a receiver o power to contract debts to be ›therwise than out of the earnings e road during the receivership. lso, Noyes *v.* Rich, 52 Me. 115.

ıpletion of Road and of Side Roads. e completion of the road is not ally within the scope of the re-'s duty, unless it is necessary to lete the road in order to render it ng concern. A receiver cannot ut the sanction of the court con-for municipal aid to complete the Smith *v.* McCullough, 104 U. 3 Am. & Eng. R. Cas. 159. He t in like manner contract for the letion of another railroad which l, if finished, serve as a valuable to the main line under his cus-Tripp *v.* Boardman, 49 Iowa The court, however, may sanc-the expenditure of money either e completion of the main road or auxiliary road. Gibert *v.* Wash-n City, etc., R. Co., 33 Gratt. (Va.) ı Am. & Eng. R. Cas. 473; Ken-*v.* St. Paul, etc., R. Co., 2 Dill. .) 448; Bank of Montreal *v.* Chi-etc., R. Co., 48 Iowa 518.

necting Lines.—Payments made ceivers while operating a railroad nnecting roads for freight received, ging to them according to a nec-usage in the business of connect-ailroads, are properly allowed to as a credit. Meyer *v.* Johnston, a. 603; 8 Am. & Eng. R. Cas. 584.

Leases of Connecting Lines. — See, *supra*, this title, *Powers of Court and Receiver—Discretion of Receiver.*

Contract of Receiver as Carrier.—In Bayles *v.* Kansas Pac. R. Co., 13 Colo. 181, 40 Am. & Eng. R. Cas. 42, it was held that where it is alleged and admitted that the receiver of a railroad company managed and controlled the business of the company and operated the railway, a contract relative to the carriage of goods will not be held to be in violation of his authority until the authority conferred upon him by the court is shown. Bayles *v.* Kansas Pac. R. Co., 13 Colo. 181; 40 Am. & Eng. R. Cas. 42.

Power of Sale.—As to the power of the receiver to sell, see *supra*, this title, *Receiver's Sales.* See Middleton *v.* New Jersey West Line R. Co., 25 N. J. Eq. 306.

1. Continuance of Pooling Contract.—In Central Trust Co. *v.* Ohio Cent. R. Co., 23 Fed. Rep. 306; 23 Am. & Eng. R. Cas. 670, it was decided that a receiver of a railroad is warranted in continuing a pooling contract in force, where it is for the benefit of the road. Where such contract has been executed the receiver cannot set up its invalidity, but must account to the other contracting roads for moneys received under it. This contract provided for the equalization of the business and earnings of the road upon a basis agreed upon among the several roads, the prices of transportation being fixed by commissioners appointed under the contract which was in force and in operation between the parties when the bill was filed and a receiver appointed. No specific directions in regard to it were given to the receiver at the time of his appointment, or since, and thinking the contract fair, reason-

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faith requires that the proceeds arisi
from its operation, and which by
terms belong to the petitioner, shou
be paid over to it, without regard
the questions now made as to t
original validity of the contract."

Execution of Contract to Maintain Switch.—In Brown *v.* Warner (Tex 45 Am. & Eng. R. Cas., 97, it was he that the receiver of a railroad compa is not bound to carry out the compan contract to maintain a switch at a giv point, and cannot be held liable damages for removing such swit previously maintained by the co pany.

The court by Gaines, J., said: "Wh the appellants were appointed ceivers and placed in charge of t railway, there was a contract existi between the railway company and t plaintiff for the maintenance of t switch at Warner's Station. Th was purely a personal contract. T duty of the receiver was to hold a operate the railroad, and they were more bound to carry out the comp ny's contract to maintain the swit than they were to discharge its oblig tions to pay money. When in t management of the road they deem it proper to remove the switch, a did remove it, the contract of the co pany was broken and it was liable damages for its breach. That the a pointment and acts of the receiver not absolve it from its liability to car out its contracts, was decided, in effe by this court in Hunt *v.* Reilly, Tex. 99. If appellee was unable recover damages of the company f its breach of the contract, by reas of its insolvency, it is a misfortune has suffered, doubtless in compa with numerous other simple contra creditors. For the failure to perfor the contract, his cause of action w against the company; and it was n of that character which could brought against the receivers witho leave of the court. Stat. of U. S 1886–7, p. 543, § 3. The authoriti bearing directly upon the question u der consideration are not numerou but they are all, so far as we have bee able to find, in accordance with th

we have expressed. The case thern Express Co. *v.* Western ır. R. Co., 99 U. S. 199, was in equity by the express com- gainst the receiver of the rail- ompany to compel a specific mance of a contract, made be- he receiver's appointment, to reight for the complainant. In inion, the court said: 'The road he hands of a receiver in a suit ıt by the bondholders to fore- heir mortgage. The appellant lien. The contract neither ex- nor by implication touches bject. It is not a license, as in- by counsel. It is simply a con- or the transportation of persons operty over the road. A specific mance by the receivers would rm of satisfaction or payment he cannot be required to make. ll might he be decreed to satisfy ee's demand for money, as by ervice sought to be enforced.' me principle was recognized in *v.* Franklin Ins. Co., 115 Mass. nd *In re* Brown, 3 Edw. Ch. .) 384, and in Ellis *v.* Boston, . Co., 107 Mass. 1. In the last ted the court say: 'The receivers ficers of the court for this pur- that of preserving the property), t under its direction and con- They continue the operation of ad, and conduct its business, be- this is essential to its proper vation. They may fulfill the cts of the corporation so far as cial. They may not pay its or fulfill contracts which are some, or tend to diminish the of property under their control, such contracts are charged as orances on the property, or are ary to its proper preservation curity.' In the case of Howe *v.* ng, 76 Tex. 17; 42 Am. & Eng. s. 1, the owner of the land d the railroad company a right over his land, in consideration company's agreeing to take from a spring belonging to him, ertain stipulated price. A re- who was appointed over the ty of the company, continued the right of way, but refused to ut the contract to take and pay water. It was held that there t one contract, and that, since eiver adopted it as to the right he became bound for its fulfill- s to the water. It was also held that a lien existed upon the right of way for securing the payments for the water, that being deemed the real consideration for the grant of the easement. The court declined to decide whether or not the receiver was bound to carry out the contract to take and pay for the water, had so much of the agreement stood as an independent contract. We conclude that the court erred in overruling the demurrer, and therefore the judgment is reversed, and the cause remanded."

The payment of indebtedness incurred more than ninety days before the appointment of the receiver, was approved in Miltenberger *v.* Logansport R. Co., 106 U. S. 286; 12 Am. & Eng. R. Cas. 464, on the ground that the payment of such claims was indispensable to the business and existence of the road.

Power of Receiver to Terminate Transportation Arrangements.—Where the receiver of a railroad company makes an arrangement for the transportation of the freight and passengers of another railroad company over the line of his road, and there is no provision making the arrangement obligatory on either party for any stated period of time, the receiver may terminate such arrangement at will, without previous notice to the other company. Investment Co. *v.* Ohio, etc., R. Co., 41 Fed. Rep. 378.

But a receiver cannot impeach a grant made by the company prior to the inception of the receivership, in fraud of creditors. Higgins *v.* Gillesheiner, 26 N. J. Eq. 308.

In Ellis *v.* Boston, etc., R. Co., 107 Mass. 1, the court held that a contract entered into with an express company by which the latter was to apply certain earnings of the railroad to a debt of the railroad corporation, gave the express company no lien upon the property or rights of the corporation. That the receivers were under no obligation to fiulfill it, either by performing the service stipulated for or by applying any earnings of the road while managed by them to the payment of the debt of the corporation. And, further, that the payment of debts to the corporation previously contracted would be inconsistent as well with the nature and purpose of the office of the receivers as with the terms of their appointment. They have no right to appropriate the property and assets of the corporation

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...—See *infra*, this title, *Rel...*

...and Against the Receiver.[2]

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...—1. Personal Liability.—...
...of a railroad is not personall...
...for misconduct, or when h...
...legally exercise.[4]
...liability of the receiver mea...
...or property which the court ...
...of a receivership.[5]

...gligence and Torts During Receive...
...COMMON CARRIER—(1) *Receiv...*
...receiver operating a railroad ar...
...the company is liable, in his offici...
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...sisting ...the re... ...is au... ...the road ...ver may, ...of the ...the con... ...case on ...terested be ...ira Iron, ...N. J. Eq. 284. ...receiver in... ...out the pur... ...ointed, are ...ment over all ...this title, ...ms.

...the modes of ...against the re... ...the extent of the ...will be found ...title, under *Suits*. ...ur, 104 U. S. 126; ...1; Newell *v.* ...See also Lyman ...59 Vt. 167; 30 ...210.

...opinion of Miller, ...ur, 104 U. S. 126; ...1.

...ceiver wrongfully or ...possession of property belonging to another, such pers... may bring suit therefor against hi... personally as a matter of right, for ... such case the receiver would be acti... *ultra vires*. Parker *v.* Browning, ... Paige (N. Y.) 388; 35 Am. Dec. 71... Hills *v.* Parker, 111 Mass. 508; 15 A... Rep. 63.

3. Vol. 20, p. 144.

4. See RECEIVERS, vol. 20, p. 1... Railroad receiverships present no pec... liarity in this respect except with r... gard to the distinction between the pe... sonal liability of technical receive... and of trustees who are permitted ... the court to take possession and ope... ate a railroad under the terms of ... trust deed for the benefit of mortgage... As to this, see *infra*, this title, *Liab... ity of Railroad Receivers, Dama... Arising from Negligence and Tor... During Receivership; Receiver Liab... as Common Carrier; Trustees Pe... mitted to Operate Personally Liable...*

5. See RECEIVERS, vol. 20, pp. 10... 248. Railroad receiverships prese... but one peculiarity in this connectio... though the variety of instances ... which they are officially liable is i... creased, of course, by reason of t... greater extent of their powers a... duties. The liability as a common ca... rier and for damages resulting from t... negligence of the receiver's employ... is peculiar to railroad receivership... and will be found treated *infra*, th... title, *Liability of Railroad Receiver... Damage Arising from Negligen... and Torts During Receivership.*

im as are applicable to the railroad company when it is itself ating the road.[1] Receivers cannot, as public officers, claim

1 **General.**—On the general point eceivers are liable, in their official ty, as common carriers. Little senberry, 46 N. J. L. 614; 25 Am. . R. Cas. 632; 50 Am. Rep. 445; v. Holbrook, 20 Ohio St., 137; . Rep. 633; Potter v. Bunnell, 20 St. 159; Newell v. Smith, 49 Vt. aige v. Smith, 99 Mass. 395; Me- v. Barbour, 78 Va. 544; 25 Am. . R. Cas. 622; Davis v. Duncan, d. Rep. 477; 17 Am. & Eng. R. 95; Cowdrey v. Galveston, etc., ., 93 U S. 352; Lehigh Coal, etc., Central R. Co., 42 N. J. Eq. 591; n. & Eng. R. Cas. 2; Kinney v. er, 18 Wis. 80; Bell v. Indian- etc., R. Co., 53 Ind. 57; Klein v. , 26 N. J. Eq. 474; *Ex parte* , 15 S. Car. 518; 9 Am. & Eng. s. 723; *Ex parte* Johnson, 19 S. 92.

Klein v. Jewett, 26 N. J. Eq. 474, urt by Van Fleet, V. C., said: "A er, operating a railroad under the of a court of equity, stands, in re- to duty and liability, just where rporation would were it operating ad; and the question whether or e receiver is liable for negligence be tested by the same rules that be applied if the corporation was tual party defendant before the . . . Upon principle it would o be clear that no person can be ted to exercise the rights and s of a common carrier, especially they embrace the franchises d to a railroad corporation, ex- ubject to the duties and liabilities mon carriers. Whether the re- is regarded as the officer of the r the representative of the pro- rs of the corporation or its credit- as combining all these characters, ntrusted with the powers of the ation, and must therefore be nec- y burdened with its duties and t to its liabilities. There can be h thing as an irresponsible power, ng force or authority, without be- ubject to duty, under any system s framed to do justice. It is an rable condition of every grant of by the State, whether expressed , that it shall be properly ex- d, and that the grantee shall be for injuries resulting directly and ively from his negligence."

Where Defect Existed When Receiver Took Possession and an injury afterward results therefrom, the receiver's liability is the same as if the defect arose during his management. Texas, etc., R. Co. v. Geiger, 79 Tex. 13.

Passengers.—Liability for injury to passengers: Barlett v. Keim, 50 N. J. L. 250; 35 Am. &. Eng. R. Cas. 15; Mobile, etc., R. Co. v. Davis, 62 Miss. 271; 26 Am. & Eng. R. Cas. 425; Brown v. Wabash R. Co., 96 Ill. 297; 1 Am. & Eng. R. Cas. 626; Ryan v. Hays, 62 Tex. 42; 23 Am. & Eng. R. Cas. 501; *Ex parte* Brown, 15 S. Car. 518; 9 Am. & Eng. R. Cas. 723; Newell v. Smith, 49 Vt. 255; Kein v. Jewett, 26 N. J. Eq. 474; Palys v. Jewett, 32 N. J. Eq. 302; Potter v. Bunnell, 20 Ohio St. 159; Winbourn's Case, 30 Fed. Rep. 167; Pope's Case, 30 Fed. Rep. 169; Dillingham v. Anthony, 73 Tex. 47; 37 Am. & Eng. R. Cas. 1.

Shippers.—Liability for damage to freight: Melendy v. Barbour, 78 Va. 544; 25 Am. & Eng. R. Cas. 622; Kansas Pac. R. Co. v. Searle, 11 Colo. 1; 35 Am. & Eng. R. Cas. 6; Nichols v. Smith, 115 Mass. 332; Newell v. Smith, 49 Vt. 255.

Employees.—Liability to employés for defective appliances and negligence of other employés: Kain v. Smith, 80 N. Y. 458; 2 Am. & Eng. R. Cas. 545; Rogers v. Mobile, etc., R. Co. (Tenn.) 12 Am. & Eng. R. Cas. 442; Sloan v. Central Iowa R. Co, 62 Iowa 728; 111 Am. & Eng. R. Cas. 145; *Ex parte* Brown, 15 S. Car. 518; 9 Am. & Eng. R. Cas. 723; Meara v. Holbrook, 20 Ohio. St. 137; 5 Am. Rep. 633.

The common-law rule that a master is not liable to his servant for injury caused by the negligence of a fellow-servant is modified by statute in England and in many of the United States, so far, at least, as concerns railroads. Whether these statutes extend to receivers who are operating a railroad is in most instances open to construction, though in some cases the language of the statute leaves but little room for doubt.

Georgia.—In this State the statute provides that "Railroad companies . . . shall be liable to such employés as to passengers" for injuries arising from negligence, and that "if the

immunity from actions for the negligence of their employé even where power to operate the road is conferred by statute

person injured is himself an employé of the company, and the damage was caused by another employé . . . his employment by the company shall be no bar to the recovery." (Ga. Code 1873, §§ 2083, 3036). Henderson *v.* Walker, 35 Ga. 481, was an action against receivers in their official capacity to recover damages for injury to a servant caused by the negligence of a fellow-servant. *Held*, that the statute referred only to servants of a railroad company, and would not be construed as extending to servants of the receivers of a railroad company; and that the receivers were not liable.

The court by Bleckley, J., said: "He (the plaintiff) rests his case on a statutory right, and yet does not put himself into the only class to which the right belongs. The company owning the road had no employés . . . A court of equity, by its officers, the receivers, had possession of the road; and the plaintiff, instead of hiring himself elsewhere to a railroad company or corporation, voluntarily hired himself to these ministers of the law. . . . They represent, not the company, but the court. . . . Doubtless the receivers as common carriers bear a relation to the public very similar to that of other common carriers; but the difference between the public and this plaintiff is, that the general public can appeal to a general law applicable as against all common carriers, whereas the plaintiff must invoke a special statutory provision which will not reach all employers alike, but only railroad companies . . . it is clear that the employés of receivers are not within the words of the code, and to extend the words by construction . . . would be attended with difficulties both technical and practical." This case was followed in Thurman *v.* Cherokee R. Co., 56 Ga. 376, which held that an action wou d not lie against the corporation for injury received through negligence of a co-employé while the railroad was in the hands of a receiver.

Iowa.—In Iowa, it is provided by statute that, "Every corporation operating a railway shall be liable for all damages sustained by any person, including employés of such corporation," in consequence of the neglect of employés of the company; and furth that "all the duties and liabilities i posed upon corporations owning operating railways by this chap shall apply to all lessees or oth owning or operating railways as fu as if they were expressly named he in." *Iowa* Rev. Code. 1880, § 1278–13 In Sloan *v.* Central Iowa R. Co., Iowa 728; 11 Am. & Eng. R. Cas. 1 it was held that this statute extend to receivers operating a railroad, a that the receiver was liable thereunc for damage to his servant injured the negligence of a fellow-servant.

Statutory Duty.—A statute of *M souri* (Session Laws of 1875, p. 1 provides that railroad corporatic shall erect and maintain fences, a that failing to do this, such corpo tion owning or operating any railro shall be liable in double damages injury to stock occurring throu such failure. *Held*, in Central Tr Co. *v.* Wabash, etc., R. Co., 26 F Rep. 12, that receivers operating railroad are liable under this statu

Presumption that Receiver Was Operating Train—In McNulta *v.* Ens 134 Ill. 46, it was held that in an tion against the receiver of a railw company to recover damages for injury received by a passenger, t fact that the defendant was operati as such receiver the train in which t accident occurred will be presum unless there is a denial.

1. Meara *v.* Holbrook, 20 Ohio 137, Little *v.* Dusenberry, 46 N. J. 614, 25 Am. & Eng. R. Cas. 632; Am. Rep. 445; Com. *v.* Runk, 26 St. 235.

Little *v.* Dusenberry, 46 N. J. L 614; 25 Am. & Eng. R Cas. 632; Am. Rep. 445, was an action against receiver to recover damages for dea caused by alleged neglect of the agen of said receiver in operating said ra road. The receiver was operating t road under the *New Jersey* statu (Rev., p. 193, § 106), which enacts th "whenever any incorporated railro company in this State shall have pass into the hands of a receiver in accor ance with the act to which this is supplement, the receiver shall and hereby empowered to operate sa railroad for the use of the public." It w urged that the receiver was not liab

e general doctrine requiring leave of court before a suit can ought against a receiver applies with equal force to actions st receivers of railroads.[1]

Receiver Not Personally Liable.—A receiver is not personally for the torts of his employés, but is only so liable in his l capacity.[2] He is, however, personally liable when he

action because, under his statu- pointment, he was not a common , but a public officer. *Held* that eiver was not entitled to the im- of a public officer, but was lia- his representative capacity, as a n carrier. The court by Scud- said: "An examination of the where this immunity has been will show that it is limited to who are strictly public officers, re parts of the governmental of the State, entirely distinct ndividual gain or profit, such as county, municipal, and township and officers, discharging duties d on them by law, with none them but the public, whom they nt, and no funds to answer for es except those that must be from the public treasury. The in the statute, "to operate said d for the use of the public," does eate this a public office. It im- n the receiver appointed by the llor, no other duty to the public at which belongs to every rail- rporation acting under statuto- ority. The object of the statute , that when a railroad company s insolvent it shall and may be operation for the public conve- of travel and transportation. If ation should immediately cease its insolvency is determined, letriment would follow to those e dependent on it as a highway r the use of all who may need ere was no intention on the part legislature to create a new pub- e, and clothe the receiver who d it by the appointment of the with the immunities of such of- d thereby enable him to shield , cover up the earnings and pro- stockholders and creditors from s to others in operating the . . . It does not change igation of the receiver, who, by pointment of the chancellor, pon him the management of the nd he is liable, in his represen- apacity, in all respects, to others, ries, as the company would be, if transacting its business in the usual way." Com. *v.* Runk, 26 Pa. St. 235, was an action against receivers to recover taxes due the State. The receivers were appointed by an act of the State legislature. *Held*, that the receivers were liable in their official capacity.

1. See RECEIVERS, vol. 20, p. 248.

2. Camp *v.* Barney, 4 Hun (N. Y.) 373; Newell *v.* Smith, 49 Vt. 255; Rock *v.* Williams, 3 Hen. & M. (Va.) 308; Meara *v.* Holbrook, 20 Ohio St. 137; 5 Am. Rep. 633; Com. *v.* Runk, 26 Pa. St. 235; Kain *v.* Smith, 80 N. Y. 458; 2 Am. & Eng. R. Cas. 545; Cardot *v.* Barney, 63 N. Y. 281; 20 Am. Rep. 533.

In Ryan *v.* Hays, 62 Tex. 42; 23 Am. & Eng. R. Cas. 501, the court by Stayton, J., says: "The sole liability of a receiver exept in cases where he is personally at fault, is official; and when his official character ceases and the property, through which alone his official liability may be discharged, has passed from his hands, in pursuance of the orders of the court that appointed him, and he has been by that court discharged from his trust, then no judgment can be rendered against him; for with the termination of his official existence ends his official liability."

In Davis *v.* Duncan, 19 Fed. Rep. 477; 17 Am. & Eng. R. Cas. 295, the court by Hill, J., said: "A receiver, as such, upon principle and authority, is not personally liable for the torts of his employés. Were he so liable few men would take the responsibility of such a trust. It is only when he himself commits the wrong that he is held personally liable. The proceedings against him as receiver, for the wrongs of his employés, is in the nature of a proceeding *in rem*, and renders the property in his hands, as such, liable for compensation for such injuries."

Com. *v.* Runk, 26 Pa. St. 235, was an action against defendants as receivers, to recover taxes due from a corporation. *Held*, that the judgment must be enforced only against funds in their hands as receivers.

himself commits the wrong, or where he fails to exercise reaso able care in the selection of qualified employés.[1]

(3) *Trustees Permitted to Operate, Personally Liable.*—A d tinction has been drawn in regard to personal liability betwe technical receivers who are directed by the court to operate railroad, and trustees or mortgagees who are permitted to opera a railroad for the benefit of creditors. Such trustees or mo gagees operating a railroad are personally liable, and are n entitled to the immunity accorded to official receivers.[2]

Cardot *v.* Barney, 63 N. Y. 281; 20 Am. Rep. 533, was an action against a receiver personally to recover for damage to a passenger caused by the negligence of an employé. *Held*, that the receiver was not liable. The court by Allen, J., said: "The defendant was an officer of the court, obeying its orders and carrying out its directions. His relation to the road and its operation was entirely official, and he had no interest in nor control over the earnings. . . . his position was analogous to that of a public officer charged with public duties, in the performance of which he is compelled to act in part by others. . . . The employment of agents was a necessity, and expressly directed by the court; and if in the performance of this part of his duty he was prudent, and selected only competent agents, he had discharged his full duty . . . the defendant should only be held to answer for his own acts and neglects."

1. Cardot *v.* Barney, 63 N. Y. 281; 20 Am. Rep. 533; Davis *v.* Duncan, 19 Fed. Rep. 477; 17 Am. & Eng. R. Cas. 295. A receiver is personally liable when he has actual knowledge of defects in machinery and equipments and the injury occurs in consequence. Erwin *v.* Davenport, 9 Heisk. (Tenn.) 44.

2. Kain *v.* Smith, 80 N. Y. 458, 2 Am. & Eng. R. Cas. 545, was an action personally to recover damages caused by the negligence of employés, against persons who have been appointed receivers of a Vermont Railroad corporation by the court of chancery of that State, and had, with the consent and authority of that court, leased a New York Railroad Co., its road and rolling stock for a term of years. It was set up that they were not personally liable, but only as receivers. The court by Danforth, J., said: "The defendant was not in possession of the railroad as an officer of any court or by its authority; the court itself ne had possession of, or control over He went into possession of it with associates by virtue of a contract; was permitted, not directed, by court to make it, and this permiss will serve him in accounting for management of the Vermont Cent Railroad. So far as the Ogdensbu and Lake Champlain road is concern the court will not trouble itself; fo the court authorized the contract will see that by its terms the recei from that road are to be taken by t defendant and others, not as receiv and officers of the court, but as c tracting parties . . . if the defen ant had confined his action to the r over which he was appointed receiv it may be conceded that the rule plied in Cardot *v.* Barney (63 N. 281; 20 Am. Rep. 533, holding tha receiver is not personally liable) wo serve as a defense. Outside of t State he stands as an individual lia for his own negligence whether acts personally or through agents. cannot be shielded by a description his position or a declaration that h acting in an official character. T court through which he derives it h no jurisdiction over the subject of contract or power to enter a decree be enforced outside of the State whose laws it was created . . . defendant could do no act *virtute off* in this State, and although cal manager or receiver, he was, as to t plaintiff, merely an operator of the r road."

In Rogers *v.* Wheeler, 43 N. Y. 5 defendants were trustees for bo holders and, the bonds not being pa they foreclosed the same by suit permission of the court, purchased mortgaged property, and operated road, receiving the income and pay the expenses thereof. In an acti against them for loss of freight, the fendant averred this fact and sta

n regard thereto, they acted as ers and ought not to be held nally liable in the premises. On rrer held that the defendants were ting as receivers, but solely upon own responsibility and were per- y liable. In Barter *v.* Wheeler, H. 9, the same defendants were personally for loss of freight, and urt arrived at the same decision eld them personally liable. In ase, the court by Bellows, C. J., "The property was bid in by the es and conveyed to them by the e. They continued to hold it in for the bondholders outside of all of redemption by the corpora- and they held it substantially as es and not as receivers. The hat the court undertook to give ions as to the mode of execu- this trust . . . does not e the character in which the rty was held by those mort- s. Such directions are entirely priate in the case of trustees. is nothing indicating that the by its officers had taken posses- f the property to manage and se of it for the benefit of the s interested, but it was left in ssession of the parties to whom rporation had conveyed, with the rity to sell it at their discretion, until it was sold to continue to te the railroad . . . It ap- then, that the legal title to the property, subject to the prior age, was in these defendants in for the bondholders . . . and time of this loss, and before, they in possession of the railroad and ting it under the orders and de- aforesaid, and were in fact the sible parties appearing to the to be exercising the franchises corporation. The corporation parted with all the title to the rty. . . . It is obvious, there- that the plaintiff's claim can be st none but these defendants, and y come in receipt of the profits income of the railroad out of such claims should be ordinarily it is manifestly just that they d be held chargeable, for in no way can the fund be reached."

man *v.* Central Vermont R. Co., 167; 30 Am. & Eng. R. Cas. 167, n action for negligence in the op- n of the Addison Railroad by the dant as lessee. It was set up that efendant at the time of the accident was in possession of the said railroad as receiver and manager of the Vermont Central and Vermont and Canada Railroads, lessees of the said railroad. It was held that this plea was insufficient, the court by Powers, J., said: "The same person who was the receiver of the roads was the lessee of the Addison road, but this did not make the Addison road receivership property nor expose it to administration as such by the Franklin county court of chancery. The receiver acquired it by contract and not by decree of the court of chancery. If the court of chancery consented that its receiver might step outside his proper function as receiver of the Vermont and Canada and Vermont and Central railroads, and engage as lessee in business foreign to the administration of the property in the hands of the court, he stands as to such business and as to all persons employed by him or having business relations with him in the conduct of such foreign business, not as receiver in the sense that he is therein officer of the court, but as a party *sui juris*, acting upon his own responsibility. The order of the court if sanctioning his engagement in such outside business is available to him in the settlement of his accounts as receiver of the roads in the hands of the court, but not as to his responsibility to other persons dealing with him." To the same effect is the Town of Roxbury *v.* Central Vermont R. Co., 60 Vt. 121.

A railroad defaulted in payment of interest, and under the terms of the mortgage the trustees in such mortgage took possession of the road and operated it. A passenger who was injured by alleged negligence in the operation of the road, brought suit against the trustees personally. *Held*, that they were liable. Sprague *v.* Smith, 29 Vt. 421; 70 Am. Dec. 424. In this case the court, by Redfield, C. J., said: "The defendants are trustees for the benefit of certain bondholders of the Vermont Central railroad. . . . The first question made in the case is, whether the defendants are personally liable . . . while they continue to operate the road, and receive freight and pay for carrying passengers, for the benefit of the *cestuis que trustent*. It is well settled in practice, and by repeated decisions, that the lessees of railroads are liable, to the same extent as the lessors would have been, while they continue to operate

[illegible] *Discharge.*—After a receiver has be[illegible] will lie against him for torts committed [illegible] the time that he operated the road.[1]

[illegible] there can be no [illegible] that a mere in- [illegible] franchise of a railway [illegible] should continue to [illegible] benefit, would be [illegible] and the owners [illegible] should employ him, to [illegible] precisely as the com- [illegible] continuing the same [illegible] other view of the lia- [illegible] intruder would be to [illegible] his own wrong in [illegible] And we can see no reason [illegible] are not liable to [illegible] as the company would [illegible] and upon similar grounds [illegible] which lessees, or any [illegible] exercising the franchise of the [illegible] for the time, must be; that [illegible] they are the ostensible parties, [illegible] to the public to be exer- [illegible] the franchises of the company. [illegible] be perplexing in the extreme [illegible] strangers, suffering injury [illegible] the negligence of operatives [illegible] the defendants' control, to look [illegible] the party exercising such [illegible]."

[illegible] v. Farnum, 9 Allen (Mass.) [illegible] was an action personally against [illegible] trustees under a mortgage exe- [illegible] by the railroad company. Upon [illegible] default in the terms of mortgage the trustees had entered into possession of the road and operated it until they leased it to another company, providing by the terms of the lease that they, the trustees, should continue to operate the road for the lessees and receive the earnings, and that after paying the expenses the balance should be applied toward the payment of the rent due from the lessees under the lease. While the trustees were thus operating the road the plaintiff was injured through the negligence of an employé. *Held*, that the defendants were personally liable.

Connecticut.—Under the statute of Connecticut, trustees operating a railroad for the benefit of creditors are relieved from personal liability for injuries arising from the negligence of employés, and the liability is restricted to the property in their charge. Lamphear v. Buckingham, 33 Conn. 437.

1. In Davis v. Duncan, 19 Fed. Rep. 477; 17 Am. & Eng. R. Cas. 295, s[illegible] was brought against the receiver [illegible] his official capacity to recover da[illegible] ages for injury sustained by a passe[illegible] ger through alleged negligence [illegible] receiver's employés in operating a ra[illegible] road. Shortly before the commen[illegible] ment of the action the receivers[illegible] had been terminated and the receiv[illegible] discharged. Provision had been ma[illegible] in the decree for the assumption [illegible] the railroad company of liability as [illegible] all pending actions against the [illegible] ceiver, but no provision had be[illegible] made as to actions which should [illegible] brought thereafter for causes acc[illegible] ing during the receivership. *Held*, th[illegible] the action would not lie against t[illegible] receiver. The court by Hill, [illegible] said: "I take it for granted th[illegible] it was supposed that there we[illegible] no claims for damage against t[illegible] receiver, or rather against t[illegible] property or funds in his hands, whi[illegible] had not been put in suit, or a reserv[illegible] tion of them would have been ma[illegible] holding the funds and property liab[illegible] as was done in favor of those in su[illegible] I am satisfied that such was the ca[illegible] or cases like the present one wou[illegible] have been provided for by the decr[illegible] of the court discharging the receiv[illegible] It is very much to be regretted th[illegible] this provision was not made, as it m[illegible] work a serious wrong to the complai[illegible] ant; but the question is, can this cou[illegible] after the adjournment of the term [illegible] which the order was made, in any w[illegible] alter, change, modify, suspend, or e[illegible] pand the decree discharging the r[illegible] ceiver, and again obtain jurisdictio[illegible] of the property and funds which [illegible] had by its decree ordered the receiv[illegible] to turn over to the corporation, a[illegible] which it was admitted was done? [illegible] am not aware of any rule by whic[illegible] this can be done."

In Ryan v. Hays, 62 Tex. 42; 23 A[illegible] & Eng. R. Cas. 501, a receiver was di[illegible] charged from his trust in Decembe[illegible] 1879, provision being made for the a[illegible] sumption by the railroad company, t[illegible] which he turned over the property, [illegible] liability for claims against the r[illegible] ceiver. About two months before h[illegible] discharge, suit had been brough[illegible] against the receiver for injury to [illegible] passenger caused by the negligence o[illegible]

CLAIMS FOR DAMAGES HAVE PRIORITY. — Damages for ies to persons or property during the receivership caused by orts of the receiver's agents and employés, are classed as ating expenses and are accorded the same priority of pay- as belongs to other necessary expenses of the receivership. claims will be paid out of the net income if that is suffi- , but in the event of a deficiency they will be paid out of the s.[1]

er's employés. *Held*, that the er was not liable to the plaintiff ll the property, once in his con- receiver, had been turned over purchasers and he had received ischarge from the court. The by Stayton, J., said: "The sole y of a receiver, except in cases he is personally at fault, is offi- nd when his official character , and the property through which his official liability may be dis- d has passed from his hands, in nce of the orders of the court ppointed him, and he has been at court discharged from his hen no judgment can be ren- against him; for with the termi- of his official existence ends his liability."

s, etc., R. Co. *v.* Adams, 78 372, was an action originally t the receiver to recover for e to freight while such road ing operated by the receiver. amended petition plaintiff d that subsequently to the done the receiver was dis- d, and that all property and in his hands were turned over corporation. The railroad ny was, by the amendment, party defendant, and appeared swered. The cause was discon- as to the receiver,

armers' L. & T. Co. *v.* Central McCrary (U. S.) 181; 7 Fed. 37, there was a motion made by ceiver of a railroad and by the ser of the road upon a foreclos- e to rescind an order granting sion to sue the receiver who een discharged before such was made, and all funds turned o the purchaser. The court, er, retained its jurisdiction of riginal case to enforce the nt of debts and liabilities in- by the receiver. *Held* that he receiver the motion should nted, but as to the purchaser it should be denied because the latter took the property, under the final order of the court, *cum onere.* Corser *v.* Russell, 20 Abb. N. Cas. (N. Y.) 316, was an action against the receivers of a railroad to recover for loss of freight by fire. The defendants offered to prove that, before the fire, a referee appointed by the court had conveyed to certain parties the right of the defendants as receivers and all the property of the railroad which had been operated by the receivers. The evidence was objected to and excluded. Upon appeal it was held that the evidence was clearly competent to show that the defendants had no rights as receivers after the conveyance, and that they could not be held liable for the loss.

1. Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S. 434; 25 Am. & Eng. R. Cas. 560; Mobile, etc., R. Co. *v.* Davis, 62 Miss. 271; 26 Am. & Eng. R. Cas. 425; Ryan *v.* Hays, 62 Tex. 42; 23 Am. & Eng. R. Cas. 501; Klein *v.* Jewett, 26 N. J. Eq. 474.

In Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S. 434; 25 Am. & Eng. R. Cas. 560, it was held that claims for damages arising during the receivership are to be regarded as necessary operating expenses, and, where the income is insufficient are entitled to priority of payment even out of the *corpus*, as against mortgagees. In this case the court, by Blatchford, J., said: "While it is admitted that these debts were incurred for the ordinary expenses of the receivers in operating the road it is contended that they are entitled to priority only out of income of the road, and not out of the proceeds of the property itself. Of course, such items are payable out of the income before the *corpus* is resorted to. But that may be resorted to, when the items are proper ones to be allowed for operating expenses."

Passengers over a railroad and employés of the company when entitled to

But damages for torts committed by the company prior to appointment of the receiver are not classed as operating penses, and the rule elsewhere considered that operating ex ses for a limited time preceding the appointment of the rece shall be allowed priority,[1] does not apply to such claims.[2]

damages for injuries received while the railroad is operated by a receiver should be paid out of the fund in court realized from the earnings of the road during the receivership, in preference to mortgage or other debts existing at the time of action brought. *Ex parte* Brown, 15 S. Car. 518; 9 Am. & Eng. R. Cas. 723. This case was decided on the ground that claims for damages occurring during the receivership are to be treated as necessary operating expenses. The court by Fraser, J., said: "The receivership is the transfer of the property to a new owner who begins his work cut off from the past with new duties and new obligations. The court could order a sale at once and let new and absolute owners take the property and assume their proper liabilities to third parties. If, instead of doing this, a receiver is appointed, he represents, technically, the interests of an insolvent corporation, but technically and substantially the interests of creditors, who ought not to be allowed to enjoy the franchises and property of the corporation without its responsibilities."

In Klein *v.* Jewett, 26 N. J. Eq. 473, the court by Van Fleet, V. C., said: "The injury having been inflicted while the road was under the control of the receiver, and he being liable in his official capacity for the damages, I think they, together with the taxed costs of the proceedings for their recovery, should be paid out of the current earnings of the road. The claim, in my judgment, may be properly included in the expenses incurred in operating the road, and should be paid out of the fund appropriated for that purpose."

Contra.—In Davenport *v.* Receivers, 2 Woods (U. S.) 519, the court decided this question differently. In this case a passenger was injured through negligence of the receiver's employés, and, the road not making running expenses, the passenger, who had recovered judgment against the receiver, petitioned the court to have his claim paid out of the proceeds of a sale of the road, on the ground that his claim was one incurred in the necessary expenses of the trust. *Held*, that he was not entitl payment prior to the bondholders.

1. See *infra*, this title, *Rel Priority of Claims; Debts Contr by Company Before Receivershi*

2. **Loss of Goods.**—A claim fo value of goods lost by fire while i possession of a railroad company carrier, and within six months b the road is placed in the hands receiver in a foreclosure suit, is entitled to be allowed as pri equity to the claim of bondho Easton *v.* Houston, etc., R. Co Fed. Rep. 12; 39 Am. & Eng. R. 588.

In this case, the U. S. ci court, by Pardee, J., said: "A of a railroad company arising o the loss by fire of goods while in session of said railroad company common carrier is generally, and haps properly classed as an oper expense; but, when presented ag an insolvent railroad company four months after the railroad erty is placed in the hands of ceiver in a foreclosure suit, and as a lien upon the income of the erty earned by the receiver, it is essary to discriminate such a from debts arising for labor, sup equipment furnished for and n sary for keeping up the railroad 'going concern.'"

Fires.—Hiles *v.* Case, 14 Fed. 141; *sub. tit. In re* Dexterville etc., Co., 4 Fed. Rep. 873, was a against a receiver for damage several occasions by fire cause sparks from a defective locom some of the fires being prior t appointment of the receiver. The c ants asserted priority against the holders as to payment out of earn on the ground that such dan should be treated as operating exp *Held*, on demurrer, that tho the claims which arose out of fir curring before the appointment receiver were not entitled to priority.

Personal Injury.—Farmers' L. Co. *v.* Green Bay, etc., R. Co., 45 Rep. 664; 46 Am. & Eng. R. Cas

LIABILITY OF CORPORATION—(1) *General Rule; Corporation iable.*—When a railroad is in the hands of a receiver, who ll possession of its property and entire charge of its affairs, orporation itself is not liable for damages or injury caused e acts or negligence of such receiver, or of his agents or oyés.[1] But where the possession of the company and the

claim for negligently causing ath of an employé twenty-six revious to the appointment of a r. *Held*, not entitled to pri- s against a precedent mortgage either the income or *corpus* of perty.

where a railroad, in settlement im for damages by an employé, to pay to him a specified sum ly, and the employé undertakes uch work about the company's s he may physically be capable forming, the sum agreed to be the employé is not a contract- ligation, but is in liquidation of m and right of action for per- njuries, and confers upon him a over the lien of mortgages statute which prohibits a rail- ompany from creating mort- ens which shall be superior to ent for injury to persons or ty. Frazier *v.* East Tenn., etc., , 88 Tenn. 138; 40 Am. & Eng. 358.

ow *v.* Memphis, etc., R. Co., 20 Rep. 17 Am. & Eng. R. Cas. e United States circuit court, Arkansas, in appointing a re- ordered that he should pay *lia* damages for injuries to per- property which accrued within nths' past, and that such claims be a lien paramount and su- to the lien of the mortgages, severely criticised in Farmers' . Co. *v.* Green Bay, etc., R. Co., Rep. 664; 46 Am. & Eng. R. 6, by the United States circuit E. D. Wisconsin. The rule, as in the text, is plainly the better d is supported by the authorities. odfrey *v.* Ohio etc., R. Co., 116 ; 37 Am. & Eng. R. Cas. 8; . Wabash R. Co., 115 Ind. 466; & Eng. R. Cas. 1; Ohio, etc., *v.* Davis, 23 Ind. 553; 85 Am. 7; Bell *v.* Indianapolis, etc., R. Ind. 57; Ohio, etc., R. Co. *v.* 20 Ind. 498; Louisville, etc., R. Cauble, 46 Ind. 277; Memphis, Co. *v.* Stringfellow, 44 Ark. Am. & Eng. R. Cas. 374; 51 Am. Rep. 598; Kansas, etc., R. Co. *v.* Dorough, 72 Tex. 108; Ryan *v.* Hays, 62 Tex. 42; 23 Am. & Eng. R. Cas. 501; Erwin *v.* Davenport, 9 Heisk. (Tenn.) 44; Thurman *v.* Cherokee R. Co., 56 Ga. 376; Leathers *v.* Shipbuilders' Bank, 40 Me. 386; Ohio, etc., R. Co. *v.* Russell, 115 Ill. 52; 23 Am. & Eng. R. Cas. 149; Metz *v.* Buffalo, etc., R. Co., 58 N. Y. 61; 17 Am. Rep. 201; Rogers *v.* Mobile, etc., R. Co. (Tenn.), 12 Am. & Eng. R. Cas. 432; Turner *v.* Hannibal, etc., R. Co., 74 Mo. 602; 6 Am. & Eng. R. Cas. 38; Kansas Pac. R. Co. *v.* Searle, 11 Colo. 1; 35 Am. & Eng. R. Cas. 6; Kansas Pac. R. Co. *v.* Wood, 24 Kan. 619; 6 Am. & Eng. R. Cas. 582; Ellis *v.* Indianapolis, etc., R. Co., 6 Am. Law Rec. 288; Washington, etc., R. Co. *v.* Brown, 17 Wall. (U. S.) 445; Davis *v.* Duncan, 19 Fed. Rep. 477; 17 Am. & Eng. R. Cas. 295.

Illustrative Cases.—The receiver of a railroad is the representative of the court and not of the company, and the company is not liable for his acts or those of his employés. Where evidence adduced shows that the injury occurred from the operation of a train on the defendant's road, and a presumption arose therefrom that the persons in charge of the train were its employés, the defendant may, if it pleaded a general denial, show that the servants in charge of the train were not its servants but those of the receiver, operating the road under the decree of a court of competent jurisdiction. For the purpose of showing that at the time of the injury the road was being operated by a receiver, a decree prior to the injury placing the property and management of the road into the hands of a receiver ought to be admitted; but if at the same time a second decree showing the time of the discharge of the receiver is tendered, neither it nor the decree appointing the receiver ought to be admitted, if it shows by its recitals that prior to the action a final decree had been rendered in the case which took the road from the receiver's

hands and discharged him from the duty of operating the line. Kansas, etc., R. Co. *v.* Dorough, 72 Tex. 108.

Memphis, etc., R. Co. *v.* Stringfellow, 44 Ark. 322; 21 Am. & Eng. R. Cas. 374; 51 Am. Rep. 598, was an action brought by a passenger against a railroad company and its receiver jointly, to recover damages for personal injuries, received while the road was being operated by the receiver. The verdict was: "We, the jury, find for the plaintiff, and assess the damages at $1,250." The defendants filed separate motions in arrest of judgment, on the ground that the verdict was general and did not fasten the liability on either of them. On appeal, *held*, that the judgment against the railroad company should be arrested, and the judgment against the receiver affirmed. The court by Smith, J., said: "The complaint states no cause of action against the railroad company. The corporation itself cannot be held responsible for the negligence of servants of the receiver in operating the road. The receiver's possession is not the possession of the corporation, but is antagonistic thereto, and the company cannot control either the receiver or his employés. The effect of the misjoinder of these defendants is not, however, to vitiate the verdict as to the receiver."

Texas, etc., R. Co. *v.* Adams, 78 Tex. 372, was an action originally against the receiver to recover for damage to freight while such road was being operated by the receiver. By an amended petition, plaintiff charged that. subsequent to the wrong done the receiver was discharged, and that all property and funds in his hands were turned over to the corporation. The railroad company, by the amendment, was made a party defendant and appeared and answered. The cause was discontinued as to the receiver. *Held*, that the railroad company was not liable to the action, as no facts were alleged which made the company liable for the payment of loss or damage occurring while the road was being operated by the receiver.

If a ticket agent in the employ of the receiver of the railroad by mistake issues the wrong ticket to an intending traveler, the company is not, upon resuming control subsequently, liable for the mistake of the receiver's agent. Godfrey *v.* Ohio, etc., R. Co., 116 Ind. 30; 37 Am. & Eng. R. Cas. 8.

Crimes and Misdemeanors.—A co poration which is in the hands of a r ceiver cannot be prosecuted for crim and misdemeanors committed by th agents and servants of the receive State *v.* Wabash R. Co. 115 Ind. 46 35 Am. & Eng. R. Cas. 1, was a pros cution for obstructing a public hig way. The court, by Elliott, J., sai "The record shows that the Waba R. Co. is in the hands of a receiv . . . and that the servants of the r ceiver constructed a platform across public street. It is only necessary f us to decide that where a corporation is the hands of a receiver who has full po session of its property and entire char of its affairs, the corporation cannot prosecuted for crimes or misdemeanc committed by the agents or servants the receiver. As the corporation c do no act while the receiver is in fu control it can commit no offense."

Pleading and Proof.—Kansas Pac. Co. *v.* Searle, 11 Colo. 1; 35 Am. Eng. R. Cas. 6, was an action agair the railroad company to recover f freight lost in transit. The complai alleged that defendant company was common carrier, and as such had r ceived the freight, which was lo through its negligence. The railro company filed its answer specifical denying the allegations. In support this answer it offered evidence at t trial that at the time of the alleg grievance the railroad was in the han of a receiver, and was operated by hi that the said railway was not at th time engaged as a common carrier, a that the persons who had the custo of the goods of the plaintiff were t agents and employés of the said r ceiver, and not of the said railw company. This evidence was object to, the court sustained the objectio and there was a verdict for the pla tiff. *Held*, on appeal that the evider should have been admitted. The cou by Stallcup, C., said: "In view of t evidence offered the liability for t loss of the goods was against the r ceiver operating the railway, in his o cial capacity. The court erred excluding the evidence . . . as t evidence offered was such as to sh that there was no undertaking in t premises upon the part of the app lant, nor negligence of any kind by or its agents; that such undertaking a negligence, if any in the premis were by the receiver then operating t railway. The pleadings were suffici

iver are joint, the liability of the corporation continues.[1] company will also be liable for a damage occurring during the iership when such damage is caused by an act or default of company previous to the receivership.[2]

) *Corporation Liable When Receiver's Income Applied to rovements.*—So, also, if during the receivership net income is lied to the permanent improvement of the railroad property,

uch proof." In order to escape ity it is not always enough for the oration to show that a receiver has appointed. It must in some cases be affirmatively shown that he has n control. Where, therefore, it ared the receiver had been ap- ed ten days previous to the acci- but had had fifteen days within h to enter bond, it was held sufficient had not been shown to erate the company from lia- . Allen *v.* Central R. Co., 42 683.

A railroad, situated partly in inia and partly in the District of mbia, was operated by lessees. road fell into pecuniary difficul- and the portion of it within the rict of Columbia was, by the de- of the supreme court of the rict, placed in the possession of a iver, and the whole road was ed on the joint account of the es on the Virginia side and the iver on the District side. All ts were issued in the name of Washington, Georgetown and andria Railroad Company." In condition of things an action was ght against the company for un- l ejection of a passenger from of the cars, by a brakeman on the . *Held*, that the receiver's pos- on and management, not being sive, the action would lie against orporation. The court, by Davis, id: "It has never been held that ompany is relieved from liability s the possession of the receiver clusive and the servants of the wholly employed and controlled im. In this case the possession not exclusive, nor were the nts subject to the receiver's or- alone. On the contrary, the road run on the joint account of the es and the receiver, and the nts employed and controlled by jointly. Both were, therefore, responsible for the act com- ed of, and if so, the original company is also responsible; for the servants under such an employment, in legal contemplation, are as much the servants of the company as of the lessees and receiver. Apart from this view of the subject, the ticket on which the plaintiff rode was issued in the name of the railroad company. The holder of such a ticket contracts for carriage with the company, not with the lessees and receiver." Washington, etc., R. Co. *v.* Brown, 17 Wall. (U. S.) 445.

2. A railroad company in constructing its road in 1870 across a stream, built a culvert which was insufficient to allow the waters of the stream to pass through. As a result, in times of high water plaintiff's land was flooded. Such damage occurred, among other times, in 1876, when the road was in the hands of a receiver. In an action to recover, it was held that the company was liable for the flooding which occurred during the receivership. The court sustained the correctness of a charge to the jury to the effect that it was the duty of the railroad company in constructing the culvert in question to provide for the free flow of such an amount of water as might reasonably be anticipated to flow in said stream, and that if, by reason of the failure of the railroad company to perform such duty, the plaintiff sustained any injury, then the railroad company would be liable for such injury, even if at the time of the injury the management of the road had passed out of the hands of the railroad company into those of a receiver. Union Trust Co. *v.* Cuppy, 26 Kan. 754; 11 Am. & Eng. R. Cas. 562.

The same principles apply where an absolute duty is imposed on a railroad company by statute. See, *infra*, this title, *Liability of Railroad Receivers; Damage Arising from Negligence and Torts During Receivership; Liability of Corporation; Corporation Liable for Breach of Statutory Duty.*

and the receivership is afterwards discharged and the road agai turned over to the company, then the company is liable for tort during the receivership to the extent of such net income s applied.[1]

1. See *infra*, this title, *Relative Priority of Claims; Debts Contracted by Company Before Receivership; Diversion of Income.* In Texas, etc., R. Co. *v.* Johnson, 76 Tex. 461 ;42 Am. & Eng. R. Cas. 7, an action was brought against the railroad company to recover damages for personal injuries. The injury occurred while the road was being operated by a receiver appointed by a Federal court. Afterward the receiver was discharged and the property turned over to the railroad company under a decree of the court, which provided that the company should take it free from all demands or claims except traffic liabilities due connecting lines, contracts made by the receiver, and judgments which might thereafter be rendered in favor of persons interested in the cause when the receiver was appointed. It also appeared that during the receivership a very large amount of net income was applied to the permament improvement of the railroad property. *Held*, that the company was liable notwithstanding the fact that the injury occurred while the road was in the hands of the receiver. The decision was based upon the fact that net earnings were put into permanent improvements, and that the property thus increased in value was now in the possession of the company. The court by Stayton, C. J., said: "The question is in no matter complicated by rights or claims of other persons, but rests between appellee and appellant who has received and retains in betterments a sum which ought to have been paid to appellee if he was injured under such circumstances as to give a right of action against the receiver. That a claim for damages caused by injuries inflicted through the negligence of a receiver while he is operating the railway is entitled to payment out of the current receipts, is well settled. . . . If such earnings be invested in betterments which, without sale, are returned to the company with its other property at the close of the receivership, then the company must be held to have received the property charged with the satisfaction of any claim which the receiver ought to have paid out of the earn ings."

In Texas, etc., R. Co. *v.* White (Te 1892), 18 S. W. Rep. 481, an action fo personal injuries received by an em ployé by reason of defective applianc was brought against the railroad com pany. At the time the injury was re ceived the road was in the hands of receiver. During the receivershi about $2,000,000 of net earnings we expended in the improvement of th property. The company set up in de fense that it was not liable for th torts of the receiver. *Held*, that th company was liable for claims again the receiver to the amount of ne earnings expended in betterments an permanent improvements.

Texas, etc., R. Co. *v.* Bailey (Te 1892), 18 S. W. Rep. 481, was an action fo injuries to a passenger through th negligence of a receiver's employé *Held*, that the company was liable net earnings during receivership ha been applied to permanent improve ments, and the property subsequentl turned over to the company.

Extent of Liability.—The railroa corporation is only liable for suc claims to the amount of net incom during receivership which was ap plied to permanent improvement Texas, etc., R. Co. *v.* White (Te 1892), 18 S. W. Rep. 478; Texas, etc R. Co. *v.* Bailey (Tex. 1892), 18 S. W Rep. 481; Texas, etc., R. Co. *v.* John son, 76 Tex. 461; 42 Am. & Eng. R Cas. 6.

But if the company wishes to set u as a defense the fact that it has alread paid such claims to an amount equal t the value of such improvements, i must raise this question by the plead ings. Where there was an actio brought against a railroad compan for injuries to a passenger during a re ceivership, the company asked th court to charge the jury, that if th claims against the company for th acts of the receiver while the road wa in his charge should exceed the valu of the improvements of the property made by him out of the earning coming into his hands, then the com pany should not be liable. *Held*, tha

Corporation Liable for Breach of Statutory Duty.—Where atute an absolute duty or liability is imposed upon a rail- company, and, in consequence of neglect to perform such s an injury occurs, the corporation is liable, notwithstanding its affairs have passed into the hands of a receiver.[1]

uestion must be raised by the ngs, and that the charge, was rly refused. Texas, etc., R. Co. iley (Tex. 1892), 18 S. W. Rep.

'hiladelphia, etc., R. Co. *v.* Com., 'a. St. 80; 13 Am. & Eng. R. 367; Union Trust Co. *v.* Cuppy, an. 754; 11 Am. & Eng. R. 562; State *v.* Wabash R. Co., nd. 466; 35 Am. & Eng. R. ; McKinney *v.* Ohio, etc., R. 22 Ind. 99; Louisville, etc., R. . Cauble, 46 Ind. 277; Ohio, R. Co. *v.* Fitch, 20 Ind. 498; s, etc., R. Co. *v.* Wood, 24 Kan. Am. & Eng. R. Cas. 582; Ohio, .. Co. *v.* Russell, 115 Ill. 52; 23 & Eng. R. Cas. 149.

on the same principle the com- s held liable for damage occurring receivership by reason of the ny's previous default in the per- nce of an absolute duty, even such duty is independent of e. See *supra*, this title, *Liability ilroad Receiver; Damage Aris- om Negligence and Torts During vership; Liability of Corpora- General Rule*; *Corporation Not*.

y to Fence Against Stock—*Illi-* -The Illinois statute of 1874, it the duty of every railroad ration within a certain time after e is open for use to erect and fter maintain fences on both sides road, to keep stock from getting e track; and provides that in he corporation shall neglect or to build such fence the owner or ier of the land adjoining the rail- nay give notice to such corpora- build such fence within a time ed, which notice may be served corporation or the lessee or per- erating the railroad; and if the s so notified shall refuse to build ence, the owner or occupant of nd required to be fenced may the fence, and shall be entitled to r double the value thereof from corporation or party actually ying or using such railroad. & Miss. R. Co. *v.* Russell, 115 Ill. 52; 23 Am. & Eng. R. Cas. 149, was an action against the railroad corporation under this statute. The corporation filed a special plea, averring that at and before the time of building the fence the railroad and all its property was in the hands of a receiver appointed by a United States court. A demurrer to the plea was sustained. The court, by Scott, J., said: "The statute has expressly given the remedy against either party, and the party aggrieved may bring his action against one or the other as he deems most expedient . . . Counsel have cited a line of authorities that hold while a railroad is in the hands of a receiver . . . the corporation will not be liable for injuries caused by the negligent conduct of the agents or servants of the receiver. . . . Conceding the correctness, as is freely done, of the general doctrine on this subject, it has no application to the case being considered. The defendant in this case is not sued for an injury or damage done by the servants of the receiver operating the road. The action is against defendant for the non-performance of a duty imposed by statute, against which, it is apprehended, no order of court can avail to relieve it. It is a police regulation, to which the corporation is subjected by the sovereignty of the State, and it is not within the rightful jurisdiction of the court, either State or Federal, to arrest its operation. . . . The mere fact that its property may be temporarily in the hands of a receiver does not relieve a corporation from the operation of such regulations any more than a private citizen is released from the duty to observe the law because his property may be sequestered by order of the court for the benefit of his creditors."

Indiana.—A statute of Indiana (3 Ind. St. 413) expressly provides that an action to recover damages in certain cases for killing of stock may be brought against the railroad company, whether such road was being run by the company or by a lessee, assignee, receiver or other person. Louisville, etc., R. Co. *v.* Cauble, 46

RECEIVER'S CERTIFICATES—(See also RAILROAD SECURITI

—**1. In General.**—Pending foreclosure p
railroad mortgage, a court of equity will appoi
authorize him, when the income is insufficient
the road, to borrow money upon the cre
and to issue for the security of the payme
or certificates of indebtedness. By the ord
these receiver's certificates are, as a rule, made
the entire property, income and franchises of t
company, and accordingly take priority over liens of fi
bondholders and all other creditors. Owing to t
the income of the receivership is generally insufficie
these evidences of indebtedness, they are usually paid o
proceeds of the foreclosure, and, being a prior lien,
precedence in distribution.[1] Where the trust fu

was an action under this stat-
a railroad company which
the hands of a receiver ap-
a United States court. It
that the action would lie
the company notwithstanding
receivership. The court, by Bus-
said: "The question . . .
resolves itself into the ques-
whether the legislature of this
possessed the constitutional power
the above-recited act. The cor-
existence, powers and fran-
of the appellant were conferred
the legislature of this State. . . .
whole effect of the decree (ap-
a receiver) is to take the cus-
control and management of such
corporation out of the hands of the
who were controlling and
managing the same, and to place the
same in the custody and under the
control and management of the re-
ceiver for a specified time and for
a special purpose. The corporate ex-
istence of the appellant was left intact."

Kansas.—A Kansas statute of 1874, required railroad companies to fence their roads or be liable for stock killed by their trains. In 1876 defendant corporation passed into a receiver's hands. In 1879 the receiver was discharged, and the property returned to the possession of the corporation. Just before this was done, and while the possession of the receiver continued, stock was killed by the railroad at a place where the road was unfenced. *Held*, that an action might be maintained against the corporation for the enforcement of the liability imposed on it by said statute. Kansas Pac. R. Co. *v.* Wood, 24 K
619; 6 Am. & Eng. R. Cas. 582.

Missouri.—The statute of Misso
(session laws of 1875, page 131) p
vides that railroad corporations sh
erect and maintain fences, and th
failing to do this, such corporat
owning or operating any railroad sh
be liable in double damages for inju
to stock occurring through such failu
Held, in Central Trust Co. *v.* Waba
etc., P. R. Co., 26 Fed. Rep. 12, t
receivers operating a railroad
liable under this statute. The con
tutionality of this statute was sustai
in the Missouri Pac. R. Co. *v.* Hun
115 U. S. 512; 22 Am. & Eng. R. C
557.

1. Union Trust Co. *v.* Illinois, M
land R. Co., 117 U. S. 434; 25 Am
Eng. R. Cas. 560; Wallace *v.* Loon
97 U. S. 146; Miltenberger *v.* Loga
port R. Co., 106 U. S. 286; 12 Am
Eng. R. Cas. 464; Stanton *v.* Alabam
etc., R. Co., 2 Woods (U. S.) 5
Smith *v.* McCullough, 104 U. S. 25
Am. & Eng. R. Cas. 159. See, a
RAILROAD SECURITIES—*Receiv*
Certificates.

"A receiver's certificate may be
fined to be a non-negotiable evidenc
debt, or debenture, issued by author
of a court of chancery, as a first l
upon the property of a debtor corpo
tion in the hands of a receiver. Wi
in the past twelve or fifteen years th
certificates, to the amount of ma
millions of dollars, have been issu
and the courts are constantly author
ing the further issue of them, ostensi
for the preservation of the property
in the interest of the bondholders,

elieved, in a majority of the cases hich they are issued, to the hin-e and delay of a prompt forê-re, to the impairment of the bond-rs' security, and to the scandal of ourts of equity." Beach on Re-rs, § 379.

Meyer v. Johnston, 53 Ala. 237, ourt by Manning, J., observes: "It ot necessary that the question of ower of a court to authorize the of first lien certificates of indebted-to enable a receiver to raise the y he might need, should be decid-fore the introduction of railroads. hese properties, with their appur-ces, vast in extent and value, yet perishable if unused and neglected, ng as the estates of private individ-associated into corporations, but tially public works, in whose op-ons the public at large and the are concerned, when drawn into tion, must be dealt with by the s according to the nature and cir-tances of the subject. And any an understand that the best and est mode of conserving a railroad, be by operating trains thereon, eeping it in repair for their use. reserve its value, it must generally ntinued in operation, and be sold going concern. If it were not for ublic quality belonging to them, e injury that would be done to terests of whole communities that become dependent on a railroad accommodation in a thousand s, a chancellor might say to the es most interested: Unless you fur-means for the protection of this erty which does not itself afford an uate income for the purpose, it may ne a dilapidated and useless k. But the inconvenience and loss this would inflict on the popula-of large districts, coupled with the it to parties who perhaps are rless to take care of themselves, eventing the rapid diminution of , and derangement and disorgani-that would otherwise result, to require—not for the completion unfinished work, or the improve-, beyond what is necessary for its rvation, of an existing one, but to it up, to conserve it as a railroad erty, if the court has been obliged e possession of it, that the court d borrow money for that purpose, cannot otherwise do so in suffi-y large sums, by causing negoti-certificates of indebtedness to be issued constituting a first lien on the proceeds of the property, and redeemable when it is sold or disposed of by the court. "Weighty objections, we know, may be alleged against such a transaction. It may be said the property does not belong to the court or the receiver. It is in their hands only while proceedings are pending to determine the respective rights of parties litigant. What title can any instrument made by them transfer in that which belongs to others? Perhaps the correct reply would be: True, the property is in the keeping of the court to be taken care of, but also to be sold; and out of the proceeds the expenses of taking care of it must be paid. The certificates may not follow the property out of the court. But they constitute a charge upon it in the particular cause enforceable in this court and must be satisfied or provided for before the property, or the proceeds of it after the sale, shall pass out of its control. The certificates are not debts of the company, but of the receivers backed by the pledged faith of the court, that the property on the proceeds of which they are charged, is in its possession, subject to be, and that it will be disposed of by it for the payment of them. This results from the fact that they are but a substitue for common methods by which money is raised for the use of a receiver in a particular cause, a mode of appropriating, in advance, a portion of the value of the property, in order to enable the court to save a greater value thereof from destruction. Hence no chancellor should permit them to be issued without the utmost circumspection; and as they are used for urgent present needs, and are to be redeemed when the litigation is ended, they should not be issued in excess of the need, or—although made negotiable that they may be more availabe—be sent out of the country for circulation like mortgage bonds abroad. Such a limited scope is all that it is necessary for the certificates to have. By enlarging it, the character which their origin should stamp upon them would be changed, and it will become impossible to preserve the value of older securities. It may also be said such a power will be abused. Rash or facile chancellors may be persuaded to issue more certificates than are necessary for the mere conservation of the property; and when out they must all

VIII. Receiver's Certificat[illegible]

Receiver's Certificates)—1. I[illegible] ceedings upon a railroad m[illegible] a receiver and authorize hi[illegible] the conservation of the [illegible] of the property, and to [illegible] thereof, debentures or [illegible] of the court these re[illegible] first lien upon the enti[illegible] railroad company, and [illegible] mortgage bondhold[illegible] fact that the income [illegible] to pay these eviden[illegible] of the proceeds [illegible] course take preced[illegible]

[illegible]tificates by payment [illegible] a *pro rata* distributio[illegible] [illegible] Issue.—The power of [illegible] of such certificates is [illegible] reserve the trust funds in [illegible] n cases where the creati[illegible] for the preservation of t[illegible] ll cases, if possible, with t[illegible] interested in the fund.[2] [illegible] property is a further jus[illegible] certificates. Where the incor[illegible] to keep the road in repair, t[illegible] in value, but the business a[illegible] ously affected; consequently, [illegible]holders to consent to the esta[illegible] purpose of preserving the pro[illegible] while it is desirable to obta[illegible] ied, as to the propriety of su[illegible] the power of the court to auth[illegible] ates does not depend upon th[illegible] to them of its intention to gra[illegible] borrow money for such purpos[illegible] om practicable, where the debts [illegible] perty. Though prior notice to perso[illegible] em as parties, first requiring them [illegible] re not, is generally the better way, [illegible] judicially equivalent to prior notic[illegible]

Ind. 277, was an ac[illegible] ute against a railr[illegible] was in the hand[illegible] pointed by a Uni[illegible] was held that [illegible] against the comp[illegible] the receivershi[illegible] kirk, Jr., said [illegible] therefore, reso[illegible] tion of wheth[illegible] State possess[illegible] to pass the ab[illegible] porate exist[illegible] chises of th[illegible] by the leg[illegible] The whol[illegible] pointing [illegible] tody, con[illegible] corporat[illegible] persons [illegible] managi[illegible] same [illegible] contro[illegible] ceiver [illegible] a spe[illegible] isten[illegible] A[illegible] req[illegible] th[illegible] kil[illegible] an[illegible] h[illegible] c[illegible] t[illegible] [illegible]

[illegible] scheme [illegible] fails, [illegible] disre- [illegible] But [illegible] ught to [illegible] except [illegible] subject of [illegible] or [illegible] destruc- [illegible] Backus, [illegible] 26 Md. [illegible] R. Co., 95 [illegible] 348; 35 [illegible] 97 U. S. [illegible] observes: [illegible] equity to [illegible] of such [illegible] taken un- [illegible] fund for the [illegible] and to au- [illegible] raise money [illegible] management [illegible] make the same [illegible] for its re- [illegible] this day be seri-

ously disputed. It is a part of that [illegible] risdiction, always exercised by the co[illegible] by which it is its duty to protect [illegible] preserve the trust funds in its hands. [illegible] is undoubtedly a power to be exerci[illegible] with great caution, and, if possi[illegible] with the consent or acquiescence [illegible] the parties interested in the fund."

3. In Union Trust Co. *v.* Illin[illegible] Midland R. Co., 117 U. S. 434; 25 A[illegible] & Eng. R. Cas. 560, the court, [illegible] Blatchford, J., said: "Property s[illegible] ject to liens and claims and debts [illegible] various characters and ranks, wh[illegible] is brought within the cognizance o[illegible] court of equity for administration [illegible] conversion into money, and distri[illegible] tion, is a trust fund. It is to be p[illegible] served for those entitled to it. T[illegible] must be done by the hands of the co[illegible] through officers. The character of [illegible] property gives character to the par[illegible] ular species of preservation which [illegible] requires. Unimproved land may [illegible] idle, with only payment of taxes. [illegible] proved property should be rent[illegible] Movable property that is not perisha[illegible]

e locked up and kept; but if per- it must be sold, by way of pres- on. A railroad and its appurte- is a peculiar species of prop- Not only will its structures orate and decay and perish if not for and kept up, but its business ood will will pass away if it is not nd kept in good order. More- railroad is a matter of public rn. The franchises and rights corporation which constructed it given, not merely for private gain corporators, but to furnish a highway; and all persons who vith the corporation as creditors ders of its obligations, must nec- y be held to do so in the view, f it falls into insolvency and its come into a court of equity for ment, involving the transfer of nchises and property by a sale ther hands, to have the purposes creation still carried out, the while in charge of the property, e power, and under some circum- s it may be its duty, to make repairs as are necessary to keep ad and its structures in a safe and r condition to serve the public.

A full opportunity, as in ase, to be heard, on evidence the propriety of the expendi- and of making them a first lien, icially equivalent to prior notice. eceiver and those lending money n on certificates issued on or- made without prior notice to interested, take the risk of the action of the court in regard to ans. The court always retains l of the matter; its records are ible to lenders and subsequent s, and the certificates are not able instruments.

principle laid down in Wallace mis, 97 U. S. 146, was applied in berger *v.* Logansport R. Co., S. 286; 12 Am. & Eng. R. Cas. In that case a bill was filed by econd mortgagee, against the agor, and a first mortgagee, and ent creditors of the mortgagor, close a mortgage on a railroad. day the bill was filed, and with- tice to the first mortgagee, a re- was appointed and power given operate and manage the road," re- ts revenues, pay its operating ex- , make repairs and manage its en- siness; and to pay the arrears due erating expenses for a period in st not exceeding ninety days, and to pay into the court all revenue over operating expenses." After that, and without notice to the first mortgagee, who had not appeared, although notified of the order appointing the receiver and of the pendency of the suit, the court authorized the receiver to purchase engine and cars, and to adjust liens on cars owned by the mortgagor, to pay indebtedness not exceeding $10,000, to other connecting lines of road, in settlement of ticket and freight accounts and balances, and for materials and repairs, which had accrued in part more than ninety days before the order appointing the receiver was made, and to construct five miles of new road, and a bridge. The petition for the order stated the necessity for the rolling stock and for the adjustment of the liens; that the payment to the connecting lines was indispensable to the business of the road, and it would suffer great detriment unless that was provided for; and that the new road and the bridge would come under the mortgages, and their construction would be to the advantage of the bondholders. After the first mortgagee had appeared and answered, an order was made, but not on prior notice to it, authorizing the receiver to issue certificates to pay for rolling stock he had bought under orders of the court, and to pay debts incurred for building the five miles of road and the bridge, under those orders, and to pay debts incurred for taxes, and rights of way, and back pay and supplies in operating the road, the certificates to be payable out of the income, and, if not so paid, to be provided for by the court in its final order.

Claims thus arising were afterwards allowed, to be paid out of the proceeds of the sale, before the mortgage bonds. This court upheld such priority, as to the debts for the purchase of rolling stock and for the adjustment of liens and for the construction of the five miles of road and the bridge and for the amount due connecting lines, some of which was incurred more than ninety days before the receiver was appointed.

But see in regard to consent of prior existing lienholders, Jones on Railroad Securities, § 539, where the author observes in this connection: "It is claimed that courts of equity have authority, without the consent of mortgagees, to order receivers to borrow money, and to bind the property in their hands for the payment of the loans. This authority, if it exist at all, is not,

[illegible] trustees of the mortgage is notice to the bo[illegible]
[illegible] consent of the bondholders will be impli[illegible]
[illegible] is made by the trustees representing the[illegible]
[illegible] with a knowledge of the issue of certificat[illegible]
[illegible] which they were issued, cannot dispute th[illegible]
[illegible] of lien after they have been issued, and sol[illegible]

[illegible] discretionary; the [illegible] limited by settled [illegible] Meyer v. John- [illegible] side from any con- [illegible] mortgagor and [illegible] right to redeem, [illegible] court of equity has [illegible] to that of a mortga- [illegible] incur charges for [illegible] and repair of the [illegible] taken possession of [illegible] receiver, a court of chan- [illegible] power to impair the obli- [illegible] mortgage contract, by cre- [illegible] lien without the [illegible] consent, unless it be in [illegible] a like equitable power [illegible] and protecting the [illegible] The law does not permit [illegible] of contracts to be im-

[illegible] Meyer v. Johnston, 53 Ala. [illegible] court by Manning, J., ob- [illegible] "The Constitution of the [illegible] States inhibits even a State [illegible] an act which shall have [illegible] ect. And certainly, a court, [illegible] a portion of the government [illegible] State cannot have a power which [illegible] to the State in convention [illegible]. If, therefore, the action [illegible] chancellor in this cause goes to [illegible] of taking the property of the [illegible] corporation into his hands [illegible] purpose, through his ap- [illegible] of completing an unfinished [illegible] or of enlarging or improving a [illegible] one, beyond what is necessary [illegible] preservation, and to that end of [illegible] money, by charging the rail- [illegible] and its appurtenances with liens [illegible] are to supersede older ones, [illegible] the consent of the holders of [illegible] he has inadvertently passed be- [illegible] the boundaries of a chancellor's [illegible]. In our opinion, no such [illegible] is vested or resides in any judi- [illegible] tribunal."

Where an order authorizing the issue of certificates is irregular—as, for instance, where it is made without the proper notice to all concerned—the mode of objecting should be by application to the court appointing the receiver to vacate it and set it as[illegible] Meyer v. Johnston, 53 Ala. 237.

1. Wallace v. Loomis, 97 U. S. [illegible]

In Shaw v. Little Rock, etc., [illegible] Co., 100 U. S. 605, the court by Wa[illegible] C. J., observes: "To allow a sm[illegible] minority of bondholders, represent[illegible] a comparatively insignificant amo[illegible] of the mortgage debt, in the abse[illegible] of any pretense even of fraud or [illegible] fairness, to defeat the wishes of s[illegible] an overwhelming majority of th[illegible] associated with them in the benefit [illegible] their common security, would be [illegible] ignore entirely the relation wh[illegible] bondholders, secured by a railr[illegible] mortgage, bear to each other. R[illegible] road mortgages are a peculiar clas[illegible] securities. If there are difference[illegible] opinion among the bondholders a[illegible] what their interests require, it is [illegible] improper that he should be gover[illegible] by the voice of the majority, actin[illegible] good faith and without collusion[illegible] what they ask is not inconsistent [illegible] the provisions of his trust."

2. In Humphreys v. Allen, 101 [illegible] 490; 4 Am. & Eng. R. Cas. 1, the c[illegible] by Dickey, J., observes: "What[illegible] may be said as to the limitat[illegible] which the law places upon the e[illegible] cise of the power of the chancello[illegible] make certificates issued by a rece[illegible] for moneys borrowed by him, a [illegible] upon the property, superior to [illegible] vested lien of the mortgagees, in [illegible] case, we think that appellants are [illegible] in a position to raise that quest[illegible] The bonds which they held [illegible] bought from Mr. Constable on [illegible] 10th of May, 1879. At that time [illegible] of these certificates had been iss[illegible] and disposed of by the receiver, [illegible] were held by the parties who had [illegible] for them in cash, or had recei[illegible] them in substitution of securi[illegible] which they held for pre-existing de[illegible] Whether the subject-matter to wh[illegible] these certificates were applied co[illegible] within the scope of the powers of [illegible] court in the preservation of the pr[illegible] erty for the benefit of all concern[illegible] was a question which might h[illegible] been raised, and ought, properly

Purposes for Which Certificates Are Authorized.—It is clear that ower of the court to authorize its receiver to issue certifi- of indebtedness is one that might readily be abused; and, it is usually resorted to under the pretext that it will en- e the security of the bondholders, it not infrequently results king from them the security they already have and appro- ing it to pay debts contracted by the court.[1] Hence it is a r to be sparingly exercised, and one which should only be ted to in cases of urgent necessity, and when exercised, the of the court is strictly construed. The certificate must be d in strict accordance with the order, and for the express oses mentioned.[2] The terms of the order cannot be ex- ed or in any way altered by implication.[3] It has been held,

been raised, before the certificates ssued and sold. Mr. Constable, wner of these bonds, knew, as a or in the railroad company, and ceedings which occurred in the ors' meeting, that the road and property of the company had laced in the hands of a receiver. ew that the order for the issue tificates, to be made a first lien the property of the company, een entered of record, and that certificates were about to be and put upon the market. The eds of a part of these certificates o be applied in releasing from a l mortgage property upon which ndholders claim to have a lien, which he had an interest as a older. It was incumbent upon he intended to insist that these cates should not be a paramount pon the property of the com- that he should have intervened ised his objections. On the con- with a full knowledge of all the he lay by and permitted others d faith to invest their money in certificates, and the money to be d for his benefit in discharging abilities of the company for s and supplies, and for a debt ich the rolling stock of the com- n which he was interested was p. In a court of equity, he not be heard afterwards to that the holders of these cer- s should not have this priority." so, Langdon *v.* Vermont, etc., R. 3 Vt. 228; 4 Am. & Eng. R. 3.

Central Trust Co. *v.* Seasongood, S. 482, S brought suit in a State o enforce his lien for the unpaid se price of three lots sold by him to a railroad company, and over which it constructed its road. He made the Central Trust Company, which held a mortgage on the entire road and all its property, a party defendant. The suit resulted in an order that the lots be sold to satisfy the claim, and if the proceeds were insufficient, then, that the entire road should be sold. The trust company did not appeal from that decree, but afterwards brought suit in the United States court to foreclose its mortgages. A receiver was appointed and an order made reciting the proceedings in the State court, and directing the receiver to issue to S a preferred certificate for the amount of his judgment and interest. This was done, and S entered satisfaction of his judgment in the State court. The road was afterwards sold, and the court directed payment out of the proceeds of the full amount of S's certificates. *Held*, that the trust company could not complain, and that it was immaterial whether the certificates were properly issued, for the reason: (1) It is apparent that the order of the court under which they were issued was the result of an agreement between the parties, and (2) if they should be held to be invalid, the appellee could not be restored to the rights under a decree of the State court which he surrendered.

1. Caldwell, J., in Credit Co. *v.* Arkansas Cent. R. Co., 15 Fed. Rep. 46; Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S. 434; 25 Am. & Eng. R. Cas. 560.

2. Newbold *v.* Peoria, etc., R. Co., 5 Ill. App. 367.

3. State *v.* Edgefield, etc., R. Co., 6 Lea (Tenn.) 353.

[illegible] that receiver's certificates may lawfully be authori[illegible] [illegible] money necessary for the preservation and managem[illegible] [illegible] property."[1] and the courts are reluctant to encourage s[illegible] [illegible] beyond the exigencies of the case,[2] taking for a [illegible] [illegible] necessity of the expenditures for which it is propo[illegible] [illegible] means.[3]

[illegible] Bank of Montreal *v.* Chicago, [illegible] Iowa 518, the court [illegible] that where a receiver is authorized [illegible] certificates for materials fur[illegible] [illegible] labor performed in extend[illegible] [illegible] road, not to exceed a given [illegible] per mile, he cannot issue [illegible] advance of the actual perform[illegible] [illegible] labor or furnishing of materials. [illegible] also, Bank of Montreal *v.* Thayer, 7 [illegible] 922; Newbold *v.* Peoria, etc., [illegible] Ill. App. 367.

[illegible] Wallace *v.* Loomis, 97 U. S. 146.

[illegible] Shaw *v.* Little Rock, etc., R. Co., [illegible] U. S. 605; Meyer *v.* Johnston, 53 [illegible]

[illegible] Jones on Railroad Securities, [illegible]

[illegible] Burhnam *v.* Bowen, 111 U. S. 776; [illegible] Am. & Eng. R. Cas. 308, the court, by Waite, C. J., says: "The income of a railroad company out of which the mortgagee is to be paid, is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment and useful improvements. Every railroad mortgagee, in accepting his security, impliedly agrees that the current debts, made in the ordinary course of business shall be paid from the current receipts before he has any claim on the income." Such being the case, when a court of chancery, in enforcing the rights of mortgage creditors, takes possession of a mortgaged railroad and thus deprives the company of the power of receiving any further earnings, it ought to do what the company would have been bound to do if it had remained in possession; that is to say, pay, out of what it receives from earnings, all the debts which in equity and good conscience, considering the character of the business, are chargeable upon such earnings. In other words, what may properly be termed the debts of the income should be paid from the income before it is applied in any way to the use of the mortgagees. The business of a railroad should be treated by a court of equity under such circumstances as a "going concern," not to be embarrassed by any unnecessar[illegible] [illegible]terference with the relations of t[illegible] [illegible] who are engaged in or affected b[illegible] We do not hold that the income [illegible] railroad in the hands of a receiver [illegible] the benefit of mortgage creditors [illegible] have a lien upon it under their m[illegible] [illegible]gage, can be taken away from t[illegible] and used to pay the general credi[illegible] of the road. All we decide is, th[illegible] current earnings are used for the [illegible] [illegible]efit of mortgage creditors before [illegible] [illegible]rent expenses are paid, the mort[illegible] [illegible] security is chargeable in equity [illegible] the restoration of the fund which [illegible] been thus improperly applied to t[illegible] use."

In Fosdick *v.* Schall, 99 U. S. [illegible] the court by Waite, C. J., said: "[illegible] have no doubt that when a cour[illegible] chancery is asked by railroad m[illegible] [illegible]gagees to appoint a receiver of [illegible] [illegible]road property, pending proceed[illegible] for foreclosure, the court in the exe[illegible] of a sound judicial discretion may, [illegible] condition of issuing the necessary o[illegible] impose such terms in reference to [illegible] payment from the income of outst[illegible] [illegible]ing debts for labor, supplies, equipm[illegible] or permanent improvement of [illegible] mortgaged property as may, under [illegible] circumstances of the particular [illegible] appear to be reasonable. . . . W[illegible] ordinarily this power is confined to [illegible] appropriation of the income of the [illegible] [illegible]ceivership and the proceeds of mon[illegible] assets that have been taken by [illegible] company, cases may arise where eq[illegible] will require the use of the procee[illegible] sale of the mortgaged property in [illegible] same way."

But this power is in its nature [illegible] [illegible]ited. It can only be exercised in c[illegible] where the money is needed for [illegible] [illegible]chases or repairs absolutely essenti[illegible] maintain the road as a going conc[illegible] Thus, where an application was m[illegible] to allow certificates to be issue[illegible] order to raise money for repairing [illegible] track and roadbed, it was said [illegible] Chancellor Runyon: "There can b[illegible] doubt as to the duty of the court u[illegible] the circumstances. Every consid[illegible] tion is in favor of making the rep[illegible]

close investigation of the authorities, however, will show the courts have, of late years, been quite liberal in exercis- this extreme limit of their extraordinary jurisdiction. The ts have seen fit to authorize the issue of receiver's certifi- s where it was found necessary to make extensive repairs, in r to operate the railroad, and the current income was inade- e to meet the expense;[1] for the improvement, repair, and ation of the road;[2] for the payment of taxes, labor, mate- and supplies due prior to the appointment of the receiver;[3]

alue of the trust estate depends in t measure upon them. If they be ade, the operations of the road necessarily cease. The injury value of the trust estate which be occasioned thereby would usly be great, to say nothing of the venience to the public. It is in- ent on the court to see that the er keeps up the property by mak- ny necessary repairs, and to that may provide the means by pledge property, if necessary." Hoover ntclair, etc., R. Co., 29 N. J. Eq. 4.

Hoover *v.* Montclair, etc., R. Co., J. Eq. 4; Credit Co. *v.* Arkansas R. Co., 15 Fed. Rep. 46.

Turner *v.* Peoria, etc., R. Co., 95 4; 1 Am. & Eng. R. Cas. 348; 35 Rep. 144.

Stanton *v.* Alabama, etc., R. Co., ods (U. S.) 506, the receivers authorized to issue certificates, xceeding a certain sum, which o be a first lien on the property ir hands, for the purpose of re- and to complete certain portions road, and to procure rolling machinery, etc., necessary for op- g the road.

Humphreys *v.* Allen, 101 Ill. 490; & Eng. R. Cas. 14; Langdon *v.* ont, etc., R. Co., 53 Vt. 228; 4 & Eng. R. Cas. 33; Taylor *v.* lelphia, etc., R. Co., 7 Fed. Rep.

Union Trust Co. *v.* Illinois Mid- R. Co., 117 U. S. 434; 25 Am. & R. Cas. 560, considering the ques- f items accrued before the ap- nent of the receiver, the court r. Justice Blatchford said: "It t be affirmed that no items accrued before the appoint- of a receiver can be allowed in ase. Many circumstances may which may make it necessary and ensable to the business of the nd the preservation of the property, for the receiver to pay pre-existing debts of certain classes, out of the earnings of the receivership, or even the *corpus* of the property, under the order of the court, with a priority of lien. Yet the discretion to do so should be exercised with very great care. The payment of such debts stands *prima facie* on a different basis from the payment of claims arising from the receivership, while it may be brought within the principle of the latter by special circumstances. It is easy to see that the payment of unpaid debts for operating expenses, accrued within ninety days, due by a railroad company suddenly deprived of the control of its property, due to operatives in its employ, whose cessation from work simultaneously is to be deprecated, the interests both of the property and of the public, and the payment of limited amounts due to other and connecting lines of road for materials and repairs, and for unpaid ticket and freight balances, the outcome of indispensable business relations, where a stoppage of the continuance of such business relations would be a probable result, in cases of non-payment, the general consequence involving largely, also, the interests and accommodation of travel and traffic, may well place such payments in the category of payments to preserve the mortgaged property in a large sense, by maintaining the good will and integrity of the enterprise, and entitle them to be made a first lien. This view of the public interest in such a highway for public use as a railroad is, as bearing on the maintenance and use of its franchises and property in the hands of a receiver, with a view to public convenience, was the subject of approval by this court, speaking by Mr. Justice Woods, in Barton *v.* Barbour, 104 U. S. 126; 4 Am. & Eng. R. Cas. 1." See, also, in this connection, Douglass *v.* Cline, 12 Bush (Ky.) 608;

[illegible] equipment and final completion of t[illegible] [illegible] unfinished portion of the road within [illegible] for the purpose of acquiring valuab[illegible] [illegible] depending on such completion;[2] f[illegible] stock, and for the preservation, manag[illegible]

[illegible] Douglass,

[illegible] New York.—[illegible] statute of 1885, [illegible] was held by [illegible] of employés [illegible] the appoint- [illegible] not be ex- [illegible] or impair [illegible] of the prior [illegible] By the terms of [illegible] of *New York*, [illegible] receiver must pay [illegible] in preference to [illegible] claims. Metropol- [illegible] Tonawanda Valley, [illegible] N. Y. 245.

[illegible] Hun (N. Y.) [illegible] Barnard, P. J., says: [illegible] principal points involved [illegible] since the argument, [illegible] court of appeals in [illegible] Metropolitan Trust Co. *v.* [illegible] etc., R. Co. (103 [illegible] that case, as in this, the [illegible] an order that certain [illegible] given for labor [illegible] the appointment of [illegible] should be preferred to a [illegible] which existed upon the [illegible] The court of appeals held [illegible] principle upon which [illegible] employés for labor per- [illegible] the receiver was ap- [illegible] be so extended as to im- [illegible] the lien of the mort- [illegible] The court of appeals, in its [illegible] this class of creditors [illegible] general creditors, with no [illegible] equities" as against prior liens. [illegible] case differs only in this, [illegible] instead of an appeal being taken [illegible] order authorizing the certifi- [illegible] the question is first raised upon [illegible] as to the distribution of [illegible] moneys under the purchase- [illegible] mortgage. The appellant [illegible] that the certificates awarded pref- [illegible] to claims "with special equities." [illegible] property was in danger from the [illegible] of unpaid workmen, and these [illegible] were used to prevent its [illegible]. The court of appeals' de- [illegible] seems to have been made upon a [illegible] theory. In that case the claim was made that the property h[illegible] been enhanced by the labor of the wo[illegible] men which was included in the mo[illegible] gage. The court says, in reply to th[illegible] "It is easy to see that, under such a pl[illegible] the lienor might be entirely defeat[illegible] and the foreclosure of his mortg[illegible] rendered inoperative and useless. S[illegible] a result, except upon his consent, [illegible] court had no power to sanction." [illegible] Burhnam *v.* Bowen, 111 U. S. 782; [illegible] Am. & Eng. R. Cas. 308. See gene[illegible] ly *infra*, this title, *Relative Pri[illegible] ity of Claims.*

1. Bank of Montreal *v.* Chica[illegible] etc., R. Co., 48 Iowa 518; Bank [illegible] Montreal *v.* Thayer, 7 Fed. Rep. 6[illegible] Gibert *v.* Washington City, etc., [illegible] Co., 33 Gratt. (Va.) 386; 1 Am. & E[illegible] R. Cas. 473; Smith *v.* McCullou[illegible] 104 U. S. 25; 3 Am. & Eng. R. C[illegible] 159; Miltenberger *v.* Logansport [illegible] Co., 106 U. S. 286; 12 Am & E[illegible] R. Cas. 464.

But see *infra*, this title, *Issuing [illegible] Receiver's Certificates to Complete [illegible] Unfinished Road Discouraged.*

Where a receiver has authority [illegible] borrow money in order to complet[illegible] branch of the railroad, such author[illegible] will not justify him in contracting [illegible] municipal aid to enable him to bu[illegible] such branch. Smith *v.* McCullou[illegible] 104 U. S. 25; 3 Am. & Eng. R. C[illegible] 159.

2. In Kennedy *v.* St. Paul, etc., [illegible] Co., 2 Dill. (U. S.) 448; 5 Dill. (U. [illegible] 519, the court, by Dillon, J., [illegible] serves: "It is manifest that, unless [illegible] receiver is appointed, no furt[illegible] work will be done on the ext[illegible] sion lines, and that the land gra[illegible] which is the only security of any c[illegible] siderable value which the plaint[illegible] and the other bondholders have [illegible] their large advances, will lapse [illegible] be wholly lost. In order to save t[illegible] land grant the road must be co[illegible] pleted by December 3d, ensuing, [illegible] it seems to me that the exigencies [illegible] the case are such as, under the circu[illegible] stances, to warrant the court, u[illegible] the application of the parties chi[illegible] interested, to appoint a receiver [illegible] clothe him with the authority desire[illegible]

: and repair of the road;[1] for the purchase of rolling stock, hinery, and necessary supplies, and to repair and to operate road;[2] to replace earnings diverted from operating expenses ordinary repairs;[3] for relaying in a substantial manner a ion of the track hastily built and considered unsafe;[4] to pay ent of locomotives leased by the company and in use on the ;[5] to build, and thereby complete, certain portions of the at a stipulated expenditure per mile.[6]

ISSUING OF RECEIVER'S CERTIFICATES TO COMPLETE AN INISHED ROAD DISCOURAGED.—It has been shown that bject of the court, in authorizing receiver's certificates, is to erve the property during litigation, and in doing this it has regard for the interests of all parties concerned. Consetly a receiver will not be allowed to create charges upon the erty in his hands, to the detriment of the security of the lholders, and he is not justified in incurring any indebtedness essential to the preservation of the property, although he think that judicious expenditures in improvements will ultiely result in increasing the value of the property. And this, nalogy to the common-law rule, that while a mortgagee in ession has the right to make necessary and reasonable irs, he has no right to "improve the mortgagor out of his e."[7]

Jerome *v.* McCarter, 94 U. S. he court held that receiver's cer- es might be issued to pay for ing a canal, in order to secure a grant from the government, con- ed upon the completion of the within a fixed time.

Hoover *v.* Montclair, etc., R. Co., J. Eq. 4.

rmont, etc., R. Co. *v.* Vermont R. Co., 50 Vt. 500.

, also, Vilas *v.* Page, 106 N.Y. 439. Vallace *v.* Loomis, 97 U. S. 146; *v.* Clark, 110 U. S. 602; 17 & Eng. R. Cas. 354; Turner oria, etc., R. Co., 95 Ill. 134; 1 & Eng. R. Cas. 348; Meyer *v.* on, 53 Ala. 237.

nion Trust Co. *v.* Illinois Mid- . Co., 117 U. S. 434; 25 Am. & . Cas. 560.

tanton *v.* Alabama, etc., R. Co., 2 s (U. S.) 506. See also Cow- *v.* Railroad Co., 1 Woods (U. S.) *n re* U. S. Rolling Stock Co., w. Pr. (N. Y.) 286.

oe *v.* New Jersey Midland R. N. J. Eq. 37; Turner *v.* Peoria, Co., 95 Ill. 134; 1 Am. & Eng. . 348; 35 Am. Rep. 144.

ank of Montreal *v.* Chicago, etc., , 48 Iowa 518.

See also Gibert *v.* Washington, etc., R. Co., 33 Gratt. (Va.) 586; 1 Am. & Eng. R. Cas. 473, and cases cited in Meyer *v.* Johnston, 53 Ala. 237.

7. **Issuing of Receiver's Certificates Discouraged.**—In Shaw *v.* Little Rock, etc., R. Co., 100 U. S. 612, the court by Waite, C. J., observes: "Railroad mortages are a peculiar class of securities. The trustee represents the mortgage, and in executing his trust may exercise his own discretion within the scope of his powers. If there are differences of opinion among the bondholders as to what their interests require, it is not improper that he should be governed by the voice of the majority, acting in good faith and without collusion, if what they ask is not inconsistent with the provisions of his trust. This company and these trustees were peculiarly situated. The road was unfinished, and the land grant, to a large extent, unearned. While the mortgages, as they stood, were first liens, there was great danger that their value would be seriously impaired unless more money could be raised. The attention of both the trustees and bondholders was called to that fact, and at first it seems to have been thought that the end might be accomplished through

for further construction, equipment and
road;[1] to complete an unfinished port
certain time fixed by law for the purpo
land grants and franchises depending
the purchase of rolling stock, and for

Newport, etc., Bridge Co. *v.* Douglass, 12 Bush (Ky.) 673.

Opposite View Held in New York.—Prior to the *New York* Statute of 1885, ch. 376, the opposite view was held by the courts, and the claims of employés for labor performed before the appointment of the receiver could not be extended so as to diminish or impair or postpone the lien of the prior existing mortgages. By the terms of the above statute (Laws of *New York*, 1885, ch. 376) the receiver must pay the wages of employés in preference to all other debts or claims. Metropolitan Trust Co. *v.* Tonawanda Valley etc., R. Co., 103 N. Y. 245.

In Raht *v.* Attrill, 42 Hun (N. Y 414, the court by Barnard, P. J., sa "One of the principal points invol in this appeal has, since the argun been decided by the court of appe the case of Metropolitan Trust Tonawanda Valley, etc., R. Co. N. Y. 245). In that case, as in t special term made an order that receivers' certificates given f performed before the appoint the receiver, should be prefer mortgage lien which existed property. The court of ap that there was no principle u the claim of employés for formed before the receiver pointed, could be so extend pair or postpone the lien gage. The court of ap opinion, calls this class "Mere general credit special equities" as again The present case differs that, instead of an appe from the order authori cates, the question is the reference as to th the surplus moneys u money mortgage. claims that the certif erence to claims "w The property was passions of unpaid certificates were destruction. The cision seems to h different theory

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sented. The advantages present
the court, as likely to arise from
change, are of such a nature as to
for the exercise of business, fore
and sagacity rather than prude
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gard to them. This is sufficient
the refusal of the order when obje
to."

In Investment Co. *v.* Ohio, etc Co., 36 Fed. Rep. 48, a receiver tioned for authority to borrow $ 577.18 and to issue his certific therefor. This sum included $111,904 for the expense of purcha and laying steel rails, and changi narrow-gauge track to the stan

n whether the lien of receiver's over the previous liens of bond- ngely a question of the necessity for ssity may be disputed by parties reby affected. The consideration of g the property is, however, the con- depends, of course, upon the circum- case. The determination of the court always final and conclusive. It may not, tue of its equitable prerogative, create a nsplace or postpone the liens of other credit- them their day in court and affording them questioning and contesting the validity and of such certificates of indebtedness. Where all parties whose property or contract rights are ned, the validity or priority of the certificates be doubted; and, also, when it subsequently the certificates were properly authorized in advance enholders being made parties, their effect as prior sustained; but should it, on the other hand, appear y reason, the issue was unnecessary, it seems, in the the consent, express or implied, of the prior existing , their security will not be postponed in favor of the e certificates.[1]

and strengthening trestles; (2) for rails and ties, and for lay- track between two towns; (3) 48 for the payment of unpaid ses for claims against the com- nane of which were liens upon ilroad; (4) $20,000 to reimburse holders who advanced that sum et arrears of wages to employés rt a threatened strike; (5) $100- or the purchase of locomotives cars used by the receiver in oper- the road, constituting its entire g stock, the annual rental of the ment being $28,800, and the s being willing to cancel claims npaid rentals amounting to about ; (6) $4,000 for the cost of re- g a line of track on a connecting the result of which would be to l a debt of $8,000 and secure gh additional business to pay the n three months; and (7) $29,430 e price of land purchased by the any and on which its track has laid, and which was especially ble on account of a deposit of l therein. The issuance of the cates was consented to by the rs of $943,000 of first mortgage , and $293,000 of second mortgage bonds. The holders of the remaining $257,000 first mortgage bonds, and $219,000 second mortgage bonds did not consent, and some of them with other lienholders objected. *Held*, that as it was doubtful whether the improvements would add to the value of the road and to its selling price, the petition must be denied as to the items of $35,000, $20,000 and $47,243.18, except upon consent of all the lienholders; but that certificates should be issued for the remaining items, if desired by the consenting bondholders with leave thereafter to petition to have the same made a charge on the non-consenting bondholders. Investment Co. *v.* Ohio, etc., R. Co., 36 Fed. Rep. 48.

1. Meyer *v.* Johnston, 53 Ala. 273; Cowdrey *v.* Railroad Co., 1 Woods (U. S.) 331; Credit Co. *v.* Arkansas Cent. R. Co., 15 Fed. Rep. 46; Wallace *v.* Loomis, 97 U. S. 146; Miltenberger *v.* Logansport R. Co., 106 U. S. 286; 12 Am. & Eng. R. Cas. 464; Union Trust Co. *v.* Illinois, etc., R. Co., 117 U. S. 434; 25 Am. & Eng. R. Cas. 560; Turner *v.* Peoria, etc., R. Co., 95 Ill. 134; 1 Am. & Eng. R. Cas. 348; Newbold *v.* Peoria, etc., R. Co., 5 Ill.

is insufficient to redeem all of these certificates by payment full, the holders thereof are entitled to a *pro rata* distribution

2. Power of the Court to Authorize Their Issue.—The power of court of equity to authorize the issuing of such certificates is d rived from its duty to protect and preserve the trust funds in i hands, and should be exercised only in cases where the creatio of such liens is absolutely necessary for the preservation of th property pending litigation, and in all cases, if possible, with th consent or acquiescence of the parties interested in the fund.[2]

The peculiar nature of railroad property is a further jus fication for the issue of receiver's certificates. Where the incom of the receivership is inadequate to keep the road in repair, th property will not only deteriorate in value, but the business an good will of the road will be seriously affected; consequently, is the interest of mortgage bondholders to consent to the esta lishment of this prior lien for the purpose of preserving the pro erty as a "going concern," and while it is desirable to obta their consent, express or implied, as to the propriety of su expenditures by the receiver, the power of the court to autho ize the issuing of the certificates does not depend upon the consent nor upon prior notice to them of its intention to gra the receiver's application to borrow money for such purpose Consent is desirable but seldom practicable, where the debts e ceed the value of the property. Though prior notice to perso interested, by notifying them as parties, first requiring them be made parties if they are not, is generally the better way, y many circumstances may be judicially equivalent to prior notice

be redeemed—else the whole scheme of raising money in this manner fails, and the court is brought into disrepute. All power may be abused. But in the first place, no receiver ought to be appointed, in any such case, except to 'prevent fraud, save the subject of litigation from material injury, or rescue it from threatened destruction.'" See, also, Baker *v.* Backus, 32 Ill. 79; Voshell *v.* Hynson, 26 Md. 92.

1. Turner *v.* Peoria, etc., R. Co., 95 Ill. 134; 1 Am. & Eng. R. Cas. 348; 35 Am. Rep. 144.

2. In Wallace *v.* Loomis, 97 U. S. 146, the court, by Bradley, J., observes: "The power of a court of equity to appoint managing receivers of such property as a railroad, when taken under its charge as a trust fund for the payment of incumbrances, and to authorize such receivers to raise money for the preservation and management of the property, and make the same chargeable as a lien thereon for its repayment, cannot, at this day be seriously disputed. It is a part of that j risdiction, always exercised by the cou by which it is its duty to protect a preserve the trust funds in its hands. is undoubtedly a power to be exercis with great caution, and, if possib with the consent or acquiescence the parties interested in the fund."

3. In Union Trust Co. *v.* Illin Midland R. Co., 117 U. S. 434; 25 A & Eng. R. Cas. 560, the court, Blatchford, J., said: "Property su ject to liens and claims and debts various characters and ranks, whi is brought within the cognizance o court of equity for administration a conversion into money, and distrib tion, is a trust fund. It is to be pr served for those entitled to it. Th must be done by the hands of the cou through officers. The character of t property gives character to the part ular species of preservation which requires. Unimproved land may idle, with only payment of taxes. In proved property should be rente Movable property that is not perishal

be locked up and kept; but if per-
e it must be sold, by way of pres-
on. A railroad and its appurte-
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given, not merely for private gain
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highway; and all persons who
with the corporation as creditors
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if it falls into insolvency and its
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other hands, to have the purposes
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e principle laid down in Wallace
omis, 97 U. S. 146, was applied in
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J. S. 286; 12 Am. & Eng. R. Cas.
In that case a bill was filed by
econd mortgagee, against the
agor, and a first mortgagee, and
nent creditors of the mortgagor,
eclose a mortgage on a railroad.
e day the bill was filed, and with-
otice to the first mortgagee, a re-
was appointed and power given
operate and manage the road," re-
its revenues, pay its operating ex-
s, make repairs and manage its en-
siness; and to pay the arrears due
erating expenses for a period in
st not exceeding ninety days, and to pay into the court all revenue over operating expenses." After that, and without notice to the first mortgagee, who had not appeared, although notified of the order appointing the receiver and of the pendency of the suit, the court authorized the receiver to purchase engine and cars, and to adjust liens on cars owned by the mortgagor, to pay indebtedness not exceeding $10,000, to other connecting lines of road, in settlement of ticket and freight accounts and balances, and for materials and repairs, which had accrued in part more than ninety days before the order appointing the receiver was made, and to construct five miles of new road, and a bridge. The petition for the order stated the necessity for the rolling stock and for the adjustment of the liens; that the payment to the connecting lines was indispensable to the business of the road, and it would suffer great detriment unless that was provided for; and that the new road and the bridge would come under the mortgages, and their construction would be to the advantage of the bondholders. After the first mortgagee had appeared and answered, an order was made, but not on prior notice to it, authorizing the receiver to issue certificates to pay for rolling stock he had bought under orders of the court, and to pay debts incurred for building the five miles of road and the bridge, under those orders, and to pay debts incurred for taxes, and rights of way, and back pay and supplies in operating the road, the certificates to be payable out of the income, and, if not so paid, to be provided for by the court in its final order.

Claims thus arising were afterwards allowed, to be paid out of the proceeds of the sale, before the mortgage bonds. This court upheld such priority, as to the debts for the purchase of rolling stock and for the adjustment of liens and for the construction of the five miles of road and the bridge and for the amount due connecting lines, some of which was incurred more than ninety days before the receiver was appointed.

But see in regard to consent of prior existing lienholders, Jones on Railroad Securities, § 539, where the author observes in this connection: "It is claimed that courts of equity have authority, without the consent of mortgagees, to order receivers to borrow money, and to bind the property in their hands for the payment of the loans. This authority, if it exist at all, is not,

Notice to the trustees of the mortgage is notice to the bo holders, and the consent of the bondholders will be impl where no objection is made by the trustees representing the and a bondholder with a knowledge of the issue of certificat and the purposes for which they were issued, cannot dispute th validity or priority of lien after they have been issued, and sol

however, altogether discretionary; the judicial discretion is limited by settled principles of equity (Meyer *v.* Johnston, 53 Ala. 237), aside from any consideration of the mortgagor and others having the right to redeem, against whom a court of equity has power analogous to that of a mortgagee in possession to incur charges for the preservation and repair of the property it has taken possession of through its receiver, a court of chancery has no power to impair the obligation of a mortgage contract, by creating a superior lien without the mortgagee's consent, unless it be in the exercise of a like equitable power of preserving and protecting the property. The law does not permit the obligation of contracts to be impaired."

And in Meyer *v.* Johnston, 53 Ala. 237, the court by Manning, J., observes: "The Constitution of the United States inhibits even a State from doing an act which shall have that effect. And certainly, a court, which is a portion of the government of a State cannot have a power which is denied to the State in convention assembled. If, therefore, the action of a chancellor in this cause goes to the extent of taking the property of the defendant corporation into his hands for the purpose, through his appointees, of completing an unfinished work, or of enlarging or improving a finished one, beyond what is necessary for its preservation, and to that end of raising money, by charging the railroad and its appurtenances with liens which are to supersede older ones, without the consent of the holders of these, he has inadvertently passed beyond the boundaries of a chancellor's jurisdiction. In our opinion, no such power is vested or resides in any judicial tribunal."

Where an order authorizing the issue of certificates is irregular—as, for instance, where it is made without the proper notice to all concerned—the mode of objecting should be by application to the court appointing the receiver, to vacate it and set it as Meyer *v.* Johnston, 53 Ala. 237.

1. Wallace *v.* Loomis, 97 U. S.

In Shaw *v.* Little Rock, etc., Co., 100 U. S. 605, the court by Wa C. J., observes: "To allow a sm minority of bondholders, represent a comparatively insignificant amo of the mortgage debt, in the abse of any pretense even of fraud or fairness, to defeat the wishes of s an overwhelming majority of th associated with them in the benefit their common security, would be ignore entirely the relation wh bondholders, secured by a railr mortgage, bear to each other. R road mortgages are a peculiar clas securities. If there are difference opinion among the bondholders a what their interests require, it is improper that he should be gover by the voice of the majority, actin good faith and without collusion what they ask is not inconsistent w the provisions of his trust."

2. In Humphreys *v.* Allen, 101 490; 4 Am. & Eng. R. Cas. 1, the c by Dickey, J., observes: "What may be said as to the limitat which the law places upon the e cise of the power of the chancello make certificates issued by a rece for moneys borrowed by him, a upon the property, superior to vested lien of the mortgagees, in case, we think that appellants are in a position to raise that quest The bonds which they held t bought from Mr. Constable on 10th of May, 1879. At that time of these certificates had been iss and disposed of by the receiver, were held by the parties who had for them in cash, or had rece them in substitution of secur which they held for pre-existing de Whether the subject-matter to wh these certificates were applied co within the scope of the powers of court in the preservation of the p erty for the benefit of all concer was a question which might h been raised, and ought, properly

Purposes for Which Certificates Are Authorized.—It is clear that power of the court to authorize its receiver to issue certifi- s of indebtedness is one that might readily be abused; and, e it is usually resorted to under the pretext that it will en- e the security of the bondholders, it not infrequently results king from them the security they already have and appro- ing it to pay debts contracted by the court.[1] Hence it is a er to be sparingly exercised, and one which should only be ted to in cases of urgent necessity, and when exercised, the r of the court is strictly construed. The certificate must be d in strict accordance with the order, and for the express oses mentioned.[2] The terms of the order cannot be ex- ed or in any way altered by implication.[3] It has been held,

been raised, before the certificates issued and sold. Mr. Constable, wner of these bonds, knew, as a tor in the railroad company, and oceedings which occurred in the tors' meeting, that the road and property of the company had placed in the hands of a receiver. new that the order for the issue rtificates, to be made a first lien the property of the company, been entered of record, and that certificates were about to be l and put upon the market. The eds of a part of these certificates to be applied in releasing from a el mortgage property upon which ondholders claim to have a lien, n which he had an interest as a nolder. It was incumbent upon if he intended to insist that these icates should not be a paramount upon the property of the com- that he should have intervened aised his objections. On the con- with a full knowledge of all the he lay by and permitted others od faith to invest their money in certificates, and the money to be ed for his benefit in discharging iabilities of the company for es and supplies, and for a debt ich the rolling stock of the com- in which he was interested was up. In a court of equity, he not be heard afterwards to that the holders of these cer- es should not have this priority." lso, Langdon *v.* Vermont, etc., R. 53 Vt. 228; 4 Am. & Eng. R. 3.

Central Trust Co. *v.* Seasongood, . S. 482, S brought suit in a State to enforce his lien for the unpaid ase price of three lots sold by him to a railroad company, and over which it constructed its road. He made the Central Trust Company, which held a mortgage on the entire road and all its property, a party defendant. The suit resulted in an order that the lots be sold to satisfy the claim, and if the proceeds were insufficient, then, that the entire road should be sold. The trust company did not appeal from that decree, but afterwards brought suit in the United States court to foreclose its mortgages. A receiver was appointed and an order made reciting the proceedings in the State court, and directing the receiver to issue to S a preferred certificate for the amount of his judgment and interest. This was done, and S entered satisfaction of his judgment in the State court. The road was afterwards sold, and the court directed payment out of the proceeds of the full amount of S's certificates. *Held*, that the trust company could not complain, and that it was immaterial whether the certificates were properly issued, for the reason: (1) It is apparent that the order of the court under which they were issued was the result of an agreement between the parties, and (2) if they should be held to be invalid, the appellee could not be restored to the rights under a decree of the State court which he surrendered.

1. Caldwell, J., in Credit Co. *v.* Arkansas Cent. R. Co., 15 Fed. Rep. 46; Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S. 434; 25 Am. & Eng. R. Cas. 560.

2. Newbold *v.* Peoria, etc., R. Co., 5 Ill. App. 367.

3. State *v.* Edgefield, etc., R. Co., 6 Lea (Tenn.) 353.

generally, that receiver's certificates may lawfully be author "to raise money necessary for the preservation and managem of the property,"[1] and the courts are reluctant to encourage indebtedness beyond the exigencies of the case,[2] taking for a terion the necessity of the expenditures for which it is prop to raise the means.[3]

In Bank of Montreal *v.* Chicago, etc., R. Co., 48 Iowa 518, the court held, that where a receiver is authorized to issue certificates for materials furnished and labor performed in extending the road, not to exceed a given amount per mile, he cannot issue them in advance of the actual performance of labor or furnishing of materials. See, also, Bank of Montreal *v.* Thayer, 7 Fed. Rep. 622; Newbold *v.* Peoria, etc., R. Co., 5 Ill. App. 367.

1. Wallace *v.* Loomis, 97 U. S. 146.

2. Shaw *v.* Little Rock, etc., R. Co., 190 U. S. 605; Meyer *v.* Johnston, 53 Ala. 237.

3. Jones on Railroad Securities, § 533.

In Burhnam *v.* Bowen, 111 U. S. 776; 17 Am. & Eng. R. Cas. 308, the court, by Waite, C. J., says: "The income of a railroad company out of which the mortgagee is to be paid, is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment and useful improvements. Every railroad mortgagee, in accepting his security, impliedly agrees that the current debts, made in the ordinary course of business shall be paid from the current receipts before he has any claim on the income." Such being the case, when a court of chancery, in enforcing the rights of mortgage creditors, takes possession of a mortgaged railroad and thus deprives the company of the power of receiving any further earnings, it ought to do what the company would have been bound to do if it had remained in possession; that is to say, pay, out of what it receives from earnings, all the debts which in equity and good conscience, considering the character of the business, are chargeable upon such earnings. In other words, what may properly be termed the debts of the income should be paid from the income before it is applied in any way to the use of the mortgagees. The business of a railroad should be treated by a court of equity under such circumstances as a "going concern," not to be embarrassed by any unnecessar terference with the relations of who are engaged in or affected We do not hold that the income railroad in the hands of a receive the benefit of mortgage creditors have a lien upon it under their gage, can be taken away from and used to pay the general cre of the road. All we decide is, t current earnings are used for the efit of mortgage creditors before rent expenses are paid, the mor security is chargeable in equity the restoration of the fund whic been thus improperly applied to use."

In Fosdick *v.* Schall, 99 U. S. the court by Waite, C. J., said: have no doubt that when a cou chancery is asked by railroad gagees to appoint a receiver of road property, pending procee for foreclosure, the court in the ex of a sound judicial discretion may condition of issuing the necessary impose such terms in reference t payment from the income of outs ing debts for labor, supplies, equip or permanent improvement of mortgaged property as may, unde circumstances of the particular appear to be reasonable. . . . ordinarily this power is confined t appropriation of the income of th ceivership and the proceeds of mo assets that have been taken by company, cases may arise where will require the use of the proce sale of the mortgaged property i same way."

But this power is in its nature ited. It can only be exercised in where the money is needed for chases or repairs absolutely essent maintain the road as a going co Thus, where an application was to allow certificates to be issu order to raise money for repairin track and roadbed, it was sai Chancellor Runyon: "There can doubt as to the duty of the court the circumstances. Every consi tion is in favor of making the re

close investigation of the authorities, however, will show the courts have, of late years, been quite liberal in exercis- this extreme limit of their extraordinary jurisdiction. The ts have seen fit to authorize the issue of receiver's certifi- where it was found necessary to make extensive repairs, in r to operate the railroad, and the current income was inade- e to meet the expense;[1] for the improvement, repair, and ation of the road;[2] for the payment of taxes, labor, mate- and supplies due prior to the appointment of the receiver;[3]

alue of the trust estate depends in t measure upon them. If they be ade, the operations of the road necessarily cease. The injury value of the trust estate which be occasioned thereby would usly be great, to say nothing of the venience to the public. It is in- ent on the court to see that the er keeps up the property by mak- ny necessary repairs, and to that may provide the means by pledge property, if necessary." Hoover ntclair, etc., R. Co., 29 N. J. Eq. 4. Hoover *v.* Montclair, etc., R. Co., J. Eq. 4; Credit Co. *v.* Arkansas R. Co., 15 Fed. Rep. 46.

Turner *v.* Peoria, etc., R. Co., 95 4; 1 Am. & Eng. R. Cas. 348; 35 Rep. 144.

Stanton *v.* Alabama, etc., R. Co., ods (U. S.) 506, the receivers authorized to issue certificates, xceeding a certain sum, which o be a first lien on the property ir hands, for the purpose of re- and to complete certain portions road, and to procure rolling machinery, etc., necessary for op- g the road.

Humphreys *v.* Allen, 101 Ill. 490; & Eng. R. Cas. 14; Langdon *v.* ont, etc., R. Co., 53 Vt. 228; 4 & Eng. R. Cas. 33; Taylor *v.* lelphia, etc., R. Co., 7 Fed. Rep.

Union Trust Co. *v.* Illinois Mid- R. Co., 117 U. S. 434; 25 Am. & R. Cas. 560, considering the ques- f items accrued before the ap- nent of the receiver, the court r. Justice Blatchford said: "It t be affirmed that no items accrued before the appoint- of a receiver can be allowed in ase. Many circumstances may which may make it necessary and ensable to the business of the nd the preservation of the prop- erty, for the receiver to pay pre-existing debts of certain classes, out of the earnings of the receivership, or even the *corpus* of the property, under the order of the court, with a priority of lien. Yet the discretion to do so should be exercised with very great care. The payment of such debts stands *prima facie* on a different basis from the payment of claims arising from the receivership, while it may be brought within the principle of the latter by special circumstances. It is easy to see that the payment of unpaid debts for operating expenses, accrued within ninety days, due by a railroad company suddenly deprived of the control of its property, due to operatives in its employ, whose cessation from work simultaneously is to be deprecated, the interests both of the property and of the public, and the payment of limited amounts due to other and connecting lines of road for materials and repairs, and for unpaid ticket and freight balances, the outcome of indispensable business relations, where a stoppage of the continuance of such business relations would be a probable result, in cases of non-payment, the general consequence involving largely, also, the interests and accommodation of travel and traffic, may well place such payments in the category of payments to preserve the mortgaged property in a large sense, by maintaining the good will and integrity of the enterprise, and entitle them to be made a first lien. This view of the public interest in such a highway for public use as a railroad is, as bearing on the maintenance and use of its franchises and property in the hands of a receiver, with a view to public convenience, was the subject of approval by this court, speaking by Mr. Justice Woods, in Barton *v.* Barbour, 104 U. S. 126; 4 Am. & Eng. R. Cas. 1." See, also, in this connection, Douglass *v.* Cline, 12 Bush (Ky.) 608;

for further construction, equipment and final completion of th road;[1] to complete an unfinished portion of the road within certain time fixed by law for the purpose of acquiring valuabl land grants and franchises depending on such completion;[2] fo the purchase of rolling stock, and for the preservation, manag

Newport, etc., Bridge Co. *v.* Douglass, 12 Bush (Ky.) 673.

Opposite View Held in New York.—Prior to the *New York* Statute of 1885, ch. 376, the opposite view was held by the courts, and the claims of employés for labor performed before the appointment of the receiver could not be extended so as to diminish or impair or postpone the lien of the prior existing mortgages. By the terms of the above statute (Laws of *New York*, 1885, ch. 376) the receiver must pay the wages of employés in preference to all other debts or claims. Metropolitan Trust Co. *v.* Tonawanda Valley, etc., R. Co., 103 N. Y. 245.

In Raht *v.* Attrill, 42 Hun (N. Y.) 414, the court by Barnard, P. J., says: "One of the principal points involved in this appeal has, since the argument, been decided by the court of appeals in the case of Metropolitan Trust Co. *v.* Tonawanda Valley, etc., R. Co. (103 N. Y. 245). In that case, as in this, the special term made an order that certain receivers' certificates given for labor performed before the appointment of the receiver, should be preferred to a mortgage lien which existed upon the property. The court of appeals held that there was no principle upon which the claim of employés for labor performed before the receiver was appointed, could be so extended as to impair or postpone the lien of the mortgage. The court of appeals, in its opinion, calls this class of creditors "Mere general creditors, with no special equities" as against prior liens. The present case differs only in this, that, instead of an appeal being taken from the order authorizing the certificates, the question is first raised upon the reference as to the distribution of the surplus moneys under the purchase-money mortgage. The appellant claims that the certificates awarded preference to claims "with special equities." The property was in danger from the passions of unpaid workmen, and these certificates were used to prevent its destruction. The court of appeals' decision seems to have been made upon a different theory. In that case the claim was made that the property ha been enhanced by the labor of the worl men which was included in the mor gage. The court says, in reply to thi "It is easy to see that, under such a ple the lienor might be entirely defeate and the foreclosure of his mortga rendered inoperative and useless. Su a result, except upon his consent, t court had no power to sanction." S Burhnam *v.* Bowen, 111 U. S. 782; Am. & Eng. R. Cas. 308. See genera ly *infra*, this title, *Relative Prio ity of Claims*.

1. Bank of Montreal *v.* Chicag etc., R. Co., 48 Iowa 518; Bank Montreal *v.* Thayer, 7 Fed. Rep. 62 Gibert *v.* Washington City, etc., Co., 33 Gratt. (Va.) 586; 1 Am. & En R. Cas. 473; Smith *v.* McCulloug 104 U. S. 25; 3 Am. & Eng. R. Ca 159; Miltenberger *v.* Logansport Co., 106 U. S. 286; 12 Am & En R. Cas. 464.

But see *infra*, this title, *Issuing Receiver's Certificates to Complete Unfinished Road Discouraged*.

Where a receiver has authority borrow money in order to complete branch of the railroad, such authori will not justify him in contracting f municipal aid to enable him to bui such branch. Smith *v.* McCulloug 104 U. S. 25; 3 Am. & Eng. R. C 159.

2. In Kennedy *v.* St. Paul, etc., Co., 2 Dill. (U. S.) 448; 5 Dill. (U. S 519, the court, by Dillon, J., c serves: "It is manifest that, unless receiver is appointed, no furth work will be done on the exte sion lines, and that the land gra which is the only security of any co siderable value which the plainti and the other bondholders have their large advances, will lapse a be wholly lost. In order to save t land grant the road must be co pleted by December 3d, ensuing, a it seems to me that the exigencies the case are such as, under the circu stances, to warrant the court, up the application of the parties chie interested, to appoint a receiver a clothe him with the authority desire

t and repair of the road;[1] for the purchase of rolling stock, hinery, and necessary supplies, and to repair and to operate road;[2] to replace earnings diverted from operating expenses ordinary repairs;[3] for relaying in a substantial manner a ion of the track hastily built and considered unsafe;[4] to pay ent of locomotives leased by the company and in use on the ;[5] to build, and thereby complete, certain portions of the at a stipulated expenditure per mile.[6]

ISSUING OF RECEIVER'S CERTIFICATES TO COMPLETE AN INISHED ROAD DISCOURAGED.—It has been shown that object of the court, in authorizing receiver's certificates, is to erve the property during litigation, and in doing this it has regard for the interests of all parties concerned. Consetly a receiver will not be allowed to create charges upon the erty in his hands, to the detriment of the security of the dholders, and he is not justified in incurring any indebtedness essential to the preservation of the property, although he think that judicious expenditures in improvements will ultiely result in increasing the value of the property. And this, nalogy to the common-law rule, that while a mortgagee in ession has the right to make necessary and reasonable irs, he has no right to "improve the mortgagor out of his te."[7]

Jerome *v.* McCarter, 94 U. S. he court held that receiver's certes might be issued to pay for ing a canal, in order to secure a grant from the government, coned upon the completion of the within a fixed time.

Hoover *v.* Montclair, etc., R. Co., J. Eq. 4.

rmont, etc., R. Co. *v.* Vermont R. Co., 50 Vt. 500.

, also, Vilas *v.* Page, 106 N.Y. 439. Wallace *v.* Loomis, 97 U. S. 146; *v.* Clark, 110 U. S. 602; 17 & Eng. R. Cas. 354; Turner oria, etc., R. Co., 95 Ill. 134; 1 & Eng. R. Cas. 348; Meyer *v.* ton, 53 Ala. 237.

Union Trust Co. *v.* Illinois Mid-R. Co., 117 U. S. 434; 25 Am. & R. Cas. 560.

tanton *v.* Alabama, etc., R. Co., 2 s (U. S.) 506. See also Cow- *v.* Railroad Co., 1 Woods (U. S.) *In re* U. S. Rolling Stock Co., w. Pr. (N. Y.) 286.

Coe *v.* New Jersey Midland R. 7 N. J. Eq. 37; Turner *v.* Peoria, . Co., 95 Ill. 134; 1 Am. & Eng. s. 348; 35 Am. Rep. 144.

ank of Montreal *v.* Chicago, etc., , 48 Iowa 518.

See also Gibert *v.* Washington, etc., R. Co., 33 Gratt. (Va.) 586; 1 Am. & Eng. R. Cas. 473, and cases cited in Meyer *v.* Johnston, 53 Ala. 237.

7. **Issuing of Receiver's Certificates Discouraged.**—In Shaw *v.* Little Rock, etc., R. Co., 100 U. S. 612, the court by Waite, C. J., observes: "Railroad mortages are a peculiar class of securities. The trustee represents the mortgage, and in executing his trust may exercise his own discretion within the scope of his powers. If there are differences of opinion among the bondholders as to what their interests require, it is not improper that he should be governed by the voice of the majority, acting in good faith and without collusion, if what they ask is not inconsistent with the provisions of his trust. This company and these trustees were peculiarly situated. The road was unfinished, and the land grant, to a large extent, unearned. While the mortgages, as they stood, were first liens, there was great danger that their value would be seriously impaired unless more money could be raised. The attention of both the trustees and bondholders was called to that fact, and at first it seems to have been thought that the end might be accomplished through

the instrumentality of a receiver and receiver's certificates. This necessarily contemplated the creation of a lien on the mortgaged property superior to that which then existed. Although the mortgages were separate, and on separate properties, the value of each depended, to a large extent, on the ability of the railroad company to finish its road. For some reason the idea of a receiver and receiver's certificates seems to have been abandoned, and what, to our minds, was a more desirable plan adopted. The power of the courts ought never to be used in enabling railroad mortgagees to protect their securities by borrowing money to complete unfinished roads, except under extraordinary circumstances. It is always better to do what was done here when ever it can be—that is to say, reorganize the enterprise on the basis of existing mortgages as stock, or something which is equivalent, and, by a new mortgage, with a lien superior to the old, raise the money which is required without asking the courts to engage in the business of railroad building. The result so far as incumbering the mortgage security is concerned, is the same substantially in both cases, while the reorganization places the whole enterprise in the hands of those immediately interested in its successful prosecution."

In Credit Co. *v.* Arkansas Cent. R. Co., 15 Fed. Rep. 46, the order authorizing the issue of receiver's certificates was subsequently rescinded, upon the ground that, owing to the dilapidated condition of the road and property, the court was not justified in spending any money for its repair and improvement.

See, also, Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 50 Vt. 500; 46 Vt. 792; Taylor *v.* Philadelphia, etc., R. Co., 9 Fed. Rep. 1; Galveston, etc., R. Co. *v.* Cowdrey, 11 Wall. (U. S.) 459; Dunham *v.* Cincinnati, etc., R. Co., 1 Wall. (U. S.) 504; New Jersey Midland R. Co. *v.* Wortendyke, 27 N. J. Eq. 658.

Where the purpose of the application for the authority to issue certificates is at all beyond keeping the road in *statu quo* as a "going concern," the issue will not be authorized by the court.

Thus in Hand *v.* Savannah, etc., R. Co., 10 S. Car. 406, where the purpose of the application was to enable the receiver to build nine miles of new track and a new bridge so as to obtain access to the city of Charleston, a sult which the receivers decla absolutely necessary to enable road to compete successfully w others for the carriage of the ma the court below granted the appli tions, and authorized the issue of ceiver's certificates. But on app the supreme court reversed the der, saying: "It cannot be doub that the court might, under pro circumstances, order a change to made in the state of the property its hands for distribution among cr itors with a view to increase the va of the fund, but it is clear that pursuit of speculative advanta would not present a proper case its exercise. To preserve the prope from all cause tending to its deprec tion, to render it reasonably produ ive during the term it remains in hands of the court, are objects pro for the attention of the court, and hands should not be too rigidly t in the pursuit of these objects. the other hand, for the court to unc take to weigh the merits of projec improvements, and to assume in half of the parties in interest t class of experimental risks that app tain to the development of mate industries, is both inconsistent w the nature of a court and the obje with which it holds assets for the isfaction of creditors. . . . We led by these considerations to concl that before the order in question made, as affecting the interests parties not assenting to it, it sho have been shown that some neces existed for the change projected in location of the line of the railro such necessity having relation to production of the property or busin of the road. No such case is p sented. The advantages presente the court, as likely to arise from change, are of such a nature as to for the exercise of business, foresi and sagacity rather than prude for the formation of a judgment in gard to them. This is sufficient the refusal of the order when objec to."

In Investment Co. *v.* Ohio, etc. Co., 36 Fed. Rep. 48, a receiver p tioned for authority to borrow $3 577.18 and to issue his certific therefor. This sum included $111,904 for the expense of purchas and laying steel rails, and changin narrow-gauge track to the stand

Priority of Lien.—The question whether the lien of receiver's ficates shall take priority over the previous liens of bond-ers and mortgagees, is largely a question of the necessity for issuance, and this necessity may be disputed by parties e interests may be thereby affected. The consideration of necessity of conserving the property is, however, the con-ng consideration, and depends, of course, upon the circum-es of each particular case. The determination of the court necessity is not always final and conclusive. It may not, arbitrarily, by virtue of its equitable prerogative, create a lien which shall displace or postpone the liens of other credit-vithout giving them their day in court and affording them opportunity of questioning and contesting the validity and t of the issue of such certificates of indebtedness. Where consent of all parties whose property or contract rights are ted, is obtained, the validity or priority of the certificates ot, of course, be doubted; and, also, when it subsequently ars that the certificates were properly authorized in advance e prior lienholders being made parties, their effect as prior will be sustained; but should it, on the other hand, appear for any reason, the issue was unnecessary, it seems, in the nce of the consent, express or implied, of the prior existing olders, their security will not be postponed in favor of the of the certificates.[1]

and strengthening trestles; (2) o for rails and ties, and for lay-e track between two towns; (3) 2.18 for the payment of unpaid ers for claims against the com-none of which were liens upon ilroad; (4) $20,000 to reimburse olders who advanced that sum et arrears of wages to employés rt a threatened strike; (5) $100-r the purchase of locomotives ars used by the receiver in oper-the road, constituting its entire g stock, the annual rental of the nent being $28,800, and the s being willing to cancel claims paid rentals amounting to about ; (6) $4,000 for the cost of re-a line of track on a connecting the result of which would be to a debt of $8,000 and secure h additional business to pay the n three months; and (7) $29,430 e price of land purchased by the ny and on which its track has laid, and which was especially le on account of a deposit of therein. The issuance of the cates was consented to by the s of $943,000 of first mortgage and $293,000 of second mortgage bonds. The holders of the remaining $257,000 first mortgage bonds, and $219,000 second mortgage bonds did not consent, and some of them with other lienholders objected. *Held*, that as it was doubtful whether the improvements would add to the value of the road and to its selling price, the petition must be denied as to the items of $35,000, $20,000 and $47,243.18, except upon consent of all the lienholders; but that certificates should be issued for the remaining items, if desired by the consenting bondholders with leave thereafter to petition to have the same made a charge on the non-consenting bondholders. Investment Co. *v.* Ohio, etc., R. Co., 36 Fed. Rep. 48.

1. Meyer *v.* Johnston, 53 Ala. 273; Cowdrey *v.* Railroad Co., 1 Woods (U. S.) 331; Credit Co. *v.* Arkansas Cent. R. Co., 15 Fed. Rep. 46; Wallace *v.* Loomis, 97 U. S. 146; Miltenberger *v.* Logansport R. Co., 106 U. S. 286; 12 Am. & Eng. R. Cas. 464; Union Trust Co. *v.* Illinois, etc., R. Co., 117 U. S. 434; 25 Am. & Eng. R. Cas. 560; Turner *v.* Peoria, etc., R. Co., 95 Ill. 134; 1 Am. & Eng. R. Cas. 348; Newbold *v.* Peoria, etc., R. Co., 5 Ill.

a. STATUTORY PROVISIONS REGULATING PRIORITY OF LIE
See RAILROAD SECURITIES—*Receiver's Certificates.*

5. Negotiability of Receiver's Certificates.[1]—Receiver's certifica are not negotiable instruments in the sense that the equities isting between the original parties will be sacrificed in favo *bona fide* purchasers for value. All parties dealing in such se rities are bound to take notice of the terms of the order of the co authorizing their issue and take them subject to the final actio the court and the rights of parties having prior liens upon property who have not had their day in court.[2] An assigne such certificates can only recover to the extent that the orig payee could have recovered;[3] and indorsement by the assig does not make him liable as a guarantor, nor imply a war

App. 367; Hoover *v.* Montclair, etc., R. Co., 29 N. J. Eq. 4; Coe *v.* New Jersey, Midland R. C. Co., 27 N. J. Eq. 37; Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 50 Vt. 500; Stanton *v.* Alabama, etc., R. Co., 2 Woods (U. S.) 506; Swan *v.* Clark, 110 U. S. 602; Jerome *v.* McCarter, 94 U. S 734; Bank of Montreal *v.* Chicago, etc., R. Co., 48 Iowa 518; Chicago *v.* Lake Huron R. Co., 7 Fed. Rep. 518; Barton *v.* Barbour, 104 U. S. 126; 4 Am. & Eng. R. Cas. 1; Shaw *v.* Little Rock, etc., R. Co., 100 U. S. 605; State *v.* Edgefield, etc., R. Co., 6 Lea (Tenn.) 353; *Ex parte* Mitchell, 12 S. Car. 83.

If prior mortgagees do not assent to receiver's liens, these should be made expressly subject to the prior mortgages. *In re* U. S. Rolling Stock Co., 55 How. Pr. (N. Y.) 286.

A party not interested in the property of a railroad company in the hands of a receiver, or who has advanced no money on the receiver's certificates cannot object to the issue of such certificates. As where a property owner along the route of an elevated railroad endeavored to restrain the completion of the road on the ground of the invalidity of the receivers certificates. Moran *v.* Lydecker, 11 Abb. N. Cas. (N. Y.) 298.

The Priority of Receiver's Certificates Cannot be Questioned by the Mortgagor or His Assignees.—In Jerome *v.* McCarter, 94 U. S. 734, a receiver was authorized to issue certificates to the amount of $500,000, secured by a mortgage of all the property, which was to be a prior lien to all other mortgages. The creditors secured by the existing mortgages appear not to have asked for this order, but they were all in court and did not object to it. U the bankruptcy of the company, assignees were made parties to foreclosure suit, and objected to priority given the certificates by foreclosure decree. The court that neither the mortgagor nor assignee in bankruptcy could obje the order in which the priority of and subsisting liens on the premis fixed by the decree. It could mak difference to them whether the ce cates had priority or not, since could take nothing until all lie the assigned property have been fied.

1. See, also, RAILROAD SECURI *Receiver's Certificates;* NEGOTI INSTRUMENTS, vol. 16, p. 481.

2. Receiver's certificates issued u the direction of the court bind no personally, nor can any actio maintained on such instrun against any one. Only the fun property under the control o court is bound, and that only wh is equitable to charge such fund the payment of the money evide Such instruments not having the ities of negotiable paper, are assignable under the *Illinois* st or as at common law, so as to ba equities existing against the paye whom they were issued. Turn Peoria, etc., R. Co., 95 Ill. 134; 1 & Eng. R. Cas. 348; 35 Am. Rep. Bank of Montreal *v.* Chicago, et Co., 48 Iowa 518; Union Trust C Chicago, etc., R. Co., 7 Fed. Rep. Baird *v.* Underwood, 74 Ill. 176; bold *v.* Peoria, etc., R. Co., 5 Ill. 367; Stanton *v.* Alabama, etc., R 2 Woods (U. S.) 506.

3. Although not negotiable in ments, receiver's certificates ma

the certificates are collectible and will be paid.[1] They are able only out of the fund in the hands of the receiver, and ment can only be enforced by application to the court author- their issue;[2] and when a receiver goes beyond the order he court and issues certificates bearing false and fraudulent esentations upon their face, he will be held personally liable *ona fide* holders, even though it was not his intention to de- e or defraud the purchasers of such certificates when he uted them;[3] and certificates in the hands of innocent holders value are invalid where the receiver has issued them in excess is authority, or for purposes other than those specified by

ferred by assignment, and, if pay- to bearer, by delivery; but the ee has no better claim than was d in the original payee. Turner oria, etc., R. Co., 95 Ill. 134; 1 & Eng. R. Cas. 348; 35 Am. Rep. Stanton *v.* Alabama, etc., R. Co., ods (U. S.) 506.

In McCurdy *v.* Bower, the court lliott, J., observes: "It is clear he assignor of the certificate is not eable as an ordinary indorser of e or bill, for the obvious reason he instrument is not negotiable as ercial paper. It has none of the nts of a negotiable instrument; it e mere acknowledgment that a s due the payee, payable out of a ic fund. . . . It is also quite that an assignor of a receiver's icate is not bound as a guarantor. . It may be that such an as- ent warrants the genuineness of nstrument, the capacity of the r to execute it, the title of the or, and his good faith; but that rrants that the instrument will be we do not believe."

In Turner *v.* Peoria, etc., R. Co., 95 34; 1 Am. & Eng. R. Cas. 348; 35 Rep. 144, the court by Scott, J., ves: "The conclusion reached upon legal principles that have been settled, but the rule deducible from has the strongest equitable deration for its support. It usually rs on the face of such instruments hat authority they were issued, or what specific purpose. Holders, fore, will always be chargeable notice of these facts. Considera- of the highest concern to all par- terested in the trust property make perative the court that charges nd, through its appointed officer, d have the most vigilant care that property is not improvidently wasted. All persons dealing in such securities must know that payment can only be coerced by application to the court having control of the trust property for an order upon its acting officer. Such certificates have not been current in commercial transactions as bills of exchange and other negotiable paper, nor are they likely to become so. It is known they are issued only for the benefit of the trust property, and usually the specific purpose is mentioned on the face; or, as in this case, on the back of the certificate. The design is only to charge the trust property, and that only so far as it is equitable to do so. While courts will be zealous to protect the rights of parties who may have furnished money for the preservation of the trust property, equal care will be observed to see that the property is not wasted by improvident acts of receivers."

3. In Bank of Montreal *v.* Thayer, 2 McCrary (U. S.) 1; 7 Fed. Rep. 622, the court, by McCrary, J., observes: "The petition does not state that the false and fraudulent representations were made with the intent to defraud any particular individual; but it does state in substance that they were contained in certain written instruments, payable to the Joliet Iron and Steel Company or bearer, and that relying upon the statements and representations contained in said instruments, the plaintiff purchased them from the payee, in good faith, in the usual course of business, before they were due, and without knowledge or notice that said representations were false, and paid their full face value. Is this sufficient? To state the question as concisely as possible, it is this: Assuming that the representations contained in the certificates were false and fraudulent—that is,

... been held that hypothecation ... an agreement by him to pay ... than allowed by the order ... effect of making them wholly

... contained in the body of the certificates, and upon these alone. If we were at liberty to assume that similar false representations must have been made by the Steel Company to the plaintiff, this would not release the defendant from liability, nor would it be necessary to join the Iron and Steel Company as a party defendant. The liability of the defendant depends upon the question whether he committed any fraud by his own misconduct and representations, and it is not to be defeated by showing that others have or have not committed like frauds. If, for example, the paper in question had passed through the hands of a number of persons after it left those of the defendant, each in turn making the same false and fraudulent representations as to its validity, would it be insisted that the last purchaser would be obliged to join all the previous holders in one suit? How could he know who had held and transferred by delivery the paper, except in the case of the person from whom he obtained it? He might sue that person, but in order to recover, it would be necessary for him to allege and prove that he relied upon his representations and not upon those embodied in the instrument. If he relied upon the latter and acted in good faith upon them, his right of action would be against the maker of the paper—the party who, by signing it and placing it upon the market, certified to the truth of the statements it contained, and gave it currency."

1. Certificates Invalid When Issued Irregularly.—The receiver's authority is bounded and limited by the order of the court. He has no general powers except such as could be derived therefrom. He may have the power to issue certificates, but such power is limited by the order of the court, and he cannot issue them in excess of the order, or for purposes not mentioned in the order. And since the receiver is an officer of the court, intrusted with the care of the property, any purchaser of his certificates is bound to know whether they were issued in accordance with the terms and contingencies contemplated by the order.

but will confine the purchasers to the amount actually ced to the receiver at the time of purchase.[1] Where, how- he court fixes the limit of discount, and the certificates are vithin that limit, the purchasers thereof are entitled to ace value as established by the order of the court.[2]

Relative Priority of Claims—1. In General.—It is a gen- le that the relative rank of claims and the standing of liens ıs unaffected by a receivership, except that the fund must ay the proper expenses resulting from its administration e court through the receiver.[3] After such expenses are ll claims of creditors are satisfied in the relative order of y belonging to them at the time the court took possession receiver. This rule is equally applicable in general to ership over railroads; but an exception exists as to certain of debts which are allowed payment prior even to mort- ens. The application of the ordinary rules would require en creditors should first be satisfied in their respective in full, and that unsecured creditors must go unpaid unless is a balance after the clearing off of the liens. The assump- y the courts of the right to overthrow this order and to nsecured claims priority of payment over established liens, the most extreme exercise of power ever ventured upon ırts of equity, is thoroughly established. The justification power, its limitations and the particular classes of debts will be given such priority, requires detailed treatment.[4]

laims Arising Out of the Receivership—*a.* RECEIVERSHIP EX- S HAVE PRIORITY.—When a court through its receiver possession of a railroad and operates it, the expenses of peration and management of the road by the court have y over all other claims of whatever nature. They consti- ıe first lien, not only on the income, but if that is insuffi- on the *corpus* of the property itself, even taking priority precedent mortgages. Not until such expenses are paid

f Montreal *v.* Chicago, etc., R. Iowa 518. See also Stanton *v.* ıa, etc., R. Co., 2 Woods (U. ; Union Trust Co. *v.* Chicago, Co., 7 Fed. Rep. 513.

ıion Trust Co. *v.* Illinois Mid- .. Co., 117 U. S. 434; 25 Am. & .. Cas. 560; Swann *v.* Clark, 110 02; 17 Am. & Eng. R. Cas. 354.

n receiver's certificates are ne- d at a discount, which the re- is not authorized to allow, a ıent *bona fide* holder will only tected to the amount actually ed by the first purchaser. Cen- at. Bank *v.* Hagard, 30 Fed. 34.

Interest.—A court of equity will not authorize a receiver to pay a rate of interest in excess of the legal rate in order to more readily dispose of the certificates. Nor will it authorize their sale at a discount, and in addition pay the highest legal rate of interest. Meyer *v.* Johnston, 53 Ala. 237.

2. Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S. 434; 25 Am. & Eng. R. Cas. 560.

3. See *infra*, this title, *Relative Priority of Claims; Claims Arising Out of the Receivership.*

4. See *infra*, this title, *Relative Priority of Claims; Debts Contracted by the Company Before Receivership.*

the order of the court.[1] But it has been held that hypothecati of the certificates by the receiver or an agreement by him to p more for the money borrowed thereon than allowed by the ord of the court, will not have the effect of making them who

made with intent to deceive—are we to assume that they were made with intent to deceive whoever should purchase the paper? In the very nature of the case, the defendant must have intended that his representations would or might be acted upon by any person or persons purchasing the certificates in the open market. He was placing paper upon the market where it was likely to be bought and sold. The certificates were so drawn as to facilitate their negotiation; they were to pass from hand to hand without indorsement; they were to be payable to bearer. Why is it not a sound rule of law and of morals that makes the signor of such paper liable in damages to any one who may be deceived and injured by having relied upon statements of fact fraudulently inserted therein? To say that it is necessary to show that defendant had a particular individual in view as the person to be defrauded, would be, in effect, to release him from liability for his representations; for a person who places such a paper upon the market cannot know into whose hands it will pass, and therefore cannot have in view the person or persons who may be injured. The matters of fact stated in the certificate gave them currency; if true, they made them amply secure, and very desirable as investments. The controlling question is, Who had the right to act upon such representations, since the law will presume that they were addressed to all persons having such right? Is there anything on the face of the paper to indicate that the representations were addressed to and intended for a particular individual, and to no others? I think, on the contrary, the representations were manifestly intended to be considered and acted upon by purchasers of the paper in the market. . . . There is sufficient privity between the defendant and any purchaser of the certificates to support the action. Now, is it any answer to say that the Joliet Iron and Steel Company, the payee of the certificates, must have participated in the fraud. The action is based upon the defendant's written representations contained in the body of the cert cates, and upon these alone. If were at liberty to assume that simi false representations must have b made by the Steel Company to plaintiff, this would not release the fendant from liability, nor would it necessary to join the Iron and St Company as a party defendant. T liability of the defendant depends on the question whether he commit any fraud by his own misconduct representations, and it is not to be feated by showing that others have have not committed like frauds. for example, the paper in question passed through the hands of a num of persons after it left those of the fendant, each in turn making same false and fraudulent represen tions as to its validity, would it be sisted that the last purchaser would obliged to join all the previous hold in one suit? How could he know w had held and transferred by deliv the paper, except in the case of person from whom he obtained He might sue that person, but in or to recover, it would be necessary him to allege and prove that he rel upon his representations and not up those embodied in the instrume If he relied upon the latter and ac in good faith upon them, his right action would be against the maker the paper—the party who, by sign it and placing it upon the market, c tified to the truth of the statements contained, and gave it currency."

1. Certificates Invalid When Iss Irregularly.—The receiver's author is bounded and limited by the order the court. He has no general pow except such as could be derived the from. He may have the power issue certificates, but such power limited by the order of the court, a he cannot issue them in excess of order, or for purposes not mentio in the order. And since the recei is an officer of the court, intrus with the care of the property, purchaser of his certificates is bou to know whether they were issued accordance with the terms and co tingencies contemplated by the ord

, but will confine the purchasers to the amount actually nced to the receiver at the time of purchase.[1] Where, how- , the court fixes the limit of discount, and the certificates are within that limit, the purchasers thereof are entitled to face value as established by the order of the court.[2]

. **Relative Priority of Claims—1. In General.**—It is a gen- rule that the relative rank of claims and the standing of liens ins unaffected by a receivership, except that the fund must pay the proper expenses resulting from its administration he court through the receiver.[3] After such expenses are all claims of creditors are satisfied in the relative order of rity belonging to them at the time the court took possession ts receiver. This rule is equally applicable in general to verships over railroads; but an exception exists as to certain es of debts which are allowed payment prior even to mort- liens. The application of the ordinary rules would require lien creditors should first be satisfied in their respective r in full, and that unsecured creditors must go unpaid unless e is a balance after the clearing off of the liens. The assump- by the courts of the right to overthrow this order and to unsecured claims priority of payment over established liens, e the most extreme exercise of power ever ventured upon ourts of equity, is thoroughly established. The justification e power, its limitations and the particular classes of debts h will be given such priority, requires detailed treatment.[4]

Claims Arising Out of the Receivership—*a.* RECEIVERSHIP EX- ES HAVE PRIORITY.—When a court through its receiver s possession of a railroad and operates it, the expenses of operation and management of the road by the court have rity over all other claims of whatever nature. They consti- the first lien, not only on the income, but if that is insuffi- , on the *corpus* of the property itself, even taking priority precedent mortgages. Not until such expenses are paid

of Montreal *v.* Chicago, etc., R. 8 Iowa 518. See also Stanton *v.* ma, etc., R. Co., 2 Woods (U. 6; Union Trust Co. *v.* Chicago, R. Co., 7 Fed. Rep. 513.

Union Trust Co. *v.* Illinois Mid- R. Co., 117 U. S. 434; 25 Am. & R. Cas. 560; Swann *v.* Clark, 110 602; 17 Am. & Eng. R. Cas. 354.

en receiver's certificates are ne- ed at a discount, which the re- r is not authorized to allow, a quent *bona fide* holder will only otected to the amount actually ced by the first purchaser. Cen- Nat. Bank *v.* Hagard, 30 Fed. 484.

Interest.—A court of equity will not authorize a receiver to pay a rate of interest in excess of the legal rate in order to more readily dispose of the certificates. Nor will it authorize their sale at a discount, and in addition pay the highest legal rate of interest. Meyer *v.* Johnston, 53 Ala. 237.

2. Union Trust Co. *v.* Illinois Mid- land R. Co., 117 U. S. 434; 25 Am. & Eng. R. Cas. 560.

3. See *infra*, this title, *Relative Pri- ority of Claims; Claims Arising Out of the Receivership.*

4. See *infra*, this title, *Relative Pri- ority of Claims; Debts Contracted by the Company Before Receivership.*

[illegible] arise out of which the claims of the creditors [illegible] company can be satisfied.[1]

[illegible] "The court which appoints a re[illegible] by virtue of that ap[illegible] rights and assumes [illegible] and the expenses [illegible] court creates in discharge of [illegible] are burdens necessa[illegible] property taken possession [illegible] irrespective of the question [illegible] be the ultimate owner, or who [illegible] the preferred lien, or who [illegible] the receivership; so, if at [illegible] of any party rightfully en[illegible] a court should appoint a [illegible] of property, the same being [illegible] property, and therefore under [illegible] to the public of continued [illegible] it, in the administration of [illegible] receivership, might rightfully con[illegible] necessary for the operation [illegible] road, either for labor, supplies or [illegible], and make such expenses a prior [illegible] on the property itself." The court [illegible] J., in Kneeland v. Amer[illegible] L. & T. Co., 136 U. S. 89; 43 Am. [illegible] R. Cas. 519.

In Union Trust Co. v. Illinois Mid[illegible] R. Co., 117 U. S. 434; 25 Am. & [illegible] R. Cas. 560, the court by Blatch[illegible] J., said: "Property subject to [illegible] and claims and debts, of various characters and ranks, which is brought within the cognizance of a court of equity for administration and conversion into money and distribution, is a trust fund. It is to be preserved for those entitled to it. This must be done by the hands of the court, through officers. The character of the property gives character to the particular species of preservation which it requires. Unimproved land may lie idle, with only payment of taxes. Improved property should be rented. Movable property that is not perishable may be locked up and kept; but if perishable it must be sold by way of preservation. A railroad and its appurtenances is a peculiar species of property. Not only will its structures deteriorate and decay and perish if not cared for and kept up, but its business and good-will will pass away if it is not run and kept in good order. Moreover, a railroad is a matter of public concern. The franchises and rights of the corporation which constructed it were given, not merely for private gain to the corporators, but to furnish a public highway; and all persons who deal with the corporation as credit[illegible] or holders of its obligations must n[illegible] essarily be held to do so in the vi[illegible] that if it falls into insolvency, and [illegible] affairs come into a court of equity [illegible] adjustment, involving the transfer o[illegible] franchises and property, by a sale, i[illegible] other hands, to have the purposes o[illegible] creation still carried out, the co[illegible] while in charge of the property, has [illegible] power, and under some circumstan[illegible] it may be its duty, to make such rep[illegible] as are necessary to keep the road [illegible] its structures in a safe and proper c[illegible] dition to serve the public. Its po[illegible] to do this does not depend on cons[illegible] nor on prior notice. Consent is de[illegible] able, but it is seldom practicable, wh[illegible] the debts exceed the value of [illegible] property."

In Ellis v. Boston, etc., R. Co., [illegible] Mass. 1, the court by Wells J., [illegible] serves: "The receivers are officer[illegible] the court for this purpose, and act [illegible] der its direction and control. T[illegible] continue the operation of the road [illegible] the conduct of its business, beca[illegible] this is essential to its proper pre[illegible] vation. They may fulfill the contr[illegible] of the corporation so far as benefi[illegible] They may not pay its debts, nor fu[illegible] contracts which are burdensome [illegible] tend to diminish the value of the pr[illegible] erty in their control, unless such c[illegible] tracts are charged as incumbran[illegible] upon the property, or are necessar[illegible] its proper preservation or secu[illegible] They are entitled to repaymen[illegible] their reasonable expenses and char[illegible] in preference to all other claims u[illegible] the property, of whatever nature."

In Meyer v. Western Car Co., [illegible] U. S. 1, the court by Waite, C. J., s[illegible] "There can be no doubt that it is [illegible] duty of a court to pay from the t[illegible] fund it has in its possession all [illegible] debts it incurred in its judicial ca[illegible] ity while administering the trust [illegible] sumed, pending the litigation, in [illegible] half of the litigating parties."

When a receiver of a railway c[illegible] pany has been appointed under [illegible] English Railway Companies' Act, [illegible] moneys received by him must be [illegible] plied first in providing for the "w[illegible] ing expenses" of the railway, ever[illegible] by authority of a special act, a fi[illegible] dividend on shares and the interest [illegible] debentures, forming the capital ra[illegible]

) *Distinction When Receiver Appointed at Instance of Other Mortgagees.*—A distinction seems to have been drawn by e of the cases between the status of receivership expenses, re the appointment is made at the instance of mortgagees, where such appointment is at the instance of judgment cred- or of the corporation itself. These cases seem to hold that expenses of receiverships created on the application of others mortgagees, have priority over mortgage bondholders only of the income, but not out of the *corpus* of the mortgaged erty.[1] It seems, however, that the peculiar facts of those s serve as the explanation of the apparent conflict, and that statement of the general principle previously made does no l to be modified.[2]

particular undertaking of the any, are charged on the gross pts of that undertaking. *In re* rn, etc., R. Co., L. R., 45 Div. 367; 45 Am. & Eng. R. 71.

The mortgagor or lienholder procures a receivership of a rail- thereby consents to the subjec- of his interest in the property of h possession is taken at his in- e, to the discharge of liabilities xpenses incurred by the receiver r the orders of the court. But e receivers are appointed the petition of the insolvent r the situation is different, and dministration of the trust and the tment of liabilities for past and nt expenses must be upon princi- different from what would other- govern." The United States cir- court, district of Indiana, by ds, J., in Central Trust Co. *v.* ash, etc., R. Co., 46 Fed. Rep. 26; n. & Eng. R. Cas. 301.

ital of Rolling Stock.—Where a re- r of a railroad was appointed at uit of a judgment creditor and after the possession of the rail- was transferred to a receiver quently appointed in proceedings reclose a mortgage, rental of roll- tock during the first receivership t entitled to priority over the gage claim when it appears that ceipts during the first receiver- did not equal the operating ex- s, and there was, therefore, no sion of the current earnings, and olling stock was not sold upon under foreclosure proceedings, as restored to the lessors. Knee- v. American L. & T. Co., 136 U. ; 43 Am. & Eng. R. Cas. 520.

Rental of Leased Lines.—In Central Trust Co. *v.* Wabash, etc., R. Co., 46 Fed. Rep. 26; 46 Am. &. Eng. R. Cas. 301, an insolvent railroad company, on its own petition, procured the appointment of receivers to take possession of its road and lines leased by it. In the same suit, the trustees of a mortgage upon the company's road, asked and were denied an appointment of receivers or an extension of the receivership under their cross-bill. The trustees, however, obtained a decree of foreclosure and a sale of the property thereon. *Held*, that the rentals of the leased lines while in the possession of the receivers did not become a charge upon the *corpus* of the property, having priority over the mortgage debt. In this case the arrangement with the other lines was by "lease," but such leases were for a long term of years and practically amounted to a consolidation.

2. This will appear from an examination of the cases digested above, in which the apparent conflict exists. Kneeland *v.* American L. & T. Co., 136 U. S. 89; 43 Am. & Eng. R. Cas. 520, was the first which seemed to support the view that expenses of receiverships at the instance of others than the mortgagees themselves were not entitled to payment out of the *corpus* prior to mortgage bondholders. In the later case of Kneeland *v.* Bass Foundry, etc., Works, 140 U. S. 592, which arose out of the same receiverships, the court gave priority out of the *corpus* to a claim for supplies furnished to the receiver appointed, for the judgment creditor. It was argued in this subsequent case that the first case decided that no expenses of the judgment creditor's receivership, had pri-

ority out of the *corpus;* but the court held that such was not the point of the decision. The court, by Lamar, J., said: "The objection to the item of $1,695.01, which was for supplies furnished to the receiver, Dwight, is, that Dwight was not the receiver for the bondholders and Kneeland, but was appointed receiver at the suit of a judgment creditor; that, so far as Kneeland and the bondholders are concerned, the situation was precisely the same as if the company had remained in possession of the road up to the expiration of Dwight's receivership. Kneeland *v.* American L. & T. Co., 136 U. S. 89; 43 Am. & Eng. R. Cas. 520; 138 U. S. 509, are relied upon as authority to sustain that contention. We do not think, however, that the case will bear any such construction. The claim in that case was for rental of rolling stock used by the road during the period of the receivership at the suit of a judgment creditor, under a contract of purchase made by the company with the owner thereof prior to the receivership. The rental was not paid, and the lessor took possession of his rolling stock. As respects the claim for rental during the period of the receivership at the suit of a judgment creditor, it was held that it was not entitled to priority of lien over the mortgage creditors on the foreclosure and sale of the road. . . . The theory of that ruling was, that, as the earnings of the road did not pay the operating expenses, and as the lessor of the rolling stock had a lien on only that personal property of the road, and was not chargeable with a *pro rata* share of such deficiency, he should be content with the return of his property. . . . As respects the supplies furnished the road in this case during the period of Dwight's receivership, the court below ordered them paid out of the fund arising from the sale of the road, because, so far as the record shows, that was the only fund available; and they had been necessary to the continued operation of the road, and had gone into the general property covered by the mortgage which was sold at the foreclosure sale. They contributed to the preservation of the property during the receivership, and went towards swelling the fund arising from the sale on foreclosure."

The other case supporting the distinction, Central Trust Co. *v.* Wabash, etc., R. Co., 46 Fed. Rep. 26; 46 Am. & Eng. R. Cas. 301. was a claim f rental of leased lines. Here it w decided that such rental, during a r ceivership at the instance of the inso vent company itself, was not entitl to priority. This case was in t United States circuit court, and w decided to a great extent, as appe from the opinion, on the authority Kneeland *v.* American L. & T. Co., 1 U. S. 89; 43 Am. & Eng. R. Cas. 5 which we have seen was subsequent explained and distinguished by t supreme court. The arrangement the case under consideration was terms a lease, but was in fact a conso dation, and that fact may serve to su tain the decision aside from the que tion of the status of a receiver's expe ses. On this point the court by Woo J., said:

"Reference has been made to M tenberger *v.* Logansport R. Co., 1 U. S. 286; 12 Am. & Eng. R. Cas. 4 and it appears that in that case t rental for the use of a leased line road by the receivers therein a pointed was ordered paid out of t proceeds of sale in preference mortgage debts. But the origi lease in that case was for a short ter with rights of extension or abando ment upon short notice, and it fairly inferable that the successive r ceivers were deemed to have co tinued in possession of the leased li with the consent of the mortgag whose rights were postponed. Wh however, as in this case, the lease for a long term, the practical resul an incorporation of the leased line i the body and ownership of the pr cipal line, and in no just sense is t value of the use of one, more than the other, an operating expense of t combination. If so, a mortgage up a railroad instead of having sta value according to the fixed princip of law and equity applicable to mo gages upon real estate, is subject displacement at the will of the mo gagor, as well for his own interest for the benefit of other parties, to co tracts of subsequent date, which, up principles hitherto supposed to be tablished, should be subject to ex ing and recorded mortgage lie The Wabash Company, by maki the contracts of June 1, 1881, c tainly neither conferred nor acqui any rights, which, in respect to mortgaged properties, were not su ject to the mortgages theretof

EXPENSES OF OPERATION AND MANAGEMENT.—The ques- of what expenditures and contracts a receiver may properly in operating a railroad, and the status of debts incurred by n excess of his authority, is treated in detail elsewhere.[1] general term "expenses of operation and management," is iently specific to cover most cases,[2] but the propriety of

and the court by appointing ers at the instance of that com- did not, as I conceive, acquire to change the order of priority t respect. In fact, while those cts are in the form, and, when ered by themselves, may be en- to the name of leases, the Cut- contracts show that the real se of the transaction was a sale Indianapolis, Peru & Chicago to the Wabash Company for the evidenced by the bonds which ompany delivered to the so- lessors. The interest on those may have been regarded by the s as equivalent to a fair annual of the leased road and equip- until at the end of the term the led sale should be consummated; ven if so treated, it was not, un- he circumstances, I think, an ing expense of such character be entitled to equitable prefer- ver the mortgage liens of prior

ment Creditors' Receivership— y to Surplus.—In Sage *v.* Mem- etc., R. Co., 125 U. S. 361; 35 Eng. R. Cas. 40, a receiver of oad company was appointed at it of a judgment creditor. In two years the receiver was dis- d and the property turned over to the company. A balance of rnings amounting to $218,000 ied in his hands. In a contest he payment out of this balance en the judgment creditor at suit the receiver was ap- d, and intervening trustees un- mortgage—*held*, that the judg- creditor was enlitled to priority. ourt by Harlan, J., said: "If the s appointing the receivership ntervened and asked possession property, they might, perhaps, een entitled as against general ors to the income of the prop- hereafter accrued; but we do not ve any legal ground upon which re entitled to the net earnings property while it was in the of a receiver in a suit instituted by the judgment creditor for the protection of his own interests and not of the interest of the trustees or the bondholders or all other creditors. His suit was, in fact, an equitable levy for his benefit upon the net income of the property. Creditors who filed their claims based upon judgments, gain nothing by the fact that their judgments were rendered upon coupons which were secured by lien upon the mortgage property. Neither they nor their trustees, prior to the termination of the receivership, chose to assert this lien, nor did they, pending the receivership, ask that the receiver should from and after their appearance hold for them as well as for the judgment creditors. They took action as simple contracting creditors whose claims were reduced to judgment . . . they could not, upon any recognized principles of equity deprive the creditor at whose instance and for whose benefit the receiver was appointed, of his priority of right arising from the institution of suit for the purpose of reaching the income of the debtor's property."

1. See *supra*, this title, *Powers of Railroad Receivers.*

2. It clearly includes wages of laborers, engineers, switchmen, yardmen, trainmen, telegraph operators, ticket agents, clerks and other agents and employés; supplies of all kinds, and such repairs as are necessary to keep the track, buildings, cars, engines, etc., in safe and proper condition for use and operation, and has been held to include reasonable counsel fees and costs of litigation. On these items in general see Langdon *v.* Vermont, etc., R. Co., 54 Vt. 593; 11 Am. & Eng. R. Cas. 688; M'Lane *v.* Placerville, etc., R. Co., 66 Cal. 606; 26 Am. & Eng. R. Cas. 404; Meyer *v.* Johnston, 53 Ala. 237; Hoover *v.* Montclair, etc., R. Co., 29 N. J. Eq. 4; Kennedy *v.* St. Paul, etc., R. Co., 2 Dill. (U. S.) 448; Stanton *v.* Alabama, etc., R. Co., 2 Woods (U. S.) 506; Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S. 434; 25 Am. & Eng. R.

including thereunder certain classes of expenditure requi more particular consideration in connection with the question priorities.[1]

(1) *Rolling Stock.*—The purchase or rental of rolling stock the operation of the road by the receiver is a proper operat expense, entitled to priority of payment out of the income, or the event of deficiency of income, out of the *corpus;* and t court may authorize the creation of a debt for such purpose a charge it as a first lien on the property.[2] Where a railroad co

Cas. 560; Cowdrey *v.* Galveston, etc., R. Co., 93 U. S. 352.

A claim for oil sold to a railroad company for use in operating the road is a current expense and payable from the income. Poland *v.* Lamoille Valley R. Co., 52 Vt. 144; 4 Am. & Eng. R. Cas. 408. So, too, is a debt incurred for coal supplied to the company for use in its locomotives. Burhnam *v.* Bowen, 111 U. S. 776; 17 Am. & Eng. R. Cas. 308. A claim for new iron rails and cross-ties required for the purpose of keeping the road in a condition safe and fit for travel. Williamson *v.* Washington City, etc., R. Co., 33 Gratt. (Va.) 624; 1 Am. & Eng. R. Cas. 498.

Wages.—In Louisville, etc., R. Co. *v.* Wilson, 138 U. S. 501, the court, in appointing a receiver, ordered that the receiver pay all "salaries of officers and wages of employés," which were earned within six months of the appointment of the receiver. *Held*, that this did not cover claims by attorney employed for special purposes. The court by Brewer, J., said: "The terms 'officers' and 'employés' both, alike, refer to those in regular and continual service. Within the ordinary acceptation of the terms, one who is engaged to render service in a particular transaction is neither an officer nor an employé." In this case, however, one of the claims of the attorney was allowed priority on the ground that the bondholders received the benefit of his services. The facts were these: Prior to the appointment of the receiver, the railroad leased to another company certain engines; the latter company passed into the hands of a receiver, and the attorney was employed to get the engines back and rental for their use. He succeeded, and secured the allowance of $1,500 to the railroad company for rental. Meanwhile the railroad company also passed into the hands of a receiver, and the allowance was paid to such receiver. The court by Br ster, J., said: "This recovery inure the benefit of the security holders placing so much more money in hands of the receiver for the purpos discharging obligations against company payable before the bo We think it may fairly be held that party who takes the benefit of s service ought to pay for it."

Supplies.—In Kneeland *v.* Foundry, etc., Works, 140 U. S. claims for necessary supplies furnis to a receiver of a railroad were gi priority as against bondholders, of the proceeds of a sale of the r The court by Lamar, J., said: "As spects the supplies furnished the in this case . . . the court be ordered them paid out of the fund ing from the sale of the road, beca so far as the record shows, that was only fund available; and they had b necessary to the continued operatio the road, and had gone into the gen property covered by the mortg which was sold at the foreclosure They contributed to the preservatio the property during the receivers and went towards swelling the arising from the foreclosure."

Damages for injuries to person property are included within the penses of operating a railroad whil the hands of a receiver. Mobile, etc Co. *v.* Davis, 62 Miss. 271; 26 Am Eng. R. Cas. 425. See also Rya Hays, 62 Tex. 42; 23 Am. & Eng Cas. 501. See for detailed treatm *supra*, this title, *Liability of Rail Receivers; Damage Arising f Negligence and Torts During ceivership.*

1. See, *infra*, this title, *Rela Priority of Claims; Claims Ari Out of the Receivership; Rolling St Leased Lines; New Construction.*

2. See, also, in reference to ro stock, *infra*, this title, *Relative Pri ity of Claims; Debts Contracted*

holds rolling stock under lease, title thereto remaining in essor until the rental has paid the purchase price, the lessor titled to reasonable compensation as rental for the use of rolling stock by the receiver, even though the cars are after- returned to the lessor.[1] The rental payable by the receiver r such circumstances is to be estimated according to the nable value thereof, irrespective of the actual use made of cars.[2] The lien of a prior mortgage containing an after- ired property clause does not attach to rolling stock held

any Before Receivership; Must Been Contracted for Certain oses.

ourt of equity having possession oreclosure action, through its re- , of the property of a railroad ny, has jurisdiction to authorize eation of a debt for the purchase ling stock and other purposes, in its discretion it is necessary so and to charge the debts so created rst lien on the mortgaged prop- Vilas *v.* Page, 106 N. Y. 439.

ere receivers of a railroad com- under an order of court authoriz- em to take charge of all the com- property of every description, ing leases, carry on the road, and he use and benefit of certain sleep- rs, with knowledge of the terms ease under which the cars were nd used by the company, they e the assignees of the company, e bound to perform its covenants ie care and return of the leased Easton *v.* Houston, etc., R. Co., . Rep. 784.

n Kneeland *v.* American L. & T. 36 U. S. 89; 43 Am. & Eng. R. 19, the question was as to pay- of rental during receivership for stock leased to the railroad com- with a proviso that title should re- n the lessor until a certain sum en paid. *Held*, that a reasonable nt for the use of the rolling stock receiver should be paid, and al- priority over the mortgage in- ness. The court by Brewer, J., "The railroad company owned nd personal property, each sub- a separate lien. The holder of n on the realty commences suit close its lien, and asks the court possession, through its receiver, n the real and personal property. latter it had a remote interest, n subordinate to existing liens. ourt, responding to its demands, possession of all the property, real and personal. . . . The application may not be a consent that the contract price of the personalty shall be paid in preference to his lien, but it certainly is a consent that the rental value of that personalty during the time of the possession by the receiver appointed at his instance may have priority to his claim. If the holder of a lien upon the realty does not think that the continued possession of the personalty is a benefit to his lien, he should simply omit the personalty from his bill, and ask the court to take possession of the realty alone. But either because he believed that the possession of the personalty was necessary for the operation of the railroad and the security of his claim, or else because, by virtue of his secondary right he expected to pay for the personalty, and retain both the personalty and the realty, he has had the court take possession of both by its receiver, and by that act, although subsequently the personalty was returned to the holder of the lien upon it, he consented to the payment of reasonable rentals pending the receiver's possession."

In Meyer *v.* Western Car Co., 102 U. S. 1, the court by Waite, C. J., said: "The money recovered was only for the use of the cars by the receiver during the receivership, and the amount was substantially agreed on. In other words, it is in effect admitted that the use of the cars was worth to the court while operating under the trust created by the appointment of a receiver at the instance of these appellants, just what has been decreed. There can be no doubt that it is the duty of a court to pay from the trust fund it has in its possession all the debts it incurred in its judicial capacity while administering the trust assumed, pending the litigation, in behalf of the litigating parties."

2. In Kneeland *v.* American L. & T. Co., 136 U. S. 89; 43 Am. & Eng. R. Cas. 519, it was contended that the

remain the property of the lessor and should be returne him, unless purchased by the receiver.[1] If the cars are under foreclosure, as part of the railroad, the price thereof be paid to the lessor out of the proceeds of the sale prior to mortgage.[2]

(2) *Leased Lines.*—When receivers are appointed over a road which is lessee of other lines, if the receiver continue possession, under the leases of such leased lines, he is liabl rental therefor, and such rental is entitled to the same priori other necessary receivership expenses.[3]

It has been held, however, that where the receiver appointed at the instance of other than the mortgagees, such als during receivership would be prior to the claims of m gagees, only out of income, and not out of the proceeds of a of the *corpus.*[4]

The rights of the parties were fixed at the moment the property was taken by the court through its receiver into its own possession."

1. Fosdick *v.* Schall, 99 U. S. 235; Fosdick *v.* Southwestern Car Co., 99 U. S. 256; Huidekoper *v.* Hinckley Locomotive Works, 99 U. S. 258; Meyer *v.* Western Car Co., 102 U. S. 1.

2. Fosdick *v.* Schall, 99 U. S. 235.

3. In Brown *v.* Toledo, etc., R. Co., 35 Fed. Rep. 444, receivers were appointed over a railroad company which was lessee of another railroad. The receivers took possession and continued to operate the leased line as part of the property over which they were appointed, and it was held that they were liable for the rental, and it was decreed that such rental should be made a charge upon the property of the receivership, as part of the receivership expenses. The court (circuit court, N. D. of Illinois) by Gresham, J., said: "The relations between the Wabash and the Toledo, Peoria & Western, at the time Humphreys and Tutt were appointed receivers, were those of lessor and lessee; and the receivers, under the orders of the court were invested with the entire estate of the Wabash company, including its leasehold interest in the Toledo, Peoria & Western property. The receivers thus became assignees of the lease, and, as such, liable for the rent."

In Miltenberger *v.* Logansport, R. Co., 106 U. S. 386; 12 Am. & Eng. R. Cas. 464, a railroad company had leased another line under a written lease stipulating for the payment rental and for the keeping o leased road in like good conditi it then was. A receiver was appo over the lessee company, and he possession of the leased line and ated it with the rest of the sy *Held*, that rental during the use road by the receiver, and a su compensate for depreciation i condition of the leased road, properly treated as necessary exp of the receivership, and were en to priority of payment out o *corpus.*

4. See also *supra*, this title, *Re Priority of Claims; Claims A Out of the Receivership; Receiv Expenses Have Priority; Disti when Receiver Appointed at In of Other than Mortgagee.*

In Central Trust Co. *v.* Wabash R. Co., 46 Fed. Rep. 26; 46 A Eng. R. Cas. 301, the road over the receiver was appointed was of a number of other lines for terms, and the arrangements sho practical consolidation rather t *bona fide* lease. The receiver als appointed at the instance of the road company itself, and not o application of bondholders. that the rentals of the leased line ing the receivership were not en to priority out of the proceeds sale of the property.

In Central Trust Co. *v.* Wa etc., R. Co., 38 Fed. Rep. 63, the erty of the defendant railway com which was insolvent, was made the consolidation of a number of some of which were taken by

ne amount of such rental is to be determined by the actual e of the leasehold, and not necessarily according to the rate blished by the contract of lease.[1]

) *New Construction.*—The court may authorize the receiver mplete unfinished line of road, or even to construct new when such new construction appears clearly necessary, and make the cost thereof a first lien, having priority over pre-nt mortgages.[2] Such completion or new construction is r authorized except under extraordinary circumstances, h make it practically a necessity in order to render the old ion of the line reasonably productive.[3]

Debts Contracted by Company Before Receivership—*a.* CERTAIN ECURED DEBTS ALLOWED PRIORITY.—When a court, ugh its receiver, takes possession of a railroad at the request ortgagees and operates it for their benefit, certain classes of s previously incurred by the railroad will be paid by the , notwithstanding the prior lien in favor of mortgage bond-ers. In other words, the mortgage lien will be postponed to ayment of unsecured creditors falling within the preferred es. Not until as late as 1878 was a judicial decision given ne point, and this case contains so clear a statement of the tion in its several aspects that it is set out at length in the s.[4] In 1879, the question came before the United States eme Court, which substantially affirmed the principles laid in the opinion just mentioned. Since that time the allow-of "back claims" has been generally referred to as the

vers were appointed to manage tire system, and it was provided ny lessor might at any time as-is right to possession of lines by him for unpaid rent. On etition of receivers, showing ne branch of the system leased defendants by the intervenor, rning more than operating ex-, an order was made directing after meeting obligations which een directed to be discharged by r orders, the rental on such h should be paid to the inter-until otherwise directed, out of nts and profits. *Held*, that as ligations directed to be paid by r orders amounted to a large nd were never paid, the inter-has no right to rely upon said and was not entitled to rent nder.

iltenberger *v.* Logansport R. 6 U. S. 286; 12 Am. & Eng. R. 64. In this case the court al-rental of a leased line priority, ed the amount of such rental at tual fair value of the leasehold, and not according to the rate fixed in the contract of lease. See also on this point *supra*, this title, *Powers of Railroad Receivers; Contracts Made Before Appointment.*

2. Kennedy *v.* St. Paul, etc., R. Co., 5 Dill. (U. S.) 519; Miltenberger *v.* Logansport R. Co., 106 U. S. 286; 12 Am. & Eng. R. Cas. 464; Meyer *v.* Johnston, 53 Ala. 237; Jerome *v.* McCarter, 94 U. S. 734; Bank of Montreal *v.* Chicago, etc., R. Co., 48 Iowa 518. See *supra*, this title, *Powers of Railroad Receivers;* also *supra*, this title, *Receiver's Certificates.*

3. Shaw *v.* Little Rock, etc., R. Co., 100 U. S. 605; Credit Co. *v.* Arkansas Cent. R. Co., 15 Fed. Rep. 46; Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 50 Vt. 500; 46 Vt. 792; Smith *v.* McCollough, 104 U. S. 25; 3 Am. & Eng. R. Cas. 159. See *supra*, this title, *Powers of Railroad Receivers;* also *supra*, this title, *Receiver's Certificates.*

4. Shortly after the Federal courts in the seventh circuit took possession, by receivers, of railroads in foreclosure

proceedings, a policy was adopted of requiring the payment by them of what were called "back" claims for materials, labor and supplies, out of the income, and sometimes, in case of sales of the railroad property under decree, out of the proceeds. This had been the practice for several years. In the case of Turner *v.* Indianapolis, etc., R. Co., 8 Biss. (U. S.) 315, decided in 1878, this policy was attacked, and the court by Drummond, J., said: "I will state some of the reasons which have caused the court to adopt the practice which exists in this circuit, in relation to materials and supplies which have been furnished railways, and labor performed on them, when they are placed in the hands of receivers by the court. . . . The railways do not come within the control of the court until after default on the bonds or coupons, and generally after absolute insolvency. There are, therefore, when application is made to the court for the appointment of a receiver, in all cases large balances due to operatives, and for supplies and materials furnished. There are also contracts running with other railways, upon which balances are due, and which contracts must often be continued in force in order to preserve the security of the mortgagees. The receiver takes the road with the benefits accruing from such contracts, and uses any supplies or materials which are on hand and not paid for. It therefore early became a question in this species of litigation what rule should be adopted by the court as to such claims against railway companies. A very simple way to dispose of the question was to take the railway at the time it came into possession of the court, pay for all work done and supplies furnished thereafter, and refuse to pay any debts so incurred before. But that seemed impracticable. It was not like an ordinary mortgage on a farm or house. A railway is a matter of public concern. It is one of the great instruments of modern commerce between states and nations. The public as well as private interests require its continual operation. To refuse to pay anything whatever for past services or supplies or materials has never, it is believed, been attempted by any court or demanded by any mortgagee. The receiver goes into possession of the railroad with all its appliances and instrumentalities, with its men at work on the track or running the with its coal, oil, tools and means of operating the road. mortgagees have come into court it to assume possession of the r protect their interests. Are th terests of all others, operative supplymen, who happen to have against it at the time, to be abso ignored in the case of insolvent panies? I think not. The ap ment of a receiver is, to a great ex matter of discretion in the cour it has been thought that the might require the receiver to pa tain of these claims, and even to the property subject to them; a lien on the road, but in the ex of the equitable discretion of the in dealing with property which peculiar character, and under ci stances of which the past hist litigation affords no example or dent.

What should be included with claims to be paid has also bee subject of consideration, and the tice has been to allow all to b that could be fairly regarded as of the actual operating expenses road, whether for labor or suppl their various forms. It being con that some claims for past se should be paid, the next point determined was, what limitat any, as to time should be placed such payment. It was found in cases that those who had cont the railways, instead of payin current operating expenses c companies, would postpone the ment of the same, sometimes for months, in favor of the interest the mortgages, in the hope, appar that a more favorable time in the ness of the roads would enable th make up the deficiency. It w view of this and similar consider growing out of the actual condit affairs, and of the absolute neces fixing some reasonable time which such claims should be al that the court adopted, as by an the rule of the statute of Illinois lation to liens on railroads for done and supplies and material nished. During the discussions have taken place on this subjec allowance of these "back" claim been sometimes called a lien, 'b point of fact, it never has been, n it be, justly so considered, but, ready stated, is an exercise o

e in *Fosdick* v. *Schall*."[1] Several distinct points arise in ence to such allowance of priority to unsecured claims: Upon what grounds does the court justify interference with usual order of priority?[2] (2) "Diversion of Income."[3] (3) such payment be allowed priority in distribution of a fund ng from a sale of the *corpus* itself, or only out of the re- r's income?[4] (4) For what purposes;[5] and (5) Within what od of time preceding the receivership must the debts have incurred?[6]

) *Must Have Been Contracted for Certain Purposes.*—Priority ayment is allowed only to debts incurred previous to receiv-

able power of the court in the ises.

ile it has been generally admitted the court had a discretionary r in the direction indicated, to rse the earnings of the road, it been insisted that these claims d not be considered as binding on property in case of foreclosure sale. The view that has been of that branch of the subject has this: In general, when the mort- s have come before the court to r the appointment of a receiver, property has been in a very di- ated condition, the rails nearly out, the ties needing replace- ; the rolling stock, station houses, ridges, repairs—the whole prop- being in a condition to render the it of persons and merchandise erous.

e practice, therefore, has been in- of immediately directing the re- to pay for labor or supplies or ials previously furnished, to ex- the receipts in repairs of the road, purchase of new iron or of steel, f rolling stock, and in the construc- nd repair of side tracks, bridges, n houses, etc., thus adding to the ty of the mortgagees by enhancing alue of the property. It has been ht that under the same equitable tion which has been heretofore re- to, this gave the operatives and ialmen a just claim upon the rty itself. It has not unfrequently ned that railroads which were aratively worthless when they into the possession of the court, become, under its administration, ble property.

s for these and other like reasons he court in the appointment of ers in all cases of railroads in rcuit has required them, either at the time of such appointment, or as being so understood then, by subsequent order, to pay for labor performed or supplies or materials furnished during the time indicated. The court has always treated this kind of property as including in the security given to the mortgagees not only real and personal estate in the ordinary sense, but franchises and intangible property.

The experience of the court which, it may be said, has been obtained by the management for many years of immense amounts of this kind of property, has satisfied it that, practically, it would be well-nigh impossible, looking at things as they actually exist, to operate the roads by receivers without some allowance for claims of the character mentioned, existing at the time of their appointment; and that the limitation already stated is not an unreasonable one, in view of all the circumstances."

1. Fosdick *v.* Schall, 99 U. S. 235.

2. See *infra*, this title, *Relative Priority of Claims; Debts Contracted by Company Before Receivership; Power of Court to Give Priority.*

3. See *infra*, this title, *Relative Priority of Claims; Debts Contracted by Company Before Receivership; Diversion of Income.*

4. See *infra*, this title, *Relative Priority of Claims; Debts Contracted by Company Before Receivership; Priority Out of Corpus.*

5. See *infra*, this title, *Relative Priority of Claims; Debts Contracted by Company Before Receivership; Must Have Been Contracted for Certain Purposes.*

6. See *infra*, this title, *Relative Priority of Claims; Debts Contracted Before Receivership; Must Have Been Contracted Within Limited Time.*

ership by the railroad company for a few specific purpo
namely: Wages, labor, materials, supplies, equipment, and
ances due connecting lines.[1] In other words, the priorit
back debts is limited to operating expenses, equipment
materials entering into the permanent improvement of the p
erty.[2] One who advances a railroad company money with w
to pay such preferred claims does not acquire a right to the
ority which would have been accorded to the claimants th

1. Operating Expenses.—Debts of the company, in order to be entitled to priority, must have been incurred for those purposes which are properly described as operating expenses. What particular expenditures may be included under that general term will appear by reference to *supra*, this title, *Relative Priority of Claims; Expenses of Operation and Management.* Also the classes of debts which will be allowed priority, may be determined by applying the principles upon which the courts justify the right to interfere at all with the ordinary rules regulating priority of liens. See *supra*, this title, *Relative Priority of Claims; Debts Contracted by Company Before Receivership; Power of Court to Give Priority.*

Supplies.—As an instance of allowance of priority for supplies furnished prior to the appointment of a receiver, see Calhoun *v.* St. Louis, etc., R. Co., 14 Fed. Rep. 9. A claim for oils sold to a railroad company for use in operating the road was allowed priority in Poland *v.* Lamoille Valley R. Co., 52 Vt. 144; 4 Am. & Eng. R. Cas. 408. So, too, a debt incurred for coal supplied to the company for use in its locomotives; Burhnam *v.* Bowen, 111 U. S. 776; 17 Am. & Eng. R. Cas. 308. Also a claim for new iron rails and cross-ties required for the purpose of keeping a road in condition safe and fit for travel. Williamson *v.* Washington City, etc., R. Co., 33 Gratt. (Va.) 624; 1 Am. & Eng. R. Cas. 498.

Where supplies used for rebuilding bridges, building side tracks and making repairs were furnished from time to time under a continuous verbal contract made after default in the company's bonded interest, which was not terminated until the appointment of a receiver more than two years after the first supplies were furnished, it was held that the materialmen were, under the circumstances, entitled to demand the balance due them and to a lien superior to that of the mor
creditors for the amount due o
earnings of the road. Blair
Louis, etc., R. Co., 22 Fed. Rep

Traffic Balances.—Ticket and fr
balances to connecting lines
allowed priority. Miltenberge
Logansport R. Co., 106 U. S.
12 Am. & Eng. R. Cas. 464; Tay
Philadelphia, etc., R. Co., 7 Fed.
377; Dow *v.* Memphis, etc., R.
20 Fed. Rep. 260; 17 Am. & En
Cas. 324; Thomas *v.* Peoria, etc
Co., 36 Fed. Rep. 808; 36 Am. &
R Cas. 381; Union Trust Co. *v.*
nois Midland R. Co., 117 U. S.
25 Am. & Eng. R. Cas. 560.

Wages.—Arrears of pay due b
company to employés are entitl
priority. Duncan *v.* Chesapeake
R. Co. (Va. 1876), 15 Law Reg.
428; Douglass *v.* Cline, 12 Bush
608; Calhoun *v.* St. Louis, etc., R
14 Fed. Rep. 9.

Canada.—In *Canada* it has been
that a receiver of a railroad com
is authorized to pay debts inc
before his appointment, but not i
ordinary course payable until aft
appointment, but that he is no
titled to pay any sums which
time of his appointment were i
position of ordinary overdue
Gooderham *v.* Toronto, etc., R.
Ont. App. 685; 17 Am. & En
Cas. 339.

2. Wood *v.* Guarantee Trust,
Co., 128 U. S. 416; Addison *v.* L
75 Va. 701; 9 Am. & Eng. R. Cas
Thomas *v.* Peoria, etc., R. Co., 36
Rep. 808; 36 Am. & Eng. R. Cas
Huidekoper *v.* Hinckley Locom
Works, 99 U. S. 258. This restri
as to the purposes for which deb
the company must have been
tracted in order to be entitled t
ority is a necessary result of the
ciples upon which priority is all
by the courts to unsecured debts.
supra, this title, *Relative Prior*
Claims; Debts Contracted by

es;[1] but one who takes an assignment of such debt from the

Before Receivership; Power of t to Give Priority.

Central Trust Co. *v.* Wabash, R. Co., 32 Fed. Rep. 566, defend-ailroad had a sand switch at a n point on its road, at which it n the habit of getting sand for urpose of repairing its track, but n it did not use for the purpose eiving freight. Near the switch a sawmill, the owner of which ed to have cars set out at the h for the purpose of loading lum-nd the officers of the road stated they would take up lumber at point whenever a certain quan-was offered. About a month they notified the owners of the hat it was impracticable to take mber at that point any longer, efused to do so. The road sub-ntly passed into the hands of a er, and the owners of the mill ed damages for the violation of ntract. *Held*, that whether the act was one which could be ter-ed at the pleasure of the railroad any or not, the claim was not one preferential character which l entitle the claimants to an al-ce against the property in the of a receiver, or out of the earn-f the road in preference to the age bondholders.

nages—Claims for damages to ns and property, though accruing n the requisite limit of time prior appointment of the receiver, are ntitled to priority as operating ses. Hiles *v.* Case, 14 Fed. Rep. *ub. tit. In re* Dexterville Mfg., Co, 4 Fed. Rep. 873. See, also, this title, *Liability of Railroad vers; Damage Arising from gence and Torts During Re-ship.*

A railroad company interested in aining as a "going concern" a aged connecting line, loaned it y which was expended in the ent of interest in its first mort-bonds and operating expenses. that the company loaning this y was not entitled to priority he first mortgage bonds by way rogation or on the ground of ior equities. Morgans, etc., Co. as Cent. R. Co., 137 U. S. 171; 45 & Eng. R. Cas. 631. On this the court by Fuller, C. J., said: "It is argued that the advances were for the payment of operating expenses, taxes and interest during five years, whereby the railroad property was preserved as a 'going' concern . . . that the advances were made to meet the particular deficits as they accrued from time to time to pay expenses when there was a deficiency in the earnings, and to pay interest on the bonds when there was not enough from the earnings to pay it, and, as a whole, constituted ways and means of maintaining the good will and integrity of the enterprise. . . . The contention is wholly inadmissible that the bondholders, because they received what was due them, should be held to have assented to the running of the road at the risk of returning the money thus paid, if the company should turn out to be insolvent . . . To allow another corporation, which for its own purpose has kept a railroad in operation in the hands of the original company . . . a preference in reimbursement over the latter on the ground of superiority of equity, would be to permit the speculative action of third parties to defeat contract obligations."

A contract between a railroad company and one advancing money to pay interest coupons on the bonds, under which the one making the advance is to be treated as an original bondholder and allowed to share equally in the proceeds of the foreclosure sale, is not valid as against the bondholders, who were not consulted, and who did not consent to the agreement. Fidelity Ins., etc., Co. *v.* West Pennsylvania, etc., R. Co., 138 Pa. St. 494.

Where the financial agents of a railroad company advance money to the company without any special arrangement as to the manner of its application, they are not entitled, by reason of the fact that a part of the money advanced was paid out to laborers and supplymen, to be subrogated to the lien of such laborers and supplymen. Fidelity, etc., Co. *v.* Shenandoah Valley R. Co., 86 Va. 1; 38 Am. & Eng. R. Cas. 559.

In Kelly *v.* Green Bay, etc., R. Co., 10 Biss. (U. S.) 151, the facts were as follows: At the request of the railroad company Kelly paid from his own personal funds, a note and interest

original creditor is entitled to priority.[1] Where rolling stoc leased to a railroad company with the proviso that title s remain in the lessor until the rental has paid the purchase pr and that the lessor may resume possession upon default, rental is not entitled to priority. Such an arrangement is re a conditional sale, not a letting; and the court will look bey the form to the substance of the contract.[2]

amounting to nearly $300,000, given by the company for cash borrowed to complete the road. At the time the original loan was made and thereafter until they had a receiver appointed, the management of the company was in actual control of the bondholders. Kelly, therefore, asked for priority out of the earnings of the road, and, if they were insufficient, out of the proceeds of the sale. *Held*, that he was not entitled to priority, unless he alleged and proved that he acted under such inducements from the bondholders, and had such dealings with them as estopped them from asserting their liens against his claim.

But in Atkins *v.* Petersburg R. Co., 3 Hughes (U. S.) 307, the employés of a railroad company were threatening to strike for non-payment of wages. At the request of the president of the company petitioners advanced money to pay the wages, under an agreement that such advances should be reimbursed out of the first net earnings of the company. The road went into the hands of a receiver before the advances had been repaid. *Held*, that the petitioners were entitled to priority.

1. In Union Trust Co. *v.* Walker, 107 U. S. 596, the court, by Waite, C. J., said: "Walker . . . is the assignee by purchase from the original holder of the claims he seeks to have paid, and one of the questions certified is, whether, being an assignee, and not an original holder, he is entitled to payment. We have no hesitation in answering this question in the affirmative. . . . These creditors are paid, not because they have in law a lien on the mortgaged property or the income, but because, in equity, the earnings of the company constitute a fund for the payment of the expenses which their claims represent, before any income arises which ought to be applied to the discharge of the mortgage debt. Under such circumstances it is a matter of no importance that the original creditor has parted with the cl The right is one which attaches to debt and not to the person of original creditor. Consequently right passes with an assignment o debt."

Where there was an arrange between a railroad company, its la ers, boarding-house keepers and cers, that the grocers should fu supplies to the boarding-house k ers, and the company should hold from the laborers' wages and to the grocers an amount sufficie discharge their claims for sup furnished, the claims so accruin the hands of the grocers were tr as claims originally due the labo and duly assigned to the hol These claims of the boarding-h keepers and the grocers were, th fore, allowed priority over the m gage creditors of the railroad com in the distribution of the procee a foreclosure sale. McIlhenny Binz, 80 Tex. 1; 45 Am. & Eng. R. 94.

2. See, also, *supra*, this title, *A tive Priority of Claims; Claims A ing Out of the Receivership; Exp of Operation and Management; ing Stock.*

In 1873 the Hinckley Locom Works entered into a contract w railroad company for the sale of t locomotives, and in October, 187 the sale of two more. By the ter these contracts, notes were to be g for the price, payable at stated pe The title of the locomotives was t main in the vendors until the n were paid. In 1875 a receiver wa pointed over the railroad, and he rendered the locomotives to the L motive Company, and it was four a master that the Locomotive C pany was entitled to $15,000 for use and repair of said locomo prior to and during the receiver *Held*, that the Locomotive Com was not entitled to priority, but simply general creditors. The c

ebts for new construction and materials furnished therefor e, in a few instances, where the equity was peculiarly strong,[1]

Vaite, C. J., said: "The amount d due the Locomotive Company t in reality for the use and repairs e engines, but on account of what agreed to be paid for the pur-e. The railroad company con-ed to buy the engines and pay a in price. The Locomotive Com- retained a paramount lien to se-the same to be paid. The debt ncurred was not paid. The lien e Locomotive Company has been fect foreclosed, and a balance of lebt still remains due. Whatever have been the form of the trans-n this is its substance. . . . Locomotive Company occupies position of a general creditor with special equities in its favor." lkoper *v.* Hinckley Locomotive ks, 99 U. S. 258.

Fosdick *v.* Schall, 99 U. S. 235, ll sold a railroad company cars, r an agreement that they were to in his property until paid for. years afterwards the road was into the hands of a receiver who e an arrangement with Schall for continued use of the cars. After-l the road was sold on foreclosure eedings, the agreed rental during receivership paid to Schall, and cars returned to him. Schall then ned, out of the proceeds of the rental for the cars during the six ths immediately preceding the intment of the receiver. *Held*, he was not entitled to priority was simply a general creditor. court by Waite, C. J., said: "He to be paid a rent for his cars; but entered into no express contract the company which requires such yment, and there is nowhere to be d any proof of an implied obliga-to make such compensation. years and more before the ap-tment of a receiver, he contracted ell his cars to the company at an ed price, payable in installments red by what was, in legal effect, a mount lien. Payments were made rding to the contract until Octo-1874, when they stopped. The remained in use, however, after —not under a new contract of , but under the old contract of . The price agreed upon not hav-been paid in full, the power of reclamation which was reserved has been exercised. . . . As the case stands no equitable claim whatever has been established upon the fund in court. . . . Schall, for the balance due after his own security has been exhausted, occupies the position of a general creditor only."

Where engines and other rolling stock are furnished to a railroad company under an agreement by which the price is to be paid in installments, the title, however, to be retained until it should be fully paid, and the receiver of the company is appointed who pays for the use of cars during receivership, the persons furnishing the cars are not entitled to the payment of amounts due them, prior to the appointment of the receiver, from the current receipts of the road, but are, as to such sum, simply general creditors. Fidelity Ins., etc., Co. *v.* Shenandoah Valley R. Co., 86 Va. 1; 38 Am. & Eng. R. Cas. 559.

English Rule.—In *England* it is held that when a railroad company has purchased rolling stock on the terms of paying for it by a series of installments at fixed times, the stock not becoming the property of the company until the complete payment of all the installments, and the vendor having the right to seize the stock on default in payment of any one installment, the "working expenses" include overdue installments as well as installments as they became due. *In re* Eastern, etc., R. Co., L. R., 45 Ch. Div. 367; 45 Am. & Eng. R. Cas. 71.

1. In McIlhenny *v.* Binz, 80 Tex. 1; 45 Am. & Eng. R. Cas. 94, petitioners claimed to be paid for the construction of new road before the receiver was appointed and for material furnished for such construction. These claims accrued within six months before the appointment of the receiver. *Held*, that such claims were entitled to priority in payment out of the receiver's net earnings over bonds under a mortgage executed when the road was unfinished and which showed that it was contemplated that the road should be completed, and which attached to the new road as fast as finished. The court by Gaines, J., said: "It has been held that claims for construction, unless the work was done or the material furnished in

been allowed priority; but it is a general and well establi
rule that such claims are not entitled to priority.[1]

pursuance of an order of the court, cannot be allowed priority; as a general rule this is correct, but we think there may be construction claims which appeal as strongly to the conscience of the court of equity as the debts which are commonly known as operating expenses. . . . The question here is as to the right of priority of payment out of the net earnings of the road while under control of the court. . . . Ordinarily, when mortgages are issued upon completed roads it is not contemplated that its income is to be applied to the construction of new road. In such cases debts incurred for such new construction ought to have no claims against the bondholders either as to *corpus* or income of the property. But when mortgages are executed upon an unfinished road, and they show upon their face that it was contemplated that the work of construction should be prosecuted to completion, and when the mortgage is to attach to the new road as fast as it is finished, we are of opinion . . . that if the road be put into the hands of a receiver before the work and materials are paid for, the holders of the claims for such work and materials should be paid from the net income of the road while under control of the court, if there be any."

1. **New Construction.**—See *supra*, this title, *Relative Priority of Claims; Claims Arising Out of the Receivership; Expenses of Operation and Management; New Construction.*

In Wood *v.* Guarantee Trust, etc., Co., 128 U. S. 416, it was held that the doctrine of Fosdick *v.* Schall, 99 U. S. 235, applied to operating expenses only, and not to a debt contracted in the ordinary construction of the road. In Addison *v.* Lewis, 9 Am. & Eng. R. Cas. 702, it was held that the claim of contractors for the construction of the road or an extension thereof is simply a general debt which will not be entitled to priority.

In American L. & T. Co. *v.* East, etc., R. Co., 46 Fed. Rep. 101, it was held by the United States circuit court for the northern district of Alabama, that a debt created for materials for original construction of a portion of a railroad more than six months before the appointment of a receiver in proceedings for the foreclosure of a mortgage, is not within the rule authorizing the to provide for arrears due for ope expenses of the road out of the r come of the property, and, in t sence of a showing that there hac a diversion of current funds or ir which should have been applied payment of the claim for such mat will not be given a priority ove rights of the mortgage creditors.

The generally recognized rule i the original construction creditor no superior equity, and there is n son why an exception should be in favor of intervenor who sold rial for general construction relyi the credit of the railroad compan this more than six months prior t receivership. Central Trust Co. *v* bash, etc., R. Co., 46 Fed. Rep. 2 Am. & Eng. R. Cas. 317. In W Guarantee Trust, etc., Co., 128 416, the court by Lamar, J., "There is a vital distinction betw debt for construction and one for ating expenses. The doctrine of dick *v.* Schall is applicable wh the latter class of liabilities. It is well settled that the doctrin not apply where it is a question o inal construction."

In Hale *v.* Frost, 99 U. S. 38 court only allowed for the paym supplies to the machinery depart furnished before the appointment receiver, and rejected that part c account which was for materi construction purposes, as not bas any special equity.

The claim of contractors for th struction of the road, or an extensi simply a general debt, which wi be preferred to the claim of bond ers. Addison *v.* Lewis. 75 Va. Am. & Eng. R. Cas. 702.

In Thompson *v.* White Water ley R. Co., 132 U. S. 68; 40 Am. & R. Cas. 373, it was held that the of bondholders under a mortgag taining an after-acquired pro clause had priority over a claim o tractors upon the rents and profit portion of the road constructe them subsequently to the mortgag

In Dunham *v.* Cincinnati, et Co., 1 Wall. (U. S.) 254, it was that a mortgage by a railroad com of its road "built and to be built priority even as regards the u

Must Have Been Contracted Within Limited Time.—Only back debts as were contracted within a reasonable time pre- to the appointment of the receiver will be allowed priority.[1] bsolute rule as to what constitutes such reasonable time een laid down,[2] but the period usually adopted is six

n over the claim of a contractor ad himself finished it under an nent with the company that he retain its possession and apply rnings to the liquidation of the him, and who had in accord- with such an agreement taken sion of the road and retained it. Fogg *v.* Blair, 133 U. S. 534, it ld that a liquidated claim against oad company not converted into gment, which a railroad com- urchasing its road and property with the selling company to as- and pay as part of the consider- does not become a lien upon the ty so as to take priority over the a mortgage made by the pur- g company to secure an issue of

It would not do to charge the in- of mortgaged railroad property ed by a receiver, or the property with every debt incurred in all vious history for labor, supplies ipment. The business of all rail- ompanies is, to a greater or less , done on credit. Those who m labor, or furnish supplies and nent, usually expect and contract paid within a reasonable time; hey do not ordinarily perform or furnish supplies or equipment, he railroad company has failed to ithin such time for what has been usly done or furnished. Expenses ed within such reasonable time tute what are called "current ses," which ought, if possible, to be ut of the receipts during the same . When, therefore, debts of that ter remain unsettled, or are not suit, for such time as would be d unreasonable, it may be fairly ned that the creditors have ceased k to current receipts for payment, ave accepted the position of gen- editors, who, as such, would have im for indemnity upon any special f the income." The court by Har- , in Thomas *v.* Peoria, etc., R. 6 Fed. Rep. 808; 36 Am. & Eng. s. 381.

Manchester Locomotive Works esdale, 44 Minn. 115, the court, by Dickenson, J., said: "If, either from lapse of time or from other circumstances, the debt for the equipment or labor sought to be preferred by order of the court and to be paid out of the earnings of the receivership, is more properly to be classed with the general debts of the corporation than with those incurred for current expenses approximately connected with the possession and operation of the road by the receiver, it is a proper exercise of the discretion of the court to disallow the application." In this case petitioner sold the railroad company a locomotive. More than six months after the sale the road was placed in the hands of a receiver at the suit of bondholders. Nearly a year after the appointment of the receiver the vendor applied to the court for an order requiring the payment of the balance of its debt out of the earnings of the receivership. *Held*, that the debt was more properly to be classed with the general debts of the corporation than with those incurred for current expenses; and hence that the court properly refused to allow this claim as one equitably entitled to preference over the claims of the bondholders upon the earnings of the road.

Where supplies used for rebuilding bridges, building side tracks, and making repairs were furnished from time to time under a continuous verbal contract, made after default in the company's bonded interest, which was not terminated until the appointment of a receiver more than two years after the first supplies were furnished, it was held that the materialmen were, under the circumstances, entitled to demand the balance due them, and to a lien superior to that of the mortgage creditors, on the earnings of the road. Blair *v.* St. Louis, etc., R. Co., 22 Fed. Rep. 769.

2. "There is no definite rule as to the period prior to the appointment of the receiver within which the operating expenses must have been incurred, and each case must depend upon the discretion of the chancellor." Taylor *v.* Philadelphia, etc., R. Co., 7 Fed. Rep. 377.

months.[1] Where the debt was contracted outside of the rec limit of time, the fact that notes given in payment therefor renewed within the limit, does not entitle the renewed no priority.[2] But where notes were given for a debt contr within the limit, and were renewed after the appointment receiver, the renewed notes are entitled to priority.[3]

(3) *Power of Court to Give Priority.*—The power of a co its equitable jurisdiction to allow priority to certain class unsecured claims, though often severely criticised as trans ing the rights of lien creditors,[4] is now too thoroughly estab

In Thomas *v.* Peoria, etc., R. Co., 36 Am. & Eng. R. Cas. 381, the United States circuit court for the northern district of Illinois, by Harlan, J., said: "The general rule that has obtained in this circuit for many years, though not fully or expressly formulated in any published decision, has been not to charge the income of mortgaged property accruing during a receivership, or the proceeds of the sale of such property, with general debts for labor, supplies, and equipment, back of the six months immediately preceding the appointment of a receiver. While the court, perhaps, has not committed itself against applying a different and more liberal rule, when the special circumstances or equities of the case demand such a course, the general rule is as just stated. I am of opinion, that, under the circumstances that usually attend the administration of railroad property by the courts, through receivers, the rule stated is a wise and salutary one."

1. In the following cases the six months' limit was approved, and such debts incurred more than that length of time previous to the receivership were held not entitled to priority, but treated simply as general debts: Turner *v.* Indianapolis, etc., R. Co., 8 Biss. (U. S.) 315; Fosdick *v.* Schall, 99 U. S. 235; Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S. 434; 25 Am. & Eng. R. Cas. 560. Five months was the period adopted in Taylor *v.* Philadelphia, etc., R. Co., 7 Fed. Rep. 377. Three months was adopted in Miltenberger *v.* Logansport R. Co., 106 U. S. 286; 12 Am. & Eng. R. Cas. 464.

2. In Brown *v.* New York, etc., R. Co., 19 How. Pr. (N. Y.) 84, the order appointing the receiver authorized him, "to pay the amount due and maturing for materials and supplies about the operation and for the use of the said road." *Held*, that thi not be construed to include the p of a renewed promissory not inally made the company in p of a claim for materials. Th by Ingraham, J., said: "Althou authority here conferred migh construed as to include this c cannot conclude that such was tention of the court when th was made. The extent to whi should be construed is to confir payment to persons who had fu materials within a short time p for repairing or operating the

3. In Burhnam *v.* Bowen, 11 776; 17 Am. & Eng. R. Cas. 3 who furnished supplies within time previous to the appointm a receiver took acceptances f price thereof, and after the a ment of the receiver, the acce were renewed from time to *Held*, that the renewed acce were entitled to priority. Th by Waite, C. J., said: "We are fied that at the time of the a ment of the receiver, this was the current debts for operati penses made in the ordinary co a continuing business and to out of current earnings, and th payment would have been mad time agreed on if the compa remained in possession."

4. In Kneeland *v.* America T. Co., 136 U. S. 89; 43 Am. & Cas. 519, the court, by Brewer, J "The appointment of a receiv in the court no absolute contr the property and no general au to displace vested contract liens cause in a few specified and cases this court has declared t secured claims were entitled to over mortgage debts, the idea s have obtained that a court app a receiver acquires power to gi preference to all unsecured clai

limit of controversy.[1] The grounds of such authority are us, but may be said in general to rest upon: First. Necessity,[2] g out of the peculiar nature of railroad property and the public character of such corporations; and, Second. The

en assumed that a court appoint- receiver could rightfully burden ortgagees for the payment of any ured indebtedness. Indeed, we vised that some courts have made ppointment of a receiver condi- upon the payment of all unse- indebtedness in preference to ortgage liens sought to be en- . Can anything be conceived more thoroughly destroys the iness of contract obligations? holding a mortgage debt upon a d has the same right to demand pect from the court respect for sted and contracted priority as lder of a mortgage on a farm or So, when a court appoints a re- of railroad property he has no to make that receivership condi- on the payment of other than few unsecured claims, which by lings of this court have been de- to have an equitable priority. e is bound to sell to a railroad any or to work for it, and through ealings with a company whose rty is mortgaged, must be assumed e dealt with it on the faith of its al responsibility, and not in ex- ion of subsequently displacing iority of the mortgage liens. It exception, and not the rule, that priority of liens can be dis- ."

n Fosdick v. Schall, 99 U. S. 235, nited States Supreme Court, by , C. J., said: "We have no doubt hen a court of chancery is asked railroad mortgagees to appoint iver of railroad property pending dings for foreclosure, that court, exercise of a sound judicial dis- n, may, as a condition of issuing cessary order, impose such terms rence to the payment from the e during the receivership of out- ng debts for labor, supplies, nent or permanent improvement mortgaged property as may, un- e circumstances of the particular ppear to be reasonable. Rail- nortgages and the rights of rail- nortgagees are comparatively new history of judicial proceedings, are peculiar in their character and affect peculiar interests. The amounts involved are generally large, and the rights of the parties oftentimes complicated and conflicting. It rarely happens that a foreclosure is carried through to the end without some concessions by some parties from their strict legal rights, in order to secure advantages that could not otherwise be attained, and which it is supposed will operate for the general good of all who are interested. This results almost as a matter of necessity from the peculiar circumstances which surround such litigation."

In Thomas v. Peoria, etc., R. Co., 36 Fed. Rep. 808; 36 Am. & Eng. R. Cas. 381, the court, by Harlan, J., said: "When a court of chancery is asked by railroad mortgagees to appoint a receiver of railroad property pending proceedings for foreclosure, the court, in the exercise of a sound judicial discretion, may, as a condition of issuing the necessary order, impose such terms in reference to the payment, from the income during the receivership, of outstanding debts for labor, supplies, equipment or permanent improvement of the mortgaged property as may, under the circumstances of the particular case, appear to be reasonable."

In Hale v. Frost, 99 U. S. 389, it is held that the net earnings of the railroad while in possession of the court and operated by its receiver are not necessarily and exclusively the property of the mortgagees, but are subject to the disposal of the chancellor in payment of claims which have superior equities, if such shall be found to exist.

2. Necessity.—Looked at even from the point of view of the bondholders alone, the absolute necessity of keeping the railroad a "going concern" is apparent. The character of railroad property is such that rapid and disastrous depreciation must follow even temporary cessation of the operation of the road; not only to its track, structures, engines, rolling stock and appurtenances, but, what is still more serious, to its good will and business also, including the probable forfeiture

of its franchises; thus resulting in the practical annihilation of mortgage bondholders' interests. But the public also is concerned. Railroad corporations are given franchises not merely for their own benefit, but to promote public purposes by furnishing highways and channels of commerce. The public good requires that railroads should be operated even at the expense of some detriment to private interest; but in this instance the interests of the bondholders and the public are identical, and the operation of the road is an absolute necessity to both. Since the road must be kept in operation, it follows that, if the payment of certain unsecured debts existing at the time the receiver is appointed is necessary to secure such operation, then these unsecured debts must be allowed priority. That unless certain debts are paid, the road must cease operations seems very clear. It is common for one road to use the tracks of other lines in making connections. The like use of terminal facilites is equally frequent. If the receiver does not pay accrued rental for these privileges, the other lines may, and probably will, at once refuse to further permit such use of their tracks and terminals. So, also, if the payment of ticket and freight balances due connecting lines is refused, traffic arrangements may be broken off. Such destruction of business relations with other lines would in some instances amount to a practical stoppage of the road. The matters of wages, amounts due for ordinary supplies, rental of rolling stock, etc., stand upon the same footing. Employés are paid at intervals, and refusal to pay back wages due them, under the existing conditions of organized labor, would no doubt result in a strike and consequent cessation of operation. The same remarks are largely applicable to debts due supplymen.

"It is indispensable to the preservation of the property and its maintenance that it should be operated. It must be kept a going concern. The expenses of such operation and maintenance within a limited time prior to the receivership is therefore allowed priority . . . such as labor and supply claims, amounts due to connecting roads for material, repairs, ticket and freight balances, and the like. Allowing priority to such claims because their non-payment would cause cessation of working suppli running arrangements and re stoppage of the operation of th which in the interest of the bondl as well as of the public, is not to erated. The doctrine is analog that of the admiralty, allowing supplies to a vessel precedence mortgage upon the vessel, and upon the same principle. The must not be allowed to rot wharf. The railway must not mitted to rust and its franchise forfeited through failure to o Such things, therefore, that are avoid such result, working dest to the mortgage, should be co sated in priority to the mortgage kins, J., in Farmers' L. & T. Green Bay, etc., R. Co., 45 Fed 664; 46 Am. & Eng. R. Cas. 296

In Miltenberger *v.* Logansp Co., 106 U. S. 286; 12 Am. & E Cas. 464, Blatchford, J., who de the opinion of the court, said: " not be affirmed that no items wh crued before the appointment receiver, can be allowed in an Many circumstances may exist make it necessary and indispens the business of the road and the vation of the property, for the r to pay pre-existing debts of classes out of the earnings of ceivership, or even the *corpus* property, under the order of the with a priority of lien. Yet t cretion to do so should be ex with a very great care. The pa of such debts stands *prima fac* different basis from the paym claims arising under the receiv while it may be brought with principle of the latter by speci cumstances. It is easy to see t payment of unpaid debts for op expenses, accrued within ninet due by a railroad company su deprived of the control of its pr due to operatives in its employ, cessation from work simultanec to be deprecated, in the interes of the property and of the pub the payment of limited amounts other and connecting lines of r materials and repairs and for ticket and freight balances, th come of indispensable business re where a stoppage of the continu such business relations woulc probable result, in case of no ment, the general consequence ing largely, also, the interests a

l principle that he who comes into equity must do equity.[1]

dation of travel and traffic, may
ace such payments in the cate-
payments to preserve the mort-
roperty in a large sense, by main-
the good will and integrity of
erprise, and entitle them to be
first lien."

own *v.* New York, etc., R. Co.,
. Pr. (N. Y.) 84, the court by
m, J., said: "When the mort-
forfeited by non-payment, the
holding it are entitled first to be
nd the right to authorize any
ayment to be made, even of sub-
supplies, can only be justified
necessity of keeping the road in
on for the benefit of the creditors
ves who seek to obtain pay-
their debts."

e citations below, from judicial
s, will show that this general
does rest upon the three distinct
s mentioned in the text; yet the
ave never separately considered
or the reason that in every rail-
ceivership all three grounds are
ble in some degree, and the
have therefore treated them
r.

y.—"The business of all rail-
mpanies is done to a greater or
tent on credit. This credit is
or shorter, as the necessities of
e require; and when companies
pecuniarily embarassed, it fre-
happens that debts for labor,
s, equipment and improvements
mitted to accumulate, in order
nded interest may be paid and a
us foreclosure postponed, if not
er avoided. In this way the
nd monthly earnings, which or-
should go to pay the daily and
y expenses, are kept from those
m in equity they belong, and
pay the mortgage debt. The
out of which the mortgagee is to
is the net income obtained by
ng from the gross earnings what
red for necessary operating and
ng expenses, proper equipment
ful improvements. Every rail-
ortgagee in accepting his secu-
liedly agrees that the current
ade in the ordinary course of
s shall be paid from the current
before he has any claim upon the
If, for the convenience of the
, something is taken from what
t improperly be called the current debt fund, and put into that which belongs to the mortgage creditors, it certainly is not inequitable for the court, when asked by the mortgagee to take possession of the future income and hold it for their benefit, to require, as a condition of such an order, that what is due from the earnings to the current debt shall be paid by the court from the future current receipts, before anything derived from that source goes to the mortgagees. In this way the court will only do what, if a receiver should not be appointed, the company ought itself to do. For even though the mortgage may in terms give a lien upon the profits and income, until possession of the mortgaged premises is actually taken or something equivalent done, the whole earnings belong to the company and are subject to its control. (Galveston, etc., R. Co. *v.* Cowdrey, 11 Wall. (U. S.) 459; Gilman *v.* Illinois, etc., Tel. Co., 91 U. S. 603; American Bridge Co. *v.* Heidelbach, 94 U. S. 798.) The mortgagee has his strict rights which he may enforce in the ordinary way. If he asks no favors, he need grant none. But if he calls upon a court of chancery to put forth its extraordinary powers and grant him purely equitable relief, he may, with propriety be required to submit to the operation of a rule which always applies in such cases, and do equity in order to get equity. The appointment of a receiver is not a matter of strict right. Such an application always calls for the exercise of judicial discretion; and the chancellor should so mold his order that, while favoring one, injustice is not done to another. If this cannot be accomplished, the application should ordinarily be denied." The United States Supreme Court by Waite, C. J., in Fosdick *v.* Schall, 99 U. S. 235.

"Where debts arising before the receivership have been allowed as prior in equity to the claim of the bondholder on the earnings of the receivership, the underlying principle is that the debt when incurred, operated in a direct way to the advantage of the mortgage holders." Easton *v.* Huston, etc., R. Co., 38 Fed. Rep. 12; 39 Am. & Eng. R. Cas. 588.

"The power rests upon the fact that in the administration of the affairs of the company the mortgage creditors

This latter view having three distinct branches: *General E*
—It is a well-known fact that railroads do not pay cash for w
supplies and traffic balances due connecting lines, but tha
character of the business is such that these claims are neces
paid only at periodical intervals; and since it is necessa
the public interests and likewise beneficial to the bondh
themselves, that such road should be operated and kept a "
concern," it is assumed that bondholders impliedly assent t
payment of such debts. *Estoppel.*—An application of the
trine of estoppel, arising from the fact that bondholders,
default in payment of interest, rarely proceed at once to
close their mortgages or take possession of the road, but, in
permit the company to continue in control after such defaul
insolvency is notorious. It is considered that under such ci
stances necessary operating expenses may be fairly held to
been contracted on the credit of the mortgagees and for
benefit.[1] *Diversion of Income.*—Money which would ordi

have got possession of that which in equity belonged to the whole or a part of the general creditors." The court by Waite, C. J., in Fosdick *v.* Schall, 99 U. S. 235.

1. **Estoppel.**—In Union Trust Co. *v.* Souther, 107 U. S. 591; 11 Am. & Eng. R. Cas. 707, United States Supreme Court by Waite, C. J., said: "The right to impose terms does not depend alone on whether current earnings have been used to pay the mortgage debt, principal or interest, instead of current expenses. . . . Many other circumstances may make such an order reasonable, and this case furnishes a striking example. The first default in the payment of interest under the mortgage occurred in October, 1873. The bondholders did not see fit to take possession which they had the right to do when the default had continued for six months. On the contrary, notwithstanding no payments of interest were made, they allowed the company to operate the road and incur obligations therefor, until December, 1887. This was evidently in the hope that their condition would be improved by the delay. . . . There cannot be a doubt that it was for the interest of the bondholders that the road should be kept in operation, and as they did not see fit to take possession while it could only be operated at a loss, it was certainly not an abuse of judicial discretion for the court to order, as the condition of granting their application for a receiver, that debts incurred by the company in thus protectin credit, should be paid from the i of the receivership."

"In case of failure of trustee possession upon default, it is inc sable to the preservation of the erty that it should be operat must be kept a going concern.' kins, J., in Farmers' L. & T. Green Bay, etc., R. Co., 45 Fe 664; 46 Am. & Eng. R. Cas. 296

In Burhnam *v.* Bowen, 111 776; 17 Am. & Eng. R. Cas. 3 mortgage bondholders were paid any interest, but the co was allowed to remain in pos and operate the road for a nun years. In this case there was version of current income for th pose of paying either fixed cha for permanent improvements. that a debt incurred prior to t ceivership for coal was entit priority. The court by Waite said: "The debt due Bowen w curred to keep the road runnin thus preserve the security bond creditors. If the truste taken possession under the mo they would have been subjec similar expenses to do what th pany, with their consent and ap tion was doing for them. So anything appears on the reco failure of the company to p debt to Bowen was due alone fact that the expenses of runni road and preserving the secu the bondholders were greate the receipts of the business.

plied to the payment of current operating expenses is fre-
ly used in making permanent improvements to the prop-
or to pay mortgage interest. This is regarded as the diver-
of a fund which primarily belongs to the current creditors
which has frequently been denominated the "current debt
" The court regards it as equitable, therefore, that such
so diverted should be restored.[1]

Diversion of Income.—The matter of "diversion of income,"
so much importance in the question of allowance of priority
secured debts against railroad companies that the term and
act limitations deserve explanation. The doctrine may be
y summarized as follows: That a railroad should be con-
d in operation is necessary to the interest of its bondholders
s also a duty to the public.[2] Bondholders are, therefore,
ned to hold subject to an implied provision, that out of the
earnings of the railroad all necessary operating expenses
be paid before the net income arises out of which the mort-
interest is to be paid or permanent improvements made to
orpus of the property.[3] The company is regarded as, to

circumstances we think the debt
charge in equity on the continu-
come, as well that which came
e hands of the court after the
r was appointed as that before."

version of Income.—"The power
pon the fact that in the admin-
n of the affairs of the company,
rtgage creditors have got pos-
of that which in equity be-
to the whole or a part of the
l creditors. Whatever is done,
re, must be with a view to a
tion by the mortgage creditors
which they have thus inequi-
btained. It follows that if there
en in reality no diversion, there
no restoration, and that the
t of restoration should be made
end upon the amount of diver-
The Supreme Court of the
States by Waite C. J., in Fos-
Schall, 99 U. S. 235.

ll be seen from an examination
other cases already considered
note that the rule laid down
"if there has been no diversion
an be no restoration," is sup-
by the language of the court in
the cases, and that the restora-
such diverted funds is regarded
courts as the true basis of the
to give priority to unsecured
There is reason, however, to ques-
ether the rule is in fact so strict.
lement of necessity has been
reat importance by some of the

cases. The question whether unsecured pre-existing debts may not be given priority even in the absence of such diversion of funds, therefore, requires examination, and will be found treated elsewhere. See *infra*, this title, *Relative Priority of Claims; Debts Contracted by Company Before Receivership; Priority Out of Corpus.*

A full explanation of the term "diversion of income," as used by the courts in discussing questions of priority, will be found elsewhere. See *infra*, this title, *Relative Priority of Claims; Debts Contracted by Company Before Receivership; Diversion of Income.*

2. See *supra*, this title, *Relative Priority of Claims; Debts Contracted Before Receivership; Power of Court to Give Priority.*

3. **Net Income.**—"The income out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment and useful improvements." The court by Waite, C. J., in Fosdick *v.* Schall, 99 U. S. 23, and the same language is used by Harlan, J., in Thomas *v.* Peoria, etc., R. Co., 36 Fed. Rep. 808; 36 Am. & Eng. R. Cas. 381.

Mortgagee Impliedly Accepts—"Every railroad mortgagee, in accepting his security, impliedly agrees that the current debts made in the ordinary course of business shall be paid from the cur-

some extent, a trustee of its receipts;[1] its duty is to apply
receipts, which constitute the "current debt fund," to the
ment of current charges. If, instead of doing this, the mon
used to pay interest or to make permanent improvements to
railroad, this is a misapplication of trust funds, and a cou
equity in administering the property, if the road while i
receiver's hands makes any profit (*i. e.*, net income), will a
such net income, to an amount equal to the amount of
diversion, to the payment of back debts for current oper
expenses, instead of to payment of interest or the improve
of the property.[2] Also, if the court uses its receiver's ne
come temporarily for the permanent improvement of the rail
property instead of paying such back debts, this will be tre
as in the nature of a loan, and upon the sale of the prop
back debts to the amount of the receiver's income so used
be paid out of the proceeds of the sale.[3] So, also, it has

rent receipts before he has any claim upon the income." The U. S. Supreme Court by Waite, C. J., in Fosdick *v.* Schall, 99 U. S. 235 "The presumption is that every railroad mortgagee, in accepting his security, impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income." The court by Harlan J., in Thomas *v.* Peoria, etc., R. Co., 36 Fed. Rep. 808; 36 Am. & Eng. R. Cas. 381; Burhnam *v.* Bowen, 111 U. S. 776; 17 Am. & Eng. R. Cas. 308.

1. **Company Is a Trustee.**—In a sense, the officers of the company are trustees of the earnings for the benefit of the different classes of creditors and the stockholders; and, if they give to one class of creditors that which properly belongs to another, the court may, upon an adjustment of the accounts, so use the income which comes into its hands as, if practicable, to restore the parties to their original equitable rights." The court, by Harlan, J., in Thomas *v.* Peoria, etc., R. Co., 36 Fed. Rep. 808; 36 Am. & Eng. R. Cas. 381.

2. **Restoration.**—"If anything is taken from the current debt fund, and put into that which belongs to the mortgage creditors, the court may require, as a condition of an order to take possession of the mortgage property, and hold the future income for the mortgagees, that the amount which is due from the earnings to the current debt shall be paid by the court from the future current receipts before anything derived from that source goes to the mortgagees; this, no
standing the mortgage may, in
give a lien upon the profits a
come; for, until possession o
mortgaged premises is actually
or something equivalent done
whole earnings belong to the
pany, and are subject to its co
The court, by Harlan, J., in Th
v. Peoria, etc., R. Co., 36 Fed.
808; 36 Am. & Eng. R. Cas. 381.

3. "In general, when the
gagees have come before the cou
property has been in a very c
dated condition. . . . The pr
therefore, has been, instead of i
diately directing the receiver t
for labor or supplies or mat
previously furnished, to expen
receipts in repairs of the road
thus adding to the security o
mortgagees by enhancing the va
the property. It has been th
that under the same equitable d
tion which has been heretofor
ferred to, this gave the operative
materialmen a just claim upo
property itself." The court, by I
mond, J., in Turner *v.* Indiana
etc., R. Co., 8 Biss. (U. S.) 315.

In Burhnam *v.* Bowen, 111
776; 17 Am. & Eng. R. Cas. 3
current income was used to pay
gage interest or to put permane
provements on the property or
crease the equipment. After the
went into the hands of the re
there was a net income amounti
about $25,000. This amount wa
to pay off a mortgage on c
real estate owned by the compan

that, even if the receiver has not applied net income to the ovement of the property, the court will, out of the proceeds e sale of the road, pay such back debts to the amount of iversion existing at the time the receiver was appointed.[1] the limitation as to time will apply, and may cut out quitable priority of back debts, even though there has been ersion.[2] It is the better practice for the court appoint- receiver to stipulate at the time what debts and lia- s of the railroad company shall be made a charge on property and paid by the receivers;[3] but if no such order

various right-of-way claims up- sale of the property. *Held*, that debt for coal should be paid the proceeds. The court, by C. J., said: "When the court he earnings of the receivership plied them to the payment of ed charges of the railroad, thus sing the security of the bond- s at the expense of the labor upply and creditors, there was diversion of what is denomi- the "current debt fund" as to it proper to require the mort- s to pay it back."

ailroad company issued bonds d by mortgage on its road and ises, but never paid any of the t which fell due thereupon. several years' default the mort- was foreclosed and a receiver ted. In making the appoint- the court of its own motion d the following order: "Said re- after paying the expenses of ing, maintaining and repairing ilroad and property, and after such other payments herein ized as are or may be necessary conduct of such receivership, ay and discharge all amounts d owing by such railroad com- or labor or supplies that may accrued in the operation and nance of such railroad property six months immediately pre- the rendition of this decree." the receivership the net earn- the road, after paying all op- expenses, exceeded $200,000. hole amount was, however, un- ders of the court, expended in sing additional grounds, rolling etc., and in making permanent and improvements. Upon a the railroad there was a defi- of $300,000 in the amount due the mortgage. There were also remaining unpaid for labor, supplies, etc., furnished within six months preceding the appointment of the receiver. The court ordered that out of the proceeds of the sale such claims for labor and supplies should be paid prior to the mortgagees. *Held*, that this was proper. Union Trust Co. *v.* Souther, 107 U. S. 591; 11 Am. & Eng. R. Cas. 707.

1. See *infra*, this title, *Relative Priority of Claims; Debts Contracted by Company Before Receivership; Priority Out of Corpus.*

The case of Burhnam *v.* Bowen, 111 U. S. 776; 17 Am. & Eng. R. Cas. 308, was a case in which the court was dealing with diversion of income for the improvement of the property by the trustees in possession, or by a receiver, and holds in such cases that the debts for operating expenses should be paid, if necessary, out of the *corpus* of the property.

2. See *supra*, this title, *Relative Priority of Claims; Debts Contracted by Company Before Receivership; Must Have Been Contracted Within Limited Time.*

3. **At Time of Appointment.**—"The better practice is for the judge or court appointing a receiver to stipulate at the time and as a condition of the appointment of a receiver what debts and liabilities of the railway company shall be made and charged on the property and paid by the receivers. If the mortgagee is unwilling to take a receiver on the terms imposed, the foreclosure can proceed without a receivership." Central Trust Co. *v.* St. Louis, etc., R. Co., 41 Fed. Rep. 551; 42 Am. & Eng. R. Cas. 26.

When "a court of chancery is asked by railroad mortgagees to appoint a receiver of railroad property pending proceedings for foreclosure, the court, in the exercise of a sound judicial discretion, may, as a condition of issuing

is made when the receiver is appointed it may be made a
wards.[1]

(5) *Priority Out of Corpus.*—The power to give "back de
preference over precedent liens is ordinarily restricted to
appropriation of the income of the receivership, but in the e
of a deficiency of income the *corpus* of the property will in s
cases be used in the same way, and such debts be made a ch
on the property, or else paid out of the proceeds of a sale the
It is well settled that this may be done where there has be
diversion of income,[2] but whether, in the absence of diver
the *corpus* may be so used is unsettled.[3]

the necessary order, impose such terms in reference to the payment, from the income during the receivership, of outstanding debts for labor, supplies, equipment or permanent improvement of the mortgaged property as may, under the circumstances of the particular case, appear to be reasonable." The court by Harlan, J., in Thomas *v.* Peoria, etc., R. Co., 36 Fed. Rep. 808; 36 Am. & Eng. R. Cas. 381.

1. **Subsequent.**—Fosdick *v.* Schall, 99 U. S. 235; Blair *v.* St. Louis, etc., R. Co., 22 Fed. Rep. 471; Central Trust Co. *v.* St. Louis, etc., R. Co., 41 Fed. Rep. 551; 42 Am. & Eng. R. Cas. 26.

"If no such order is made when the receiver is appointed, and it appears in the progress of the cause that bonded interest has been paid, additional equipment provided, or lasting and valuable improvements made out of earnings which ought in equity to have been employed to keep down debts for labor, supplies and the like, it is within the power of the court to use the income of the receivership to discharge obligations which, but for the diversion of funds, would have been paid in the ordinary course of business." The U. S. Supreme Court by Waite, C. J., in Fosdick *v.* Schall, 99 U. S. 235; same language in Thomas *v.* Peoria, etc., R. Co., 36 Fed. Rep. 808; 36 Am. & Eng. R. Cas. 381.

2. See *supra*, this title, *Debts Contracted by the Company Before Receivership; Certain Unsecured Debts Allowed Priority; Diversion of Income.*

In Fosdick *v.* Schall, 99 U. S. 235, the Supreme Court of the United States by Waite, C. J., said: "While ordinarily, this power is confined to the appropriation of the income of the receivership and the proce
moneyed assets that have been
from the company, cases may
where equity will require the
the proceeds of the sale of the
gaged property in the same
Thus it often happens that, i
course of the administration
cause, the court is called upon t
income which would otherwise
plied to the payment of old de
current expenses, and use it to
permanent improvements on th
property, or to buy additional
ment. In this way the value
mortgaged property is not
quently materially increased.
not to be supposed that any suc
of the income will be directed
court, without giving the par
interest an opportunity to be
against it. Generally, as we
both from observation and expe
all such orders are made at the r
of the parties or with their co
Under such circumstances, it i
to see that there may sometime
propriety in paying back to t
come, from the proceeds of th
what is thus again diverted fro
current debt fund in order to in
the value of the property sold.
same may sometimes be true
spect to expenditures before t
ceivership. No fixed and inf
rule can be laid down for the g
ment of the courts in all cases.
case will necessarily have its o
culiarities, which must to a gre
less extent influence the cha
when he comes to act."

3. See in general, *supra*, th
*Debts Contracted by the Co
Before Receivership; Certain
cured Debts Allowed Priority;
sion of Income.*

The courts have in terms laid

ule that the *corpus* can be used
ıy such debts only where there
een a diversion of income. Thus
Vood *v.* Guarantee Trust Co., 128
416, the Supreme Court said by
ar, J.: "The doctrine only ap-
where there is a diversion of the
ne of a 'going concern' from the
ose to which that income is equi-
entitled." In Farmers' L. & T.
. Green Bay, etc., R. Co., 45 Fed.
664; 46 Am. & Eng. R. Cas. 296,
Inited States circuit court for
E. D. Wisconsin, by Jenkins, J.,
"The gross income arising
the operation of a railway
d be first applied to the pay-
of the expenses of operation,
r equipments and needful im-
ments. If the income be di-
d to the payment of bonded in-
in disregard of the payment of
expenses, there should be restora-
to the original equitable right.
g diversion there can be no
ation. The amount of restora-
s dependent upon the amount of
ion." Language to the same
occurs in many other cases in
the subject was considered.
is evident, however, from the
age of the opinions, that some
have felt that there were other
ıs than diversion of income
would justify such payment out
corpus. Thus in Farmers' Loan
ust Co. *v.* Green Bay, etc., R.
46 Am. & Eng. R. Cas. 296, the
by Jenkins, J., qualified the
ıent of the strict rule by saying:
exercise of this equitable power
court is not, however, depend-
olely upon diversion of current
ses . . . but is exercised as
ı consideration of the fact that,
e of failure of trustee to take
sion upon default, it is indis-
ole to the preservation of the
rty, and its maintenance in in-
that it should be operated." In
nberger *v.* Logansport R. Co.,
J. S. 286; 12 Am. & Eng. R.
64, the court, by Blatchford, J.,
"It cannot be affirmed that no
which accrued before the
ıtment of a receiver can be
d in any case. Many circum-
s may exist which may make it
ary and indispensable to the
ss of the road and the preserva-
f the property for the receiver
y pre-existing debts of certain
out of the earnings of the re-
ceivership, or even the *corpus* of the property, under the order of the court, with a priority of lien. Yet the discretion to do so should be exercised with very great care. The payment of such debts stands *prima facie* on a different basis from the payment of claims arising under the receivership, while it may be brought within the principle of the latter by special circumstances. It is easy to see that the payment of unpaid debts for operating expenses accrued within ninety days, due by a railroad company suddenly deprived of the control of its property, due to operatives in its employ, whose cessation from work simultaneously is to be deprecated in the interest both of the property and of the public; and the payment of limited amounts due to other connecting lines of road for materials and repairs, and for unpaid ticket and freight balances, the outcome of indispensable business relations, where a stoppage of the continuance of such business relations would be a probable result in the case of non-payment; the general consequence involving largely also the interests and accommodation of travel and traffic, may well place such payments in the category of payments to preserve the mortgaged property, in a large sense by maintaining the good will and integrity of the enterprise, and entitle them to be made a first lien."

The extracts given above seem to show a conflict in the minds of the courts on this question, but it must be remembered that the remarks both *pro* and *con*, were to a great extent mere *dicta*. An examination of the cases will show that the decisions really rested upon undisputed principles, and that the remarks of the judges were purely argumentative, and adduced as additional reasons for rulings which were really not affected by the question whether claims would be allowed out of income but not out of *corpus*. In fact there seems to be no case in which the point has been squarely presented in such shape as to require a decision thereon. The facts in the cases are nearly always such as to cover every one of the various circumstances which have been suggested by the courts as warranting the exercise of the power to give priority to back claims, out of the *corpus*, or else there are ample reasons to justify refusal of priority to the claim regardless of the distinction between *corpus* and income. The allowance of

4. **Taxes.**—A railroad in the hands of a receiver is liab taxes in precisely the same manner as if there were no re ship. The lien of the State for such taxes, therefore, has th priority against a receiver as in ordinary cases, and the must be paid in preference to the claims of mortgagees. lien of the State for taxes has priority over all lien claims, except judicial costs.[1]

such claims out of the *corpus*, in the absence both of a diversion of income and of an estoppel growing out of permitting the road to continue in operation after notorious default in payment of mortgage interest, may be fairly regarded as an unsettled question. Such allowance, if upheld, must be based upon the necessity of the payment of the claims in order to keep the road a "going concern," as indicated in the quotation above from the opinion of Blatchford, J., in Miltenberger *v.* Logansport, etc., R. Co., 106 U. S. 286; 12 Am. & Eng. R. Cas. 464, and as supported by the remark of Drummond, J., in Turner *v.* Indianoplis, etc., R. Co., 8 Biss. (U. S.) 315, that "The experience of the court, which, it may be said, has been obtained by the management for many years of immense amounts of this kind of property, has satisfied it that practically it would be well-nigh impossible, looking at things as they actually exist, to operate the roads by receivers without some allowance for claims of the character mentioned existing at the time of their appointment."

1. Union Trust Co. *v.* Illinois & Midland R. Co., 117 U. S. 434; 25 Am. & Eng. R. Cas. 560; Perry Co. *v.* Selma, etc., R. Co., 65 Ala. 391; 7 Am. & Eng. R. Cas. 298; Philadelphia, etc., R. Co. *v.* Com., 104 Pa. St. 80; 13 Am. & Eng. R. Cas. 367; Union Trust Co. *v.* Weber, 96 Ill. 296; 3 Am. & Eng. R. Cas. 583; Com. *v.* Runk, 26 Pa. St. 235; Central Trust Co. *v.* New York City, etc., R. Co., 110 N. Y. 250; 35 Am. & Eng. R. Cas. 9; St. Joseph, etc., R. Co. *v.* Smith, 19 Kan. 225; Greeley *v.* Provident Sav. Bank, 98 Mo. 458; Georgia *v.* Atlantic, etc., R. Co., 3 Woods (U. S.) 434; Central Trust Co. *v.* Wabash, etc., R. Co., 26 Fed. Rep. 11.

In Georgia *v.* Atlantic, etc., R. Co., 3 Woods (U. S.) 434, the court by Bradley, J., said: "The lien of the State for its taxes is undoubtedly prior to all other liens whatsoever, except judicial costs, which are first to be paid where the property is rightfull custody of the law."

In the case of Philadelph R. Co. *v.* Com., 104 Pa. St Am. & Eng. R. Cas. 367, ceivers claimed that their while operating the road were n to a State tax upon gross receip court by Gordon, J., said: "Th gross receipts were taxable by the act of 1879 there can be n and if they were not to be against the Phila. & Reading we know not who was to acc them. If the owner of this was not to bear the burden of th charges against it, we are at a know upon whom they shou The receivers . . . were neither of these receipts nor property whence they were . . . The decree of the circu made no change in the title property. The receivers . nothing but a qualified right to ceipts which by force of that came into their possession. T the right to receive them, but the purpose of applying them debts of the company. . . . this was the defendant's prop was used for the defendant's be cannot see to whom else th could properly have been charg best the defendant's controvers technical, for had the amou settled against the receivers, The money to pay the taxes all events come from the purs company. In either event the c wealth was entitled to her ta that the owner of the propert should be made to pay the upon it, is a conclusion that is and reasonable."

In Commonwealth *v.* Runk St. 235, suit was brought again ceiver to recover tax upon the stock of the company which some prior to the receiver's ment. *Held*, that the property receiver's hands was liable taxes.

stinction Between Tax on Franchises on Property.—A distinction has drawn between a tax upon the orate franchise as distinguished a tax upon the property. Thus om. *v.* Lancaster Sav. Bank, 123 . 493, it was held that after the ap- ment of a receiver, the savings was not liable to a state tax on verage amount of deposits, because e decree appointing the receiver, ompany was prohibited by injunc- from transacting any further busi- Since this tax was a tax upon ranchise, the court considered that the company was forbidden to r exercise the franchise, there was ng on which a valid tax could be

is principle is not applicable to re- rs of railroads, because the re- r continues to operate the road by e of the franchises conferred upon company by the State. Central t Co. *v.* New York City, etc., R. 110 N. Y. 250; 35 Am. & Eng. R. 9.

de of Collection.—The mode of col- g such tax is not affected by the ntment of the receiver, and the rty in the hands of the receiver is to execution in the same manner it were still in possession of the any.

Central Trust Co. *v.* Wabash, etc., o., 26 Fed Rep. 11, a collector of levied on an engine belonging to ompany, which was in the hands receiver appointed by the United s court. A petition was made by eceiver for an attachment against ollector. The court refused the cation saying by Brewer, J.: "It represented in the petition that xes are not just and legal, or that are not due. The statutes of Mis- make it the duty of the collector, taxes are not paid, to issue his nt and seize the property, and he same as upon execution. It is sted that there is no danger of roperty being placed beyond the liction of the county and no doubt at the taxes will be paid in a few and it is intimated that perhaps ollector is proceeding summarily s way for the mere sake of obtain- e fees which the statute authorizes to charge whenever he makes a Be that as it may; I think that ying and collecting taxes the State ercising its sovereign power, and there should be no interference with its collection of those taxes in its prescribed and regular methods, even by a court having property in the possession of its receivers, unless it is first charged that the taxes are in some way illegal or excessive. The mere fact that the receivers have no money on hand to pay the taxes is no excuse for stopping the process of the State for their collection. It may be hard for the road to pay these taxes, but it can be no harder for a corporation in the hands of receivers to pay taxes than it is for an individual, and the remedy of the State is in each case the same."

Georgia *v.* Atlantic, etc., R. Co., 3 Woods (U. S.) 434, was a case in which a tax execution had been levied on the depots, freight houses, passenger houses and offices of the company. The levy had been suspended by an affidavit of illegality filed by the railroad company. Section 3669 of the Code (*Georgia*) provides: "When an execution has been levied on property, and an affidavit of illegality filed to stay proceedings, the property so levied on shall be subject to levy and sale under other execution, and the officer making the first levy shall claim, receive, hold and retain such amount of the proceeds of the sale as the court shall deem sufficient to pay the execution first levied." Subsequently a receiver was appointed by the United States court. On an application by the State to sell under the tax levy, the court denied the application, saying by Bradley, J.: "We have no doubt that this release of the property in favor of a subsequent execution inures to the benefit of executions issued by the circuit court of the United States, sitting in Georgia, as well as to those issued by a State court. . . . We think, also, that the equity of the statute applies to a taking possession by a receiver under an order of court, as well as a levy under execution. . . . The receiver holds it, as a sheriff would, subject to the prior lien of the execution which is being contested. That lien is not disturbed. The court will take care not only that it shall be respected, but will see that no injustice shall be done to the execution creditor by any unreasonable delay in satisfying his claim." And again: "The lien of the State for its taxes is undoubtedly prior to all other liens whatsoever, except judicial costs, which are first to be paid where the property is rightfully in the custody of the law."

X. **Suits.**—The law relating to suits by and against recei is the same in the case of receiverships over railroads as in o cases, and is fully treated elsewhere.[1] One class of acti those for damages caused by the negligence of employés of receiver in the operation of the railroad, are peculiar to recei of railroads, and will be found separately treated.[2]

XI. **Compensation of Railroad Receivers.**—The compensa paid to receivers of the property of railroad corporations is allowed upon the same basis as that upon which other ceivers are paid for their services. The court selects a pe whom it regards as competent and trustworthy; and the am of his compensation is graduated somewhat by the duties somewhat by the responsibilities of the situation. Whe receiver is a manager as well as a mere receiver, his duties responsibilities are largely increased; and the management business like that of a railroad is one of the most difficult responsible duties that a receiver is charged with. It requi man of first-rate qualities and attainments;[3] the compensa should, therefore, be liberal.[4] And, owing to the unexpe

Restriction on Mode of Execution.—It is readily seen that a railroad is peculiar property, and whether an execution either for taxes or other claims, would be permitted in such a mode as render the operation of the road impossible, may well be questioned. In Georgia *v.* Atlantic, etc., R. Co., 3 Woods (U. S.) 434, the refusal to allow sale for taxes of depots and offices of a railroad company was based upon other reasons. (See *supra*, this note.) But the court by Bradley, J., took occasion to say: "A railroad is a public highway, and a highway of a most peculiar kind. It is not land, nor like land, in the ordinary sense. For though, in form, the railroad company may own the fee, or some other legal estate in the strip of land on which the road is constructed, yet the company owns it and holds it under a franchise for a particular purpose—namely, that of a road-way for the operation of a railroad under and by virtue of the franchises which have been conferred upon it, and for the purposes of travel and transportation thereon by the public. It is an artery of commerce; it is the means of communication between one part of the country and another. The interest which the public has in it is greater and more important than the interest which the company has in it. It cannot be supposed that the legislature, in authorizing its construction, and granting peculiar franchises for its operation and use ever intended execution creditors might levy parcels of it, and cut it up into se and destroy it as a great public roughfare. . . . Suppose a m the road should be levied on and Would the purchaser have a rig fence it in and take up the rails cross-ties, and plant it, and th destroy the railroad? Could th done without contemning the pow the State by which it was created made a public highway?"

1. See in general Receivers, edies Concerning, vol. 20, pp. *et seq.;* Receiver's Title, vol. 2 126, *et seq.;* Receiver's Possess vol. 20, pp. 137, *et seq.* As re the right of set-off in connection Receivers, see Receivers, vol. 135.

2. See, *supra*, this title, *Liabili Railroad Receivers, Damage Ar from Negligence and Torts Du Receivership.*

3. Cowdrey *v.* Railroad Co., 1 W (U. S.) 331. See, title, Recei *Compensation Allowed*, where matter of the compensation all railroad receivers is fully treated, also his duty to account.

4. McArthur *v.* Montclair R. C N. J. Eq. 77.

Sometimes the salary of the pres of the road is fixed upon as th ceiver's compensation. Malory Brown, 12 Heisk. Tenn. 597.

arduous duties he is frequently called upon to perform, a iver of a railroad may be allowed additional compensation.[1]

II. **Removal or Discharge.**—The principles and practice relat- to the removal or discharge of receivers in general apply

e this is the case, or indeed where eceiver agrees to act for any fixed he will not be allowed more on the that his duties have proved more ous than he expected. Farmers' T. Co. *v.* Central R. Co., 2 Mc- y (U. S.) 318.

should, however, be remembered in many instances, the president's y is a very inadequate compensa- for the receiver. The road is apt e time it passes into his hands to a state of disorganization which res consummate skill and ability on part of the receiver, and a much er expenditure of time and labor is expected from the president of oad in its ordinary management. compensation should be graduated dingly. Cowdrey *v.* Railroad Co., ods (U. S.) 331.

foreclosure proceedings it ap- ed that the trustees and receivers acted originally to render their ces for the sum of $1,500, and that were paid such sum up to the be- ng of the litigation; that since itigation commenced they have paid by allowances by the court em as receivers, and by appropri- by themselves as trustees, at the of $4,500 per year. The services ered were not exclusive of their ess, and did not take all or nearly f their time, and there was no responsibility requiring extraor- y compensation. *Held*, that they been amply compensated, and an extra allowance was improper. on *v.* Houston, etc., R. Co., 40 Fed. 189.

It is the duty of the receiver to rm his duties with fidelity and omy, and to so manage the affairs e company as to make the least ble expenditure. He is not, fore, entitled to extra compensa- for uniting the offices of auditor cashier, and for disbursing the y for debts contracted by his cessor. Farmers' L. & T. Co. *v.* ral R. Co., 2 McCrary (U. S.) 318. not, therefore, required to him- perform any other duties than strictly executive. Hence, if he extra work for the company and travels beyond office hours and at night; if he takes upon himself the duties of superintendent and appears as attorney for the company so as to save it counsel fees, he is entitled to additional compensation for these services. So, also, where he is suddenly and unexpectedly called upon by the court to furnish accounts and statements to be used in the course of pending litigation, he is entitled to extra compensation. Farmers' L. & T. Co. *v.* Central R. Co., 2 McCrary (U. S.) 318.

In Central Trust Co. *v.* Wabash, St. L. & P. R. Co., 32 Fed. Rep. 187, Brewer, J., observes: "The question of allowances is a judicial one, and while it is said the matter is left to the discretion of the court, it is discretionary only in the sense that there are no fixed rules to determine the proper allowance, and is not discretionary in the sense that the courts are at liberty to give anything more than a fair and reasonable compensation. We desire to see the officers and agents of the court well paid, in order that men of character and ability may be willing to accept the burdens and responsibilities of these trusts; but at the same time we may not forget that the property to be charged with these allowances is not ours, that there are many thousands scattered all over the land who are the owners, whose property, by the strong hand of the law, has been taken out of their custody, and who look to us to see that no unjust or excessive burden is cast upon them. We may not exercise the generosity of owners, but are closely limited to the justice of judges. Our duties are as sacred, our responsibilities more solemn than those of any other parties connected with this foreclosure, for our action is almost certainly final."

In Easton *v.* Houston & T. C. R. Co., 40 Fed. Rep. 189, on foreclosure proceedings, it appeared that the trustees and receivers contracted originally to render their services for the sum of $1,500, and that they were paid such sum up to the beginning of the litigation; that since the litigation commenced they have been paid by allow-

also to the removal or discharge of receivers of railroad co
tions, and the subject has been fully treated elsewhere.[1]

RECEIVING STOLEN PROPERTY.—(See also LARCENY,
12, p. 760.)

I. Definition, 440.
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I. **DEFINITION.**—The offense of receiving stolen proper
committed when a person receives into his possession, with
nious intent, any stolen goods or chattels, with knowledge
they have been stolen.[2]

II. **NATURE OF THE OFFENSE.**—At common law the offen
receiving stolen property was a misdemeanor merely and
receiver was punished for misprision of felony. He migl
punished as an accessory after the fact if he harbored or ass

ances by the court to them as receivers, and by appropriation by themselves as trustees, at the rate of $4,500 per year. The services rendered were not exclusive of their business, and did not take all or nearly all of their time, and there was no great responsibility requiring extraordinary compensation. *Held*, that they had been amply compensated, and that an extra allowance was improper.

In McArthur *v.* Montclair R. Co., 27 N. J. Eq. 77, the chancellor observes: "The master has reported that two of the trustees should receive for their compensation $3,000 each, and the other about $1,400. The usual practice of appointing but a single receiver was departed from in this case at the instance of the representatives of the different interests in the trust property. The gentlemen selected were chosen for their fitness for the discharge of the various duties which were to be devolved upon them in the management of the railroad, and the examination of the affairs of the company. They were all men of experience in business, one in the management of trusts, another in the superintendence of railroads, and the third in financial affairs. They appear to have necessarily devoted much time during a period of two years to the interests of the trust (which involv
sale of the road), and to have bee
diligent and thorough in their att
to, and discharge of their duties.
amount reported by the master
not to be unreasonable."

1. See title, RECEIVERS, *Re*
or Discharge.

2. See the statutes of the v
States defining the offense. The
York statute is as follows: "A
who buys or receives any stolen
erty, or any property which has
wrongfully appropriated in s
manner as to constitute larceny a
ing to this chapter, knowing the
to have been stolen or so deal
or who corruptly, for any r
property, reward, or promise or
ment for the same, conceals,
holds, or aids in concealing or
holding any property, knowin
same to have been stolen, or
priated wrongfully in such a m
as to constitute larceny under th
visions of this chapter, if such
propriation had been committed
the State, whether such property
so stolen or misappropriated wit
without the State, is guilty of
nally receiving such property,
punishable, by imprisonment
State prison for not more tha

thief, but not otherwise.[1] One may be a receiver under the tute who would not be an accessory at common law.[2] But by tute in *England* the receiver of stolen property was made nishable as an accessory after the fact to the felony.[3]

Subsequent statutes have been passed in *England*, from time to e, defining the offense and determining the punishment for it.[4] the present *English* statute[5] the offense of receiving is made elony, and the receiver may be indicted either as an accessory er the fact or for a substantive felony; and in the latter case, ether the principal offender shall have been convicted or not, whether or not he shall be amenable to justice. Most, if not of the States of the Union have followed the *English* statutes l have made the offense a distinct offense,[6] punishable in some

rs, or in a county jail for not more n six months, or by a fine of not re than two hundred and fifty lars, or by both such fine and imonment." *New York* Penal Code, 0.

People *v.* Teal, 1 Wheel. Cr. Cas. Y.) 199, n; 1 Bishop Cr. Law n ed.), § 699.

Anonymous, 2 East P. C. 765.

3 W. & M., ch. 9, § 4.

After the enactment of this statute indictment for receiving as a misneanor would lie, because the ofse was merged in the felony. State Hodges, 55 Md. 127.

The statute of 5 Anne, ch. 31, §§ 5, eclared that the receiving of stolen ds, knowing them to have been stoland the receiving or harboring of thief, made the person so offending accessory after the fact; but, if the ncipal felon could not be taken, so o be prosecuted and convicted, the eiver might be prosecuted for a demeanor.

Under this statute it was held in lkes' Case, 1 Leach Cr. L. 103, that ceiver of stolen goods might be secuted and convicted of the ofse as a misdemeanor although the ncipal felon was known, unless it eared from the finding of the jury, t the principal was out of custody by usion and could have been taken convicted when the indictment inst the receiver was found.

n State *v.* Hodges, 55 Md. 127, it held that the statute of 5 Anne ned a part of the common law of *ryland*.

The statute of 7 & 8, Geo. IV, made felony to receive only. After that ute it was no longer a felony to buy ess there was also a receiving.

In Rex *v.* Cole, 1 M. C. C. 11, the court held that the statute 3 Geo. IV "leaves as misdemeanors what before were misdemeanors, and one convicted of receiving stolen goods could not be punished as a felon."

5. The statutes 24 and 25 Vict., ch. 96, § 91, provides that the receiver of stolen property shall be guilty of felony when the "stealing, taking, extorting, obtaining, embezzling, or otherwise disposing" of such property amounts to a felony either at common law or by statute. Where the principal offense is a misdemeanor only, and only in such a case, the receiving is a misdemeanor. Reg. *v.* Smith, 39 L. J., M. C. 112.

6. Wright *v.* State, 5 Yerg. (Tenn.) 154; 26 Am. Dec. 258; State *v.* Weston, 9 Conn. 527; 25 Am. Dec. 46; Shriedley *v.* State, 23 Ohio St. 130; People *v.* Reynolds, 2 Mich. 422; Bicber *v.* State, 45 Ga. 569; State *v.* Hodges, 55 Md. 127; State *v.* Brien, 53 Hun (N. Y.) 496; People *v.* Maxwell, 24 Cal. 14; State *v.* Stroud, 95 N. Car. 626; Allison *v.* Com., 83 Ky. 255; Com. *v.* Barry, 116 Mass. 1.

In *Illinois* it is provided that "Every person who, for his own gain, or to prevent the owner from again possessing his property, shall buy, receive, or aid in concealing stolen goods or anything the stealing of which is declared to be larceny, or property obtained by robbery or burglary, knowing the same to have been so obtained, shall be imprisoned in the penitentiary not less than one year nor more than ten years; or if such goods, or other property or thing does not exceed the value of fifteen dollars, he shall be fined not exceeding one thousand dollars and confined in the county jail not exceeding

States as a misdemeanor,[1] in others as a felony.[2] The chara or grade of the offense does not depend upon the value of property.[3]

III. **Essentials—1. Stolen Property**—*a.* In General.—I essential, first, that the property which the accused is cha with receiving should have been stolen.[4]

b. The Stealing.—As a general rule the terms stealing larceny are used interchangeably.[5] But the statutes agains ceiving apply not only to goods taken by larceny but als goods taken by robbery and burglary.[6] Without statutory vision embezzlement does not amount to a stealing within meaning of the statutes against receiving stolen property.[7]

one year." *Illinois* Rev. Stat. 1885, 239.

In *Ohio*, the provision is as follows: "Whoever buys, receives or conceals anything of value which has been stolen, taken by robbers, embezzled, or obtained by false pretense shall be deemed guilty of larceny and punished accordingly." *Ohio* Rev. Stat. 1889, § 6858.

1. In *Maryland* receiving has always been regarded as a misdemeanor. State *v.* Hodges, 55 Md. 127.

In *Georgia* also the offense is a misdemeanor, and the receiver may be convicted as an accessory after the fact. Edwards *v.* State, 80 Ga. 127.

2. So in the majority of the States. In some States the receiver is by statute an accessory after the fact but is punishable independent of the thief.

In *Connecticut* it is provided that, "Every person who shall receive and conceal any stolen goods or articles, knowing them to be stolen, shall be proceeded against as a principal, although the person who committed the theft be not convicted thereof; and shall be prosecuted and tried before the same court and punished in the same manner as if he had been the principal."

Under this statute the receiver may be charged with the original crime. State *v.* Ward, 49 Conn. 429.

3. It is not necessary to prove that the defendant received all the property or that the part he did receive was of a particular value. People *v.* Fitzpatrick, 80 Cal. 538.

In *Ohio*, however, a receiver, to be punishable as a felon, must have received property of the value of thirty-five dollars or upwards. State *v.* Pardee, 37 Ohio St. 63. See also, Tobin *v.* People, 104 Ill. 565.

4. In Wilson *v.* State, 12 Tex. 481, the court by Wilson, J., "Before the defendant can be pro convicted it must be proved bey reasonable doubt first, that the erty was acquired by theft; se that knowing it to have been s quired he concealed the same." also, Arcid *v.* State, 26 Tex. App

In State *v.* Caveness, 78 N. Ca the court by Bynum, J., said: be guilty the defendant must known at the moment of receivi that it had been stolen and mu that time have received it with nious intent."

Under the Criminal Code of *Ill* in order to convict it is necessa show, first, that the property stolen; second, that the accuse ceived the goods knowing them to been stolen, guilty knowledge an essential ingredient; third, tha accused for his own gain, or to pr the owner from recovering, bough ceived or aided in concealing the goods. Aldrich *v.* People, 101 Ill.

If an indictment be presented c ing, in one court, one defendant the larceny of certain goods, a another court, another defendant receiving the same goods, kno them to have been stolen, and th fendant be acquitted of larceny, necessitates the discharge of the defendant. State *v.* Antonie, 42 Ann. 945. See Edwards *v.* Sta Ga. 127; Com. *v.* King, 9 Cush. (M 284; Com. *v.* Elisha, 3 Gray (M 460; Owen *v.* State, 52 Ind. 379.

5. Campbell *v.* State, 22 Tex. 262.

6. 2 Bishop Crim. Law (7th e 1141.

7. Receiving stolen property offense distinct from the offen

generally the statutes declare that any one convicted of zzling "shall be deemed to have feloniously stolen" the rty embezzled. Where this provision exists, embezzlement ealing within the meaning of the statutes against receiving.[1] ods taken by a wife from her husband are not stolen goods; ho receives such goods cannot be convicted of receiving.[2] tner who disposes of the goods of the firm in fraud of the ership is not guilty of such a stealing as will make one who ases such goods with knowledge of the circumstances liable ceiving.[3]

THE PROPERTY.[4]—The goods must retain their character len at the time when the act of receiving is consummated. lefendant cannot be convicted if the goods are stopped *in tu* and redelivered to the owner and by him given again to ief for the purpose of entrapping the receiver.[5] The in- f the receiver in such a case is immaterial, since the goods longer stolen.

ng embezzled property. Com. nard, 140 Mass. 473; 54 Am. 85.

iving embezzled property is thin the penal code of *Texas*. State, 12 Tex. App. 279.

was indicted for embezzling ods and for larceny of H's B for receiving goods, the ty of H, knowing them to be A was found guilty of embez- only, and B for feloniously re- . *Held*, that the conviction ght, for 7 & 8 Geo. IV, ch. 29, § cts that every person who has zled within the meaning of that "shall be deemed to have fel- ly stolen from his master," and, ing so, B's offense was proper- ribed in the court for receiving. . Frampton, 8 Cox C. C. 16.

present English statute covers embezzled and goods obtained e pretenses.

New York larceny includes not e offense at common law but bezzlement, obtaining money lse pretenses and felonious es of trust. People *v.* Dumar, Y. 502.

hio the statute against receiving to property that has been , taken by robbers, embezzled, ined by false pretenses." *Ohio* tat. 1889, § 6858.

wa, the crime may be commit- to property procured by burg- robbery as well as by larceny. . Turner, 19 Iowa 144; State *v.* 58 Iowa 384.

2. Reg. *v.* Kenny, 13 Cox C. C. 397.
3. Reg. *v.* Smith, 39 L. J., M. C. 112.
4. See LARCENY, vol. 12, p. 781.

Promissory notes do not come within the meaning of the words "goods and chattels." Rex *v.* Gage, Russ. & R. C. C. 383.

Bank notes are not "goods and chattels." Boyd's Case, 3 City Hall Rec. (N. Y.) 134; State *v.* Calvin, 22 N. J. L. 207.

5. In Reg. *v.* Dolan, 6 Cox C. C. 449, the facts were these: Stolen goods were found by the owner in the pockets of the thief. A policeman was sent for who took the goods and subsequently returned them to the thief who was then sent by the master to sell them where he had sold others. He sold them at the shop of D, who was tried and convicted of receiving the goods knowing them to have been stolen. *Held*, that the conviction was wrong as the facts did not constitute a receiving within the statute. Cresswell, J., said: "If it were necessary to hold that the policeman, by taking the stolen goods out of the pocket of Rogers, restored the possession of them to the owner, I should dissent. The goods in the policeman's hands were in the custody of the law and the master could not have brought trover for them; but when they were given back to Rogers, and the master desired him to go and sell them, the master, I think, may be said to have employed Rogers for that purpose."

In another case a boy was detained as he was leaving his master's prem-

2. **Receiving.**—To constitute the offense the property have been received and taken into possession by the acc The receipt must have been from the thief, or from one for, or on behalf of the thief.[2] Without an actual or con

ises, and a policeman sent for who searched him and took a stolen cigar from him in the master's presence. In consequence of the boy's statement, the cigar was returned to him together with five others by the policeman who had searched him, still in the master's presence. The six cigars were then taken by the boy to the prisoner and given to him. *Held*, that the prisoner could not be convicted of feloniously receiving the cigars knowing them to be stolen, since they were not stolen property at the time they were received, the master and the policeman having acted in concert in supplying the boy with the six cigars and in instructing him what to do with them.

In this case, Cockburn, C. J., said: "At the time the cigar was received by the prisoner it had been reduced into the possession of the master, or, if you please, of the police, and Hancock was then employed as an instrument to detect Baker. . . . In Reg. *v.* Dolan, Lord Campbell evidently assumed that what was done in that case by the police was done in concert with the master. I should infer the same in the present case. . . . The present case is undistinguishable in principle from Reg. *v.* Dolan, and the conviction must be quashed."

In this case Huddleston, B., in commenting on the opinion of Cresswell, J., in Reg. *v.* Dolan, said: "That learned judge treated the thief as the agent of the master for the purpose of detecting the receiver." Reg. *v.* Hancock, 14 Cox C. C. 119.

In Reg. *v.* Schmidt, 10 Cox C. C. 172, a prisoner was convicted of feloniously receiving stolen goods under circumstances as follows: The goods were stolen and sent by the thief in a parcel by railway addressed to the prisoner. A policeman belonging to the railway company, from information he had received, examined the parcel at the railway station, at the place of its destination, and stopped it. It was called for by one of the thieves on the day of its arrival and refused to him. A porter of the company, the next day, by the direction of the policeman, took it to a house which the thief who had called for it designated, and there received by the prisoner. that the conviction was wrong, goods had ceased to be stolen within the meaning of the sta the time of receipt by the priso

In a prosecution for receivin postage stamps, the proof was t thief deposited them in an exp fice directed to the defendant, ter arrest gave a written order property to a postmaster wh them, and subsequently, by o the Post-Office Department, r ited them in the express office a were forwarded to the defend received them. *Held*, that th acter of the stamps as stolen p ceased in the hands of the pos and there could be no convicti S. *v.* De Bare, 6 Biss. (U. S.) 3

1. Farina *v.* Home, 16 M. & Com. *v.* Sheriff, 3 Brewst. (P Reg. *v.* Hill, 3 Cox C. C. 533.

The defendant must not onl had possession of the proper must have done somethin amounted to a receiving. J State, 14 Ind. 346; Reg. *v.* Wo 9 Cox C. C. 95.

2. Com. *v.* White, 123 Mass. Am. Rep. 116; Owen *v.* State, 379.

One who receives from a gu ceiver cannot be convicted of ing stolen property. State *v.* Ired. (N. Car.) 338; U. S. *v.* I 6 Biss. (U. S.) 358.

But where one partner stolen property without the kno of the other, and the other aft takes charge of it, both are g receiving. Sanderson *v.* Com., L. Rep. 341.

The statutes generally presc punishment of "every person w buy, receive, or aid in the conce of stolen goods, knowing the s have been stolen," and it has be that such statutes describe on offense, which may be commit one of three ways, and that a c ant charged with receiving and in the concealment of stolen g charged with only one offen may be sentenced on convict

possession by the accused, an indictment cannot be sus-
ed.[1] It is not necessary that there should be a manual pos-
on, but it is sufficient that the property is under the control
ne accused so that he can direct the disposal of it.[2]

g in the concealment of the goods
gh the charge of receiving be not
ed. State *v.* Nelson, 29 Me. 329;
ens *v.* Com., 6 Met. (Mass.) 241;
v. Montgomery, 3 Sawy. (U. S.)

oncealing, under the statute, in-
es all acts which tend to render
iscovery of the property difficult,
as attempting to destroy the
ns of its identification. State *v.*
d, 49 Conn. 429.

the persons who committed the
ny placed the stolen property in
house of the defendant, who,
ving it to be stolen property
ed there for him, took control of
fraudulently deprive the owner
his property, the defendant is
y of receiving. Sanderson *v.*
., 11 Ky. L. Rep. 341.

prisoner admits having bought an
le which is subsequently found in
ouse; that is sufficient evidence
jury to convict of receiving with-
roof of an actual receipt or that
ad ever been at the house from
e the purchase to the time of the
ge. Reg. *v.* Matthews, 1 Den.
. 596.

Reg. *v.* Hill, 1 Den. C. C. 453;
v. Wiley, 4 Cox C. C. 412.

the latter case the facts were as
ws: Two men, having stolen
fowls, had put them into a sack
carried them into the house of the
ner's father at about half past
o'clock in the morning. After
ining in the house about ten
tes the two men were seen to
out of a back door, one of them
ing the sack, and the prisoner go-
efore with a light. The stable
was closed by one of the party
when the policeman entered he
d the two thieves and the pris-
standing around the sack, which
n the floor untied, as if bargain-
for the fowls. *Held*, that this
not a receiving within the stat-

It is sufficient if it be shown that
goods were received by the
t or servant of the accused, or
s instigation deposited in some
directed by him, he knowing
they were stolen. State *v.* Stroud,
95 N. Car. 626.

There may be a personal possession
without a manual possession. Reg.
v. Rogers, 2 M. C. C. 85; Reg. *v.*
Gerrisch, 2 M. & R. 219; Reg. *v.*
Smith, 6 Cox C. C. 554.

In the case last cited, the prisoner
was charged with feloniously receiv-
ing a stolen watch. It was proved
that the prisoner, who had been pres-
ent at the time when the watch was
stolen, afterwards went to the prose-
cutor and offered to get it back for
him. The prosecutor agreed to pay
a sum of money and sent a woman
with the prisoner to get the watch.
They went to a room, where was an-
other man who placed the watch upon
the table; and the prisoner directed
the woman to take it to the prose-
cutor, which she did. The jury were
directed that if they believed the pris-
oner knew the watch to have been
stolen, and also believed that it was
in custody of another person with
the cognizance of the prisoner, that
person being one over whom the
prisoner had absolute control, so that
the watch would be forthcoming if he
ordered it, there was ample evidence
to justify conviction.

In Reg. *v.* Miller, 6 Cox C. C. 353,
the facts were as follows: Some
stolen property was brought by the
thief into A's shop. A, knowing the
goods to be stolen, called a servant
and directed her to take the stolen
goods to a pawn office and "pawn
them for the girl." A's servant did
so, and brought back the money
which she handed to the thief in her
mistress's presence. A never had
manual possession of either the goods
or the money. *Held*, that this amount-
ed to a receiving by A of the stolen
property.

In another case A was indicted for
feloniously receiving a watch and a
hat. It was proved that a policeman,
in consequence of information re-
ceived from B (the thief), went to a
room in a lodging house where A
slept, and in a box in that room found
the hat. A admitted that the hat had
been brought there by B, but denied all

But while a control is sufficient to constitute possession it be clear that such control existed.[1]

The possession of the receiver must be with the free will o thief.[2] To take goods from the thief without his consent commit larceny.[3] It is not necessary that the whole of the erty should have come into the possession of the accused. enough if he received one of several articles. Neither is quired that he should have received all the property at one ti

The possession of property for which the property stolen been exchanged is not sufficient. But a change in form is material, so long as the substance of the property stolen has preserved.[5] A husband may adopt his wife's act of receivi as to make it his own receipt.[6] But an adoption of the wife ceipt, in the sense of a mere passive consent to it, is not suffi to constitute receipt by the husband.[7]

3. **Guilty Knowledge.**—To be guilty of the offense the acc must have known at the time he received the property th

knowledge of the watch. On the following day A was taken into custody, and he then told the policeman that he knew where the watch was, but did not like to say anything about it before the people of the house. A then took the policeman to a place where he said the watch was, but it was not found there; but he afterwards sent a boy for the watch, and on the boy bringing it to A, he gave it to the policeman. *Held*, that there was sufficient evidence to go to the jury. Reg. *v.* Hobson, Dears. C. C. 400.

1. Reg. *v.* Wiley, 4 Cox C. C. 412.

2. While W and L were in custody together, W told L that he had 'planted' a watch, which he had stolen from A, under a flag in the soot-cellar of L's house. After this, L was discharged and went to the flag and took up the watch and sent his wife to pawn it. *Held*, that, if L thus took the watch in consequence of W's information, W telling L in order that he might use the information by taking the watch, L was indictable for this as a receiver of stolen goods; but that, if this was an act done by L in opposition to W, or against his will, it might be a question whether it would be a receiving. Reg. *v* Wade, 1 C. & K. 739.

3. 2 Bishop Crim. Law (7th ed.), § 781.

4. People *v.* Wiley, 3 Hill (N. Y.) 194.

5. When the accused has possession of coin made from stolen gold dust it is sufficient possession to constitute the offense. U. S. *v.* Montgomery, 3 (U. S.) 544. And see Com. *v.* W 123 Mass. 430; 25 Am. Rep. 116.

A charge that the defendants their own gain knowingly and f ously received one gold coin o value of ten dollars, one bill, pu ing to be issued by the Monmouth tional Bank, of the value of ten d and one bill, purporting to be issu same national bank, of the value dollars, is not sustained by the mony of a witness that he foun one of the defendants, ten dollars on the other fifteen dollars and small change, as it does not sho it was of the kind and character tioned in the indictment. Willia People, 101 Ill. 382.

6. Stolen goods were delivere the thief to the wife of the prison his absence. She paid sixpence c count, but the amount to be paid not then agreed upon. The pr and the thief afterwards met agreed upon the price, and the p er, knowing that the goods were s paid the balance. *Held*, that he properly convicted of receiving. *v.* Woodward, 9 Cox C. C. 95.

7. A wife received stolen goods out the control, or knowledge o apart from, her husband, and the found that he afterwards "adopted act. He was convicted on a char receiving; but the conviction quashed because the court though the jury might have used the "adopted" to signify that the hu

stolen.[1] But the knowledge need not be that of an eye-ness, nor absolute. If the circumstances under which it was eived were such as would have led a man of ordinary prudence understanding to believe that it was stolen, it is sufficient.[2]

Felonious Intent.—To constitute the crime it is essential that accused received the property with a felonious or fraudulent nt.[3] If the intent be honest the offense is not committed.[4] he property was received for the purpose of preventing it from ng reclaimed by the owner,[5] or to prevent the discovery of thief,[6] or as a means to induce the owner to pay a reward for return,[7] this will constitute the corrupt intent required. But

ore than passively consented to wife's act. Reg. *v.* Dring, 7 Cox C. 82.

r further illustration of what will what will not constitute a sufficient ipt, see Reg. *v.* Brooks, 6 Cox C. 48; Reg. *v.* Kenny, 13 Cox C. C.

Wilson *v.* State, 12 Tex. App. 481; onnell *v.* State, 55 Ga. 296; State odges, 55 Md. 130; May *v.* People, ll. 119; Aldrich *v.* People, 101 Ill. State *v.* Caveness, 78 N. Car. 484; ple *v.* Teal, 1 Wheel. Cr. Cas. (N. 199; Reg. *v.* Wood, 1 F. & F.

Reg. *v.* White, 1 F. & F. 665; . *v.* Finn, 108 Mass. 466.

Com. *v.* Leonard, 140 Mass. 473; m. Rep. 485, the court by Field, J., "If the property had actually stolen, a belief on the part of the ndant is tantamount to knowledge. e defendant knew the facts but ght that they constituted embezzle-, this is no defense if they consti- larceny.

the defendant did not know the but thought from the circum-es that the property had been em-led or stolen, and it was stolen, he be found guilty of receiving stolen s."

is sufficient that the defendant had reason to believe that the goods stolen. Tully *v.* Com., 13 Bush) 142.

here circumstances warrant the lusion that the goods were stolen they were traced to the possession e defendant under circumstances cient to make him believe that they stolen, this is sufficient to warrant nviction. Frank *v.* State, 67 Miss.

ods Found.—In the case of goods d it is not sufficient that the prisoner has a general knowledge of the circumstances under which the goods were taken unless it also appears that he knew that the circumstances constituted larceny. Reg. *v.* Adams, 1 F. & F. 86.

3. Pelts *v.* State, 3 Blackf. (Ind.) 28; Hurell *v.* State, 5 Humph. (Tenn.) 68; Rice *v.* State, 3 Heisk. (Tenn.) 215; People *v.* Johnson, 1 Park. Cr. Rep. (N. Y.) 564; People *v.* Avila, 43 Cal. 196; Arcia *v.* State, 26 Tex. App. 193.

The receiving of goods, knowing them to be stolen with a fraudulent intent at the time to deprive the owner of them, is a felony, although the guilty party may have been authorized by the owner of the goods to receive them for him. Wright *v.* State, 5 Yerg. (Tenn.) 154; 26 Am. Rep. 258.

4. If the defendant, though he does not take the property himself, finds it at his house and detains it under a *bona fide* claim of right he cannot be convicted. State *v.* Caveness, 78 N. Car. 484.

5. One who receives goods for the mere purpose of concealment is just as much a receiver as if he had purchased for the sake of making profit. Rex *v.* Richardson, 6 C & P. 335.

The fact of aiding in concealing stolen goods, knowing them to be stolen, necessarily implies a felonious intent. State *v.* Turner, 19 Iowa 144.

6. It is enough if the object be to shelter or accommodate the thief. Com. *v.* Bean, 117 Mass. 141; State *v.* Rushing, 69 N. Car. 29; 12 Am. Rep. 641.

7. One who representing himself as agent of the thief, negotiates with the owner to restore goods for a reward which he represents to be wholly for the thief, concealing his intent to benefit for himself may be convicted of receiving. People *v.* Wiley, 3 Hill (N. Y.) 194.

The receiving of stolen goods, know-

it is not necessary that there should be an intent to make pr by the transaction, or an intent to defraud the owner of his pr erty in the goods.[1]

IV Who May be Guilty of the Offense—1. In General.—C who is a principal in the second degree cannot be convicted receiving. The same person cannot be both thief and receiver the same goods.[2] One who advises and counsels the stealing a special article cannot be convicted of receiving, though, if counsel were general, such conviction might be had, when he w counseled subsequently received the goods from the thief.[3] T owner of goods may be convicted of receiving stolen prope when he receives with fraudulent intent his goods which h been stolen with his knowledge from his bailee.[4] One cannot convicted for receiving from one irresponsible, though in suc case he may be convicted as a principal in the theft.[5]

ing them to be stolen, with intent to use possession thus acquired as a means to induce the owner to pay the receiver money for the return of them, is a fraud within the meaning of the statute. State *v.* Pardee, 37 Ohio St. 63.

1. To constitute a guilty receiver of stolen property it must appear that the defendant voluntarily took it into her control and possession, or voluntarily had it in her possession and control with intent to prevent the larceny or the thief from being discovered, or the property from being reclaimed by the true owner, or for his benefit; but it need not appear that she received it with intent to make any gain or profit thereby to herself. U. S. *v.* Montgomery, 3 Sawy. (U. S.) 544. See also People *v.* Reynolds, 2 Mich. 422.

The *Texas* courts hold that there should be a fraudulent intent to secure profit from the act. Arcia *v.* State, 26 Tex. App. 193.

2 Reg. *v.* Perkins, 5 Cox C. C. 554; Reg. *v.* Coggins, 12 Cox C. C. 517; State *v.* Ives, 13 Ired. (N. Car.) 338; State *v.* Smith, 37 Mo. 58; State *v.* Honig, 9 Mo. App. 298; Owen *v.* State, 52 Ind. 379; *In re* Franklin, 77 Mich. 615; Tobin *v.* People, 104 Ill. 565.

J had employed M to load sacks of oats, the property of J, from a vessel into the trams of K who was to carry them on the trams to the warehouse of K. By previous concert between M & K the oats were taken by M from two of the sacks and put into a nose-bag, in the absence of K, and hidden under a tram. K returned in a few minutes and took the nose-bag and its contents from under the tram and took them away, M being then within th or four yards of him. *Held*, tha was not a receiver but a principa the larceny. Reg. *v.* Kelly, 2 C. & 379.

In R. *v.* Coggins, 12 Cox C. C. T was charged with stealing 18s. and R with receiving the same ur the following circumstances: T wa bar-man at a refreshment bar an went up to the bar, called for refre ments and put down a florin. T ser R, took up the florin and took f his employer's till some money gave R as his change, 18s. 6d., wh R put in his pocket and went a with it. On leaving the place he t some silver from his pocket and counting it when arrested. On en ing the bar, signs of recognition t place between T and R, and R present when T took the money fr the till. The jury convicted T stealing and R of receiving. It ruled that this was evidence which judge ought to have left to the jur reasonable evidence upon which might have been convicted as a pri pal in the second degree; and t therefore the conviction of R co not be sustained.

3. People *v.* Green, 1 Wheel. Cas. (N. Y.) 152.

A person who instigates the th and furnishes another with the me of obtaining possession of the good a principal in the larceny and can be convicted of receiving. People Brien, 53 Hun (N. Y.) 496.

4. People *v.* Wiley, 3 Hill (N. 194.

5. The defendant was charged w

Husband and Wife.—A husband may be guilty of receiving erty stolen by his wife with his knowledge.[1] But a wife can- be convicted of receiving stolen property from her husband.[2] may, however, commit the offense by receiving from any one her husband, independent of his control. When she offends e she is responsible for her offense as much as any *feme sole*.[3] band and wife may be jointly indicted and convicted of re- ng when it appears that both were guilty and that the wife l of her own will and free from the control of the husband.[4] there are some circumstances under which the wife might be ted and convicted if she performed the acts separately from husband, but which will not make her liable jointly with him.[5] f of a joint receiving might justify a conviction of the hus- l, but is not sufficient to convict the wife without evidence she acted without coercion.[6]

Joint Receivers.—Two or more may be convicted of jointly iving; but when two are charged jointly a joint act must be ed.[7] But the possession may be constructive.[8]

ving from an infant under ten of age, by whom the goods had stolen. On account of non- he infant had been acquitted of charge of theft. *Held*, that the dant could not be convicted of ving but might be convicted as ipal. Edwards *v.* State, 80 Ga.

Reg. *v.* McAthey, 9 Cox C. C.
Reg. *v.* Woodward, 9 Cox C. C.

Reg. *v.* Brooks, 6 Cox C. C. 148;
v. Wardroper, 8 Cox C. C. 284.
Blackstone Com. 29.
Goldstein *v.* People, 82 N. Y.

Reg. *v.* Wardroper, 8 Cox C. C.

Reg. *v.* Matthews, 4 Cox C. C.

t will not suffice that one re- d in the absence of the other and vards delivered to him. Rex *v.* ngham, 1 M. C. C. 257.
in Sanderson *v.* Com., 11 Ky. L. 341, it was ruled that, on a joint ment against two for receiving, that one received the property guilty knowledge and then let her have it with the same guilty ledge would warrant a convic- f both.
Reg. *v.* Dovey, 4 Cox C. C. 428, held that where a separate re- by each is proved that one may nvicted who is guilty of the first ate act. But now the rule in *England* is different; for by Stat. 24 and 25 Vict., ch. 96, § 94, it was provided that "if upon the trial of any two or more persons indicted for jointly receiving any property it shall be proved that one or more of such persons separately received any part or parts of such property it shall be lawful for the jury to convict upon such indictment such of the said persons as shall be proved to have received any part or parts of such property."

Under this statute it was held, in Reg. *v.* Reardon, 1 L. R., C. C. 31; 35 L. J., M. C. 171, that two or more persons may be indicted jointly for receiving stolen property though each successively received the whole of the same at different times.

8. Two were convicted under a count charging them with receiving upon proof that they were present, aiding and abetting a third receiver who was found in actual possession of the box containing the goods; but the two former never had actual possession of the box. *Held*, that the conviction was right. Reg. *v.* Rogers, 37 L. J., M. C. 83.

In another case, A, knowing that goods had been stolen, directed B, his servant, to receive them into his premises, and B, in pursuance of that direction, afterwards received them in A's absence, B knowing that they had been stolen. *Held*, that they might be jointly indicted. Reg. *v.* Parr, 2 M. & Rob. 346.

V. INDICTMENT.—In the indictment every material fact esse to the commission of the crime must be alleged.[1] It mu averred that the property was stolen; but the same tech particularity is not required in stating the larceny in an in ment against one charged as receiver as would be required i indictment against the party charged with committing the ceny.[2] The name of the thief need not be averred,[3] nor ne be alleged that the thief was unknown.[4] When, however name of the thief is alleged, it must be proved as laid; a vari will be fatal.[5]

It is never necessary to aver that the thief has been convic

The indictment need not state the time or place of larceny.[7]

The goods must be described accurately and the owner's must be averred if known.[8]

1. Williams *v.* People, 101 Ill. 382; Com. *v.* Lakeman, 5 Gray (Mass.) 82.

2. It is sufficient to allege that the goods were "feloniously stolen," and that the defendant received them, "knowing them to have been stolen," without adding the words "and carried away." Com. *v.* Lakeman, 5 Gray (Mass.) 82.

The facts going to constitute the theft need not be alleged. Brothers *v.* State, 22 Tex. App. 447.

3. In 2 East Cr. L. 781, it is said: "When the principal is known it seems proper to state according to the truth." The weight of authority seems to be with the rule in the text.

See Reg. *v.* Jervis, 6 C. & P. 156; Com. *v.* King, 9 Cush. (Mass.) 284; Swaggerty *v.* State, 9 Yerg. (Tenn.) 338; Shriedley *v.* State, 23 Ohio St. 130.

An indictment for receiving need not name the thief though his name is known to the district attorney and to the grand jury before indictment. Com. *v.* Hogan, 121 Mass. 373.

A conviction for receiving is good, even though the jury do not find by whom the property was stolen. People *v.* Caswell, 21 Wend. (N. Y.) 86.

In some States it is necessary to aver that the goods were received from the principal felon, for if received from any one else the statute will not apply; in such States the name of the thief must be averred. State *v.* Beatty, Phill. (N. Car.) 52; State *v.* Ives, 13 Ired. (N. Car.) 338; Brothers *v.* State, 22 Tex. App. 447.

4. If it is averred that the thief is unknown, it will not be fatal tha grand jury has found an indic against a named person for the Com. *v.* Hill, 11 Cush. (Mass.) 1

5. Com. *v.* King, 9 Cush. (1 284; U. S. *v.* De Bare, 6 Biss. (U 358.

But see State *v.* Coppenb Strobh. (S. Car.) 273.

6. Com. *v.* Elisha, 3 Gray (1 460; Com. *v.* King, 9 Cush. (1 284; Edwards *v.* State, 80 Ga. 127 *v.* Woolford, 1 M. & Rob. 384.

7. State *v.* Murphy, 6 Ala. 845 ford *v.* State, 2 Blackf. (Ind.) 103 ple *v.* Goldberg, 39 Mich. 545; man *v.* State, 49 Ind. 249; Co Sullivan, 136 Mass. 170.

8. Williams *v.* People, 101 I People *v.* Wiley, 3 Hill (N. Y.) 1

"As in larceny, so in receivi transaction is identified by th scription of the stolen things an ownership. The things stolen m described in the same manner larceny." 2 Bish. Cr. Pr. (3rd 982–3; Brothers *v.* State, 22 Tex 447.

But it will be sufficient to pro receipt of any one of several a mentioned in the indictment. *v.* Wiley, 3 Hill (N. Y.) 194.

In *Massachusetts*, by statute, dictment against a receiver of goods may describe the goods as the property of the person from they were stolen, although he h stole them from the owner. C Finer, 108 Mass. 466.

In *Maine*, however, it is necess allege and prove, either the own of the property, or that the thi

The value of the property received need not be stated,[1] nor is necessary to allege that any consideration passed between re-ver and thief.[2] The guilty knowledge must be averred,[3] as ll as the felonious intent.[4] A count for larceny and another receiving may be joined in one indictment,[5,6] but in such a se it must appear that the property in each count is the same.[6] e thief and the receiver may be indicted jointly.[7] When the tutes have made receiving stolen property a substantive ony, an indictment is not had because the defendant is charged

n convicted. State *v.* McAloon, 40 . 133.

A receiver, in the case of a sheep, niously stolen alive and killed, uld be stated to have received mut-. Rex *v.* Cowell, 2 East P. C. 617.

On an indictment for stealing and re-ving a mixture, it appeared that the f had stolen two sorts of grain and ed them and sold them to the oner. *Held*, that the latter could be convicted on such an indict-nt. Reg. *v.* Robinson, 4 F. & F. 43.

. People *v.* Rice, 73 Cal. 220; Peo-*v.* Fitzpatrick, 80 Cal. 538.

Bish. Crim. Proc. (3d ed.), § 723. But 1 Whart. Crim. Law (8th ed.), § 3.

. Hopkins *v.* People, 12 Wend. (N. 76.

. Reg. *v.* Larkin, 6 Cox C. C. 377; m. *v.* Cohen, 120 Mass. 198.

n Huggins *v.* State, 41 Ala. 393, it held that an averment that the de-dants received two horses which had ore then been feloniously taken and ried away "well knowing that the l horses had been feloniously taken carried away," shows with sufficient tainty that the defendants had owledge of the larceny at the time en they received the horses.

. Pelts *v.* State, 3 Blackf. (Ind.) 28; ple *v.* Johnson, 1 Park. Cr. Rep. Y.) 564.

n *Tennessee* the indictment must r that the accused received the ds with the intent to deprive the ner thereof. Hurell *v.* State, 5 mph. (Tenn.) 68.

n *New York* it is held sufficient rment of criminal intent that the endant "unlawfully, unjustly and for sake of wicked gain did feloniously eive the goods knowing them to be en." Chatterton *v.* People, 15 Abb. (N. Y.) 147.

n *Indiana*, an allegation that the endant "unlawfully and feloniously eived" the goods is a sufficient allegation of felonious intent. Gandolpho *v.* State, 33 Ind. 439.

In *Maryland* it is not necessary to allege any intent on the part of the defendant to appropriate the property to his own use. State *v.* Hodges, 55 Ind. 127.

5. State *v.* Stimpson, 45 Me. 608.

Where an indictment contains several counts, each charging a different offense the jury must point out the crime of which the defendant is found guilty. *In re* Franklin, 77 Mich. 615.

In Reg. *v.* Huntley, 8 Cox C. C. 260, the prisoner was charged in the first count with stealing certain goods and chattels, and in the second count with receiving "the goods and chattels aforesaid, of the value aforesaid, so as aforesaid "stolen" after objection that he could not be found to have feloniously received goods stolen by himself, the case went to the jury and he was acquitted upon the first count and convicted upon the second. *Held*, that the conviction was good.

In three counts, larceny was charged, the goods enumerated and the names of the owners mentioned, and in the fourth count receiving was charged and the enumeration of the goods and the name of the thief repeated, and reference was made to the former counts. *Held*, that this was sufficient allegation of ownership. State *v.* Nelson, 29 Me. 329. See also, Reg. *v.* Craddock, 4 Cox C. C. 409.

6. Reg. *v.* Saresfield, 6 Cox C. C. 12. A count for stealing certain articles may not be joined with a count for receiving those and other articles. Reg. *v.* Ward, 2 F. & F. 18.

7. But where an indictment is insufficient to sustain judgment against the thief, this will render it insufficient to sustain judgment against the receiver who is charged as an accessory in the same indictment. Com. *v.* Adams, 7 Gray (Mass.) 43. State *v.* Antoine, 42 La. Ann. 945.

in one count as an accessory at common law and in another for a substantive felony [1] Two or more may be indicted join for receiving.[2] A conviction for receiving the property of owner will not bar an indictment for receiving that of another the same time and place and by one and the same act.[3]

VI. The Trial—1. Jurisdiction.—The court of the county which the property was received has jurisdiction, though the ceny was committed in another county.[4]

There is some conflict as to whether, at common law, indictment will lie in one State for receiving goods stolen another.[5] The courts of many States hold that no indictment

1. Rex *v.* Austin, 7 C. & P. 796. And in Rex *v.* Hartel, 7 C. & P. 775, it was held that a count charging A and B with stealing and C with receiving part of the stolen property may be joined with a count charging C and D with the substantive felony of jointly receiving the whole of the stolen property and with counts charging C and D separately with the substantive felony of each receiving part of the stolen property; and it will be no objection at the trial that C and D each received part unconnectedly with each other.

2. See *supra*, this title, *Who May be Guilty of the Offense—Joint Receivers.*

By statute in *England* any number of persons may be charged separately in the same indictment for receiving stolen property though there be no joint receipt. "No real distinction," said Pollock, C. B., "can be made between a separate receipt of a part and a separate receipt of the whole." Reg. *v.* Reardon, 10 Cox C. C. 241.

When two or more are jointly indicted though they received separately, they may be convicted as though they had been indicted separately. Chatterton *v.* People, 15 Abb. Pr. (N. Y.) 147.

3. In Com. *v.* Andrews, 2 Mass. 409; 3 Am. Dec. 17, the defendant was indicted for receiving stolen goods, the property of A, and pleaded in bar that he was formerly indicted for having received of the same thief goods stolen by him from B; that he was convicted and that judgment was rendered on that indictment; that the goods stolen from A were received by him in the same parcel containing the goods stolen from B, and were received at the same time by the same act. *Held*, that the defendant was guilty of two crimes, and that conviction in one case could bar an indictment for the other.

First Offense.—It is not necessar allege that the prosecution is for a offense of that kind nor that the ac stealing the property received was n simple larceny nor that the defend has made no restitution or satisfac of any kind to the owner of the p erty. People *v.* Caulkins, 67 M 488.

4. Allison *v.* Com., 83 Ky. 255.

In *England*, by statute 24 & 25 V ch. 96, § 96, a receiver may be indic tried and punished in any county which he is found with the goods in possession or in any county in wh the party guilty of the principal fel or misdemeanor may be tried.

In *Connecticut*, by statute, the ceiver may be prosecuted in the cou where the goods were stolen thoug received in another. State *v.* W 49 Conn. 429.

In *New York*, under the stat a person may be tried for receiv either in the county where he rece the property, or in any county wh he afterwards had it. Wills *v.* Peo 3 Park. Cr. Rep. (N. Y.) 473.

5. In *England* no indictment wil against one who receives, in that co try, goods stolen abroad. Reg Debruiel, 11 Cox C. C. 702. Whil *Massachusetts* it has been held peatedly that an indictment will li common law for receiving, in State, goods stolen in another St Com. *v.* Cullins, 1 Mass. 116; Com Andrews, 2 Mass. 14; 3 Am. Dec. Com. *v.* Holder, 9 Gray (Mass.) In Com. *v.* Andrews, 2 Mass. 1 Am. Dec. 17, Dana, C. J., s "Every moment's possession is, in c templation of law a new taking, st ing and carrying away."

in the absence of a statute[1] and in most States the jurisdiction been conferred by statute.

. **Evidence.**—It must be proved that the goods were stolen,[2] to the knowledge of the accused.[3]

See People *v.* Schenck, 2 Johns. Y.) 479; State *v.* Reonnals, 14 La. 276.

ee LARCENY, vol. 12, p. 796.

nd see also State *v.* Ellis, 3 Conn. 8 Am. Dec. 175; Ferrill *v.* Com., uv. (Ky.) 153; Hamilton *v.* State,)hio 435; Stanley *v.* State, 24 Ohio 66; 15 Am. Rep. 604; Cummings tate, 1 Har. & J. (Md) 340; State ennett, 14 Iowa 479; Myers *v.* Peo- 26 Ill. 173; State *v.* Stimpson, 45 608; State *v.* Underwood, 49 Me. 77 Am. Dec. 254; People *v.* Wil s, 24 Mich. 156; 9 Am. Rep. 119, e Franklin, 77 Mich 615; State *v.* wn, 1 Hayw. (N. Car.) 100, 1 Am. 548; Watson *v.* State, 36 Miss. State *v.* Williams, 35 Mo. 229; e *v.* Newman, 9 Nev. 48; 16 Am. 3; State *v.* Johnson, 2 Oregon State *v.* Bartlett, 11 Vt. 650. O'Connell *v.* State, 55 Ga. 296; *v.* Woolford, 1 M. & Rob. 384.

e Evidence of the Thief is compe- to show the theft. Rex *v.* Haslam, ach C. C. (3rd ed.) 467.

nd an admission of his guilt made he thief while in custody, in pres- of the receiver, is evidence nst the receiver. Reg. *v.* Cox, 1 F. 90.

t it is unsafe to convict a party as iver on the evidence of the thief ss it is confirmed. Reg. *v.* Robin- 4 F. & F. 43.

is error to allow the jury to con- on the uncorroborated evidence e thief without leaving to them to if such witness was not, in fact, ccomplice of the defendant, so as quire his testimony to be corrob- ed. People *v.* Kraker, 72 Cal. 459. e testimony of the thief is insuffi- to convict when the character of accused has hitherto been good. niah Hill's Case, 1 City Hall Rec. Y.) 66.

t in Friedberg *v.* People, 102 Ill. it was held that a jury should re- the evidence of an accomplice caution, but if they think him hy of belief, in view of all the mstances, they may convict upon evidence, though uncorroborated. Reilley *v.* State, 14 Ind. 217, it was held that admissions of the thief were not admissible to prove the theft.

In Com. *v.* Elisha, 3 Gray (Mass.) 460, the court, by Metcalf, J., held that the record of conviction of a thief on his plea of guilty to an indictment against him alone, for stealing certain property is not admissible in evidence to prove the theft, on the trial of the receiver of that property, upon an indictment against him alone, which does not aver that the thief has been convicted.

The mere fact that the goods were found on the defendants' premises is not sufficient to confirm the evidence of the thief so far as to make it proper to convict. Reg. *v.* Pratt, 4 F. & F. 315. See Reg. *v.* Turner, 1 M. C. C. 347.

If an indictment against a receiver states the principal felony to have been committed by A, whatever would have been evidence of the principal felony to convict A is receivable to prove this allegation on the trial of the receiver, but is not conclusive. Reg. *v.* Blick, 4 C. & P. 377.

3. Reg. *v.* Densley, 6 C. & P. 399; Shotwell's Case, 3 City Hall Rec. (N. Y.) 95.

It is not sufficient to show that the prisoner had a general knowledge of the circumstances under which the goods were taken unless the jury were satisfied also that he knew that the circumstances constituted larceny. Reg. *v.* Adams, 1 F. & F. 86.

Evidence of belief. without actual knowledge is sufficient. Reg. *v.* White, 1 F. & F. 665; Tulley *v.* Com., 13 Bush (Ky.) 142; Frank *v.* State, 67 Miss. 125.

Guilty knowledge is made out by proof that the defendant received the goods under such circumstances as would satisfy a man of ordinary intelligence and caution that they were stolen. Com. *v.* Finn, 108 Mass. 466.

Evidence of conversations between defendant and the thief, making arrangements for receiving the goods before commission of the offense, is admissible to prove guilty knowledge. Com. *v.* Jenkins, 10 Gray (Mass.) 485.

And evidence of conversations be-

tween the thief and the receiver on previous similar occasions is admissible. Copperman *v.* People, 3 Thomp. & C. (N. Y.) 199.

A was prosecuted for receiving. It appeared from the evidence that A and W had entered into a conspiracy to sell the property. A bill of sale of the property was executed by W to the purchaser after the price had been agreed upon and the property delivered, and while A was in the room. *Held*, that the bill of sale was part of the *res gestæ* and admissible. McFadden *v.* State, 28 Tex. App. 241.

It may be proved that the house of the defendant is the resort of felons who go there to dispose of their plunder. People *v.* Pierpont, 1 Wheel. Cr. Cas. (N. Y.) 139.

On an indictment for receiving it was in proof that when the defendant received the animal mentioned in the indictment, from J, he received, in connection with G, two other animals, and he and G sold the three at one time to L. It was clear that the animals were stolen property at the time when the defendant and G came in possession of them. *Held*, that this evidence was admissible for the purpose of showing that the defendant had knowledge that the animal named in the indictment was stolen property. Harwell *v.* State, 12 Tex. App. 251.

Evidence that the defendant bought property from an ex-convict for one-fourth of its value, and afterwards denied having it, and made contradictory statements about it, and finally, when arrested, produced it, is sufficient to show guilty knowledge. Huggins *v.* People (Ill. 1890), 25 N. E. Rep. 1002.

Former Receivings.—If the prisoner at different times receives property stolen from the prosecutor, although the substantial charge must be confined to some one receiving, yet the other receivings may be given in evidence to show guilty knowledge that the goods were stolen. Rex *v.* Dunn, 1 M. C. C. 146.

Evidence of former criminal acts not so remote from the specific act charged as to be distinct transactions, is admissible to show guilty knowledge. Kilrow *v.* Com., 89 Pa. St. 480.

In Hall *v.* People, 6 Park. Cr. Rep. (N. Y.) 671, Peckham, J., said: "Testimony, to be relied on by the prosecution, must have a direct bearing on the crime sought to be charged upon the prisoner."

Possession of Other Goods.—Evid that other stolen goods were foun the possession of the defendant is missible for the purpose of sho guilty knowledge. Devoto *v.* Co Metc. (Ky.) 417; Shriedley *v.* Stat Ohio St. 130; Com. *v.* Hills, 10 C (Mass.) 530.

On an indictment against A for s ing and B for receiving goods, dence that, on various former sions, portions of the commodity s have been missed, and that the pr ers have, after such occasions, found selling such a commodity, that on the last occasion it was p what was stolen, is sufficient to fi receiver with guilty knowledge. *v.* Nicholls, 1 F. & F. 51.

In Reg. *v.* Drage, 14 Cox C. C. was held that, in order to give evid of guilty knowledge it is not suffi to prove that other property ha some time previously, been dealt by the prisoner. It must be p that such other property was fou the possession of the prisoner a time when he is found in possessi the property which is the subject indictment.

In Reg. *v.* Oddy, 5 Cox C. C. 2 prisoner was indicted for rece stolen goods, and, to prove the *scie* evidence was given that on a pre occasion other stolen goods, the erty of different owners, had found in the possession of the pris *Held*, that the evidence was impro admitted, as it is a general princi the law of *England*, that proof t man had committed one offense proof that he has committed anc and as the possession of stolen on a previous occasion could not any knowledge on the part of the oner that the particular goods tioned in the indictment were stol

In *New York* it is held tha goods must have belonged to the prosecutor. Jarvis' Case, 1 City Rec. (N. Y.) 105.

See also Rex *v.* Dunn, 1 M. 146.

And that they must have bee ceived from the same person. man *v.* People, 55 N. Y. 81; Co man *v.* People, 56 N. Y. 591.

See also Reg. *v.* Nicholls, 1 F. 51; Wood *v.* U. S., 16 Pet. (U 360.

In *Connecticut*, however, it i necessary that the goods befor ceived should have been stolen

e same person nor that they should ve been of the same character. State Ward, 49 Conn. 429.

Recent Possession.—Mere possession stolen property is evidence, not of ceiving, but of stealing. Reg. *v.* ensley, 6 C. & P. 399.

Recent possession raises no pre- mption that the possessor knew that e property was stolen. State *v.* illa, 89 Mo. 595.

And may, according to circum- ances, support either the presump- n that the possessor stole the prop- ty, or that he received it, knowing to be stolen. Sartorious *v.* State, Miss. 602.

But if under peculiar and suspicious rcumstances, where there is evidence at some other stole the property, ch possession, not being satisfactori- explained, would warrant a convic- n. Goldstein *v.* People, 82 N. Y. 1.

Where a prisoner was found in pos- ssion of some sheep of which he uld give no satisfactory account, and might reasonably be inferred from e circumstances that he did not al them himself, it was held that ere was evidence for the jury that received them, knowing them to be olen. Reg. *v.* Langmead, 9 Cox C. 464.

Explanation of Possession.—When a rty in possession of recently stolen operty gives an exculpatory explana- n of his possession which is reason- le or probable, then the burden de- lves on the State to prove its falsity; herwise, the accused is entitled to acquittal. Brothers *v.* State, 22 Tex. p. 447.

On a trial for receiving, it is compe- nt for the defense to show, by the cused, he being a witness for him- f, when, from whom and how, and der what circumstances he received and what was done and said at the ne in connection with the receipt of by himself; such facts being a part the *res gestæ* to be submitted as idence and weighed by the jury. ate *v.* Bethel, 97 N. Car. 459. See o Estes *v.* State, 23 Tex. App. 600.

Evidence as to the reputation of the ef in the community, as to his be- g a regular and honest dealer in ods such as were stolen is admissi- e to explain possession. Com. *v.* zzolo, 123 Mass. 220, 25 Am. Rep.

It is not competent for the defendant to prove what the person said from whom the goods were purchased as to the manner in which such person became possessed of them, in order to prove that the defendant had no knowledge that the goods were stolen. Wills *v.* People, 3 Park. Cr. Rep. (N. Y.) 473.

Claim of Title.—Evidence that the thief had at one time been lawfully employed to sell such articles to the prisoner, will warrant an acquittal in the absence of any evidence that the prisoner knew that the authority had been withdrawn. 1 Wharton Crim. Law, § 987.

In Harwell *v.* State, 22 Tex. App. 251, it was held error to exclude evidence offered by the defense that the vendor claimed the property as his own before the sale to the accused.

Evidence Held Sufficient to Support Conviction.—When a woman was indicted for larceny of a gold chain, a bank note, and money, and also for receiving, and the evidence against her consisted of the fact of the stolen property having been found concealed on her person at about ten o'clock on the morning after the night on which the property was stolen, and she made a voluntary statement asserting that she had found the things, the judge directed the jury to acquit her on the count for receiving, but the jury, notwithstanding, acquitted her on the count for larceny, but convicted her of receiving, and the judge did not insist on the direction he had previously given, but reserved the question as to whether the evidence was sufficient in law to sustain the conviction on the count for receiving, it was held that the evidence was sufficient. Reg. *v.* M'Mahon, 13 Cox C. C. 275.

B, a letter carrier, and C, his mother, were indicted for receiving a gold pendant, knowing it to be stolen.

Before the 23rd of October, a box containing the pendant, a brooch, and some other articles of jewelry, was sent by post to a Mrs. W, residing at D. A letter was posted at the same time. Both should have arrived that evening. Mrs. W. got the letter the next evening, but not the box. B was a letter carrier at D, but it would not have been his duty to deliver the letter and parcel. From the way the letters and parcels were sorted, he might have taken them, but so might others. On the 30th of October C attempted to pawn the pendant.

RECESSES.—See note 1.

RECIPROCAL.—See MUTUAL, vol. 16, p. 3. See note 2.

RECITALS.—See DEEDS, vol. 5, p. 435; ESTOPPEL, vol. 7, p

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I. **RECITALS IN CONTRACTS—1. Definition.**—A recital in a se instrument is the preliminary statement of such deeds, ag ments, or matters of fact as are necessary to explain the rea upon which the transaction is founded.[3]

While she was in the pawn-shop B remained outside and left along with her. Early in November a girl who knew B received a box by post, directed in B's handwriting, containing the brooch, which was in the box with the pendant. *Held*, by a majority of the Irish judges that the jury was justified in convicting B and C of jointly receiving the pendant. Reg. *v.* Syrne, 4 Ir. R., C. L. 68.

The prisoner had been a lodger in the prosecutor's house, and left under circumstances not disclosed. On the following day the prosecutor's wife also left the house, taking with her a small bundle. Two days after the prisoner was found in company with the prosecutor's wife (who was passing by the prisoner's name) on board a ship. Property belonging to the prosecutor, of a bulk greater than could have been comprised in the bundle taken by the wife, was found in the prisoner's cabin and upon his person. *Held*, that there was some evidence to support a conviction for receiving the property, knowing it to have been stolen. Reg. *v.* Deer, 9 Cox C. C. 225.

See also State *v.* St. Clair, 17 Iowa 149; State *v.* Mayer, 45 Iowa 698; Friedberg *v.* People, 102 Ill. 160.

1. **Recesses.**—*California* Code Proc., provides that "adjournm from day to day or from time to are to be construed as recesses in sessions, and shall not prevent the from sitting at any time." *In re* non, 69 Cal. 545, it was held that the term 'recesses' is meant the tin which the court is not actually eng in business."

2. **Reciprocal Demand.**—See MU ACCOUNTS, vol. 16, p. 6.

3. Bigelow on Estoppel (2nd 266.

Other Definitions.—The reputati some former writing or the stateme something which has been don Bouv. L. Dict. (15th ed.) 517.

The formal statement or setting of some matter of fact in any de writing in order to explain the rea upon which the transaction is four the rehearsal or making mention deed or writing of something which been done before. Abb. L. Dict.

The statement in a deed or othe strument of the reason for executi or of its relation to other instrum And. L. Dict.

The formal statement or setting of some matter of fact, in any de writing, in order to explain the re

2. **Estoppel by Recitals**—*a.* IN GENERAL.—It is by the appli-
ion of the principles of estoppel that the effect of recitals is
ally determined, outside of mere questions of the construc-
n of the language used. And it may be said broadly that the
ject is a branch of the law of estoppel.[1]

The term recital, as used in the law of estoppel, applies to
terial statements of fact contained in the instrument.[2]

It may be said generally that, to work an estoppel, the recitals
st be definite, particular[3] as distinguished from general,[4] and
terial,[5] and that, these requisites concurring, the recitals bind
ties and privies,[6] but not strangers.[7]

Recitals are to be construed as a whole, where the intention is
better discoverable by the application of this rule of con-
uction.[8]

That one claiming under an instrument has neglected to read
recitals cannot avail him.[9]

n which the transaction is founded.
k's L. Dict.

rm of Recitals.—Recitals are con-
ed in the premises of a deed, that is,
he part between the date and the
endum, and generally commenced
the word "whereas," which, when
e are several recitals, is repeated ac-
lingly, "and whereas." Black's L.
.

gelow on Estoppel (2nd ed.) 266;
t's Actions and Defenses 497.

he term recital, however, is applied
ther parts of the deed than those
tioned above; and not every re-
, as will be seen hereafter, is intro-
d by the formal word "whereas."
Bigelow on Estoppel (2nd ed.)

e of Recitals.—A recital is useful
xplain matters of fact which are
ssary to make the deed intelligible.
uv. L. Dict. (15th ed.) 517.

ecitals are introduced for the pur-
of explaining why the deed is ex-
ed, or of showing circumstances
h preserve the connection in the
of title. 2 Devlin on Deeds, §

See ESTOPPEL, vol. 7, p. 7.

he learned author deduces from the
orities the doctrine that there may
estoppel by recital of a conclusion
aw, cites Hills *v.* Laming, 9 Exch.
where the defendant was held es-
ed to deny the validity of certain
nts by reason of the recitals of a
executed between him and the
tiff, and says: "And there is good
on for such a doctrine. It is a set-
principle of the law of contracts

that the compromise of a claim doubtful in law is binding, and is a sufficient consideration for a promise to pay money. If so, the recitals of the deed, though admitting the validity of acts or instruments which, in law, were invalid, will preclude the parties in an action upon the deed from asserting the contrary."

2. Bigelow on Estoppel (4th ed.) 354.

3. See *infra*, this title, *Particular Recitals.*

4. See *infra*, this title, *General Recitals.*

5. See *infra*, this title, *Immaterial Recitals.*

6. See *infra*, this title, *Parties and Privies.*

7. See *infra*, this title, *Strangers.*

8. Doe *v.* Brooks, 3 A. & E. 513; 30 E. C. L. 139; Walsh *v.* Trevanion, 15 A. & E. 733; 69 E. C. L. 733; South-eastern R. Co. *v.* Warton, 6 H. & N. 520.

In Bower *v.* McCormick, 23 Gratt. (Va.) 310, the court by Christian, J., said: "A mere recital does not conclude all the parties; there must be a direct affirmation, so intended, by all the parties in order to bind all; and this intention may be gathered from the whole instrument."

Discrepancy.—When there is a discrepancy between the recitals in the preamble and the operative part of a deed, "the operative part, if clear and unambiguous must be followed." Miller *v.* Tunica Co., 67 Miss. 651.

9. Wailes *v.* Cooper, 24 Miss. 208; Hamilton *v.* Nutt, 34 Conn. 501.

b. PARTICULAR RECITALS.—Facts particularly recited ca be contradicted in an action in which the purpose of the de directly involved.[1]

1. George *v.* Bischoff, 68 Ill. 236. This was an action of debt on an appeal bond which recited that the appellee had recovered a decree against the appellant, and contained the usual condition that the appellant would pay such decree, if affirmed. It was held that the appellant was estopped by the recitals from denying the existence of the decree which he had solemnly admitted, and from showing that the decree was *in rem.*

See also Smith *v.* Whitaker, 11 Ill. 418; Arnott *v.* Friel, 50 Ill. 175; Mix *v.* People, 86 Ill. 329. And also the opinion of Parke, B., in Carpenter *v.* Buller, 8 M. & W. 209, *citing* Lainson *v.* Tremere, 1 A. & E. 792.

Herrick *v.* Swartwout, 72 Ill. 341, was a suit on an appeal bond. It was held unnecessary to introduce a copy of the record of the judgment appealed from, since by its recital in the condition of the bond, the defendants were estopped from denying its existence.

In Byrne *v.* Morehouse, 22 Ill. 603, the court by Caton, J., said: "No party claiming title under that deed, however remotely, can be permitted to deny any fact admitted to exist by those recitals. However contrary to the truth they may be, unless obtained by fraud, they must stand as uncontroverted truth."

In Pinckard *v.* Milmine, 76 Ill. 453, the court, by Scott, J., said: "We recognize the doctrine of estoppel by the recitals in a deed, and that a party claiming under such deed cannot be permitted to deny any fact admitted to exist by such recitals, as that doctrine is declared in Byrne *v.* Morehouse, 22 Ill. 603, and Riggs *v.* Cook, 9 Ill. 336. The principle of these cases is that whatever rights legitimately arise on such admitted facts, may at all times be asserted, whether it be to obtain or defend the possession of such rights."

A mortgage recited that the plaintiffs in error were the "owners and proprietors" of all the property described therein. *Held*, that the plaintiffs were estopped from denying title to the property. Usina *v.* Wilder, 58 Ga. 178.

In Shaw *v.* Havekluft, 21 Ill. 127, the court, by Caton, C. J., said: "In an action upon a constable's bond the obligees cannot be permitted to deny that he is a constable. Upon that qu the execution of the bond con them. This same question was in an action on the bond of a of the peace, in Green *v.* Wardw Ill. 278, 63 Am. Dec. 366, wher court said: 'By signing his bond acknowledged his right to the and to discharge its duties, a such, recommended him to the They, at least, shall not be he say, that although they signed hi and thereby induced others t money in his hands, relying on bond for its safety, still he wa elected, was not commissioned, w sworn; and that he, in fact, was justice of the peace.'"

Recital of Incorporation.—A rec a deed of a mortgage in favor of a bearing a corporate name esto party claiming under the deed fro nying that the mortgagee is in rated according to law. Hasenri Kirchhoffer, 79 Mo. 239, and cited therein.

Recital of Heirship.—Heirshi not be proved by a recital merely deed, especially where the deed recent date. This, at most, amou a mere claim of heirship. Po Washburn, 13 Vt. 558; 37 Am. De

Where a deed recites the de the person from whom the gr therein claim title, and that th the heirs at law of such person recitals are not competent ev either of his death or of their he Costello *v.* Burke, 63 Iowa 361.

Recital of Will.—Where a deed reference to a will the grantee is by the recital and has notice o will. Graff *v.* Castleman, 5 (Va.) 195; 16 Am. Dec. 741.

In Hope *v.* Liddell, 21 Beav. was held that a purchaser has no a will recited in his deed, thoug will be recited inaccurately.

Recitals in Letters-Patent.— held in Bowman *v.* Taylor, 2 A 278, that a licensee under a patent not controvert the recital of nove invention in the patent. See Hayne *v.* Maltby, 3 T. R. 438; H Laming, 9 Exch. 256; Cut Bower, 11 Q. B. 973. And see o general subject, PATENT LAW, v p. 20.

But in actions not founded on the instrument, and wholly lateral to it, the recitals in it are merely *prima facie* evidence the facts recited.[1]

. GENERAL RECITALS.—While, ordinarily, mere general itals do not estop,[2] yet, though general in form, they may be

tistence of a Mortgage.—In Jackson avis, 18 Johns. (N. Y.) 7, the court Platt, J., said: "Although the exist- of an absolute deed or lease may roved by a recital, against the par- aking such recital and all claiming er him, yet I incline to think that a tgage cannot be so proved, because defeasible by payment of the mort- money; and if produced it might bably show an acknowledgment of faction on the back of it, that be- the usual mode, no release being essary to restore the title to the tgagor."

In Bank of America *v.* Banks, 101 S. 240, the court, by Clifford, J. said: cts recited in an instrument may be troverted by the other party in an on not founded on the instrument wholly collateral to it. Recitals of kind may be evidence for the party tuting the suit but they are not clusive. Carpenter *v.* Suller, 8 M. V. 209; Herman on Estoppel, § 238; ell *v.* Daniels, 2 Gray (Mass.) 169; Am. Rep. 448; Champlain etc. R. *v.* Valentine, 19 Barb. (N.Y.) 488." arpenter *v.* Suller, 8 M. & W. 209, an action for trespass alleged to been committed on the close of plaintiff. After alleging title in self the defendant introduced a deed een the parties to the suit, col- al to the question of title, which ed title in the defendant. The t held that the recital did not cre- an estoppel and that the evidence admissible. Parke, B., said: "If a nct statement of a particular fact is e in the recital of a bond or other ument under seal, and a contract is e with reference to that recital, it is estionably true that, as between parties to that instrument, and in on upon it, it is not competent for party bound to deny the recital, withstanding what Lord Coke says e matter of recital [Co. Lit., 352, and a recital in instruments not er seal may be such as to be conclu- to the same extent. A strong in- ce as to a recital in a deed is found ainson *v.* Tremere, 1 A. & E. 792; 3 N. & M. 603, where, in a bond to secure the payment of rent under a lease stated, it was recited that the lease was at a rent of £170, and the defendant was estopped from pleading that it was £140 only and that such amount had been paid. So where other particular facts are mentioned in a condition to a bond, as that the obligor and his wife should appear, the obligor cannot appear himself and deny that he is married, in an action on the bond. 1 Roll. Abr. 873, ch. 25. All the instances given in Com. Dig., Estoppel (A. 2), under the head of 'Estoppel by matter of writing' (except one, which relates to a release), are cases of estoppel in actions on the instrument in which the admissions are contained. By his contract in the instrument itself a party is assuredly bound and must fulfill it. But there is no authority to show that a party to the instrument would be estopped, in an action by the other party, not founded on the deed and wholly collateral to it, to dispute the facts so admitted, though the recitals would certainly be evidence; for instance, in another suit though between the same parties, when a question should arise whether the plaintiff held at a rent of £170, in the one case, or was married in the other case, it could not be held that the recitals in the bond were conclusive evidence of these facts. Still less would matter alleged in the instrument, wholly immaterial to the contract therein contained; as, for instance, suppose an indenture or bond to contain an unnecessary description of one of the parties as assignee of a bankrupt, overseer of the poor, or as filling any other character, it could not be contended that such statement would be conclusive on the other party in any other proceeding between them."

Recitals in a divorce decree may be disproven in a case where the divorce comes collaterally in question in another State. People *v.* Dawell, 25 Mich. 247; 12 Am. Rep. 260. And see, for additional citations, ESTOPPEL, vol. 7, pp. 7, 8.

2. See ESTOPPEL, vol. 7, p. 8.

sufficiently specific and certain to have such effect;[1] but, lac
the element of certainty, they may be contradicted by
maker.[2]

d. IMMATERIAL RECITALS.—Recitals of immaterial mat
that is, of matters not essential to the transaction in hand,
not necessarily binding.[3]

1. Southeastern R. Co. *v.* Warton, 6 H. & N. 520: Carpenter *v.* Buller, 8 M. & W. 209.

2. Kepp *v.* Wiggett, 10 C. B. 35. The condition in a bond given by a tax collector recited that one L had been "duly nominated and appointed a collector for the year," etc., and that duplicates of the assessments had been "delivered and given in charge to the said L with a warrant or warrants for collecting the same." L made default, and, in an action against the sureties it was held that they were not estopped by these recitals from showing that L had never been duly appointed collector, and that the duplicate assessments and warrants had not been delivered to him.

In this case, Williams, J., said: "As to the remaining question, whether the defendants are estopped by the recitals in the bond from setting up this defence, it is to be observed that it is a rule that estoppels must be certain to every intent. And here it is at least doubtful whether the recital that L had been duly nominated and appointed a collector for the year ending the 5th of April, 1847, and that duplicates of the assessment had been delivered and given in charge to him, with a warrant or warrants for collecting the same, should be referred to the assessments under Schedule (A) or Schedule (D). I therefore think there is no estoppel."

Maule, J., said: "As to the question of estoppel it appears to me that the matters that are stated in the case—some of them by recital in the condition of the bond—and which were in the knowledge of all parties, show that, in speaking of the appointment of L as collector, they did not mean that he was fully armed with authority to collect the sum assessed. He had been appointed to collect, and was the person who was intended to be armed with power to collect and enforce payment of the sums assessed. Still he was a collector within the sense and meaning of the expressions used in the bond. I therefore think that the
trine of estoppel does not apply."

See also Lainson *v.* Tremere, 1
E. 792: Right *v.* Bucknell, 2 B. &
278; Jackson *v.* Allen, 120 Mass. 6

3. Osborne *v.* Endicott, 6 Cal.
65 Am. Dec. 498. In this case
court by Murray, C. J., said: "The
eral rule of law is that recitals in a
bind all persons who are partie
privies thereto; but this rule does
extend to that which is mere des
tion or an averment which is not e
tial."

This was a case between the ori
parties, and it was held that the gr
was not estopped by the recital in
deed that he held the land in que
in trust for the grantee.

In Barr *v.* Schroeder, 32 Cal. 60
court, by Rhodes, J., said: "Strike
of the deed the matters in respect t
mistake and the confirmation, and
deed still remains sufficient in la
pass the title. Those matters mu
disregarded because they were imp
ble of accomplishment in that m

In Brinegar *v.* Chaffin, 3 Dev.
Car.) 108, a deed contained a re
that one of the parties thereto w
feme covert. She was in fact a
sole. It was held that neither o
parties was estopped to deny the
cital. The court, by Henderson, C
said: "Recitals in a deed are esto
when they are of the essence of
contract; that is, where, unless the
recited exist, the contract, it is
sumed, would not have been made
if A recites that he is seised in fe
certain lands, which he bargains
sells in fee, he is estopped to deny
he is seised in fee, for without
seisin it is fair to presume that
contract would not have been m
But if the recital be that he is seise
fee by purchase from C, here ne
the bargainor nor bargainee is esto
from averring and proving that
seised by purchase from D, unle
appear that the seisin in fee by
chase from C, was part of the cont
and without which it would not

. PARTIES AND PRIVIES.—The general rule is that a recital in instrument of a material fact is binding and conclusive upon party reciting it and all claiming under him, as privies in od, in estate, or in law.[1]

made. For ordinarily the seisin is of the essence of the contract, how and from whom derived are circumstances.

of every other recital. And this nction reconciles the many apparcontradictions in the books, some ring that recitals are estoppels others that they are not. In the under consideration that the *feme* the wife of Jacks was not of the es- of the contract. It formed no of it. It was a mere circumstance scription, more unfavorable to the ndant, or rather the bargainee, if she had been *sole*. For if *sole* eed was effectual by sealing and ery. If she was *covert* her private ination was necessary to make it eed. In truth, her coverture was t for which the bargainee neither nor received anything. Nor did that account receive anything by eed, which he would not have re- d if she had been *sole*. Neither t form the basis, nor in any manmove or conduce to the contract. therefore, mere matter of evidence like all other evidence may be tted by contrary proof." . . . ut the case does not rest on gen- reasoning. If A S, by her deed, ng that she is a *feme covert*, when uth she is a *feme sole*, grants an ity, it is a good grant, for that is void recital, although the grantee not put it in his writ; and it cannot conclusion to him when it shows deed. Vin. Abr. M., § 8, pl. 11; ., § 40. So if a *feme covert*, recit- y her deed that she is a *feme sole*, an annuity, this is a void grant he shall not be concluded by this l. Perk. 41, note."

Ambs *v.* Chicago etc. R. Co., 44 . 266, the court, by Dickinson, J., "The doctrine of estoppel would d soon become odious if it should applied as to forever preclude of the truth, contrary to the age which parties may have used spect to matters not essential to transaction between them, which cannot be supposed to have in- d as an admission or statement of to be accepted and acted upon as such, and in respect to which it is immaterial whether tne language employed was accurate or inaccurate, true or untrue.

The rule requiring a vendee to take notice of the contents of a deed under which he holds does not require him to take notice of a fact exhibited in the deed, which is wholly foreign to the subject of the reference. For instance, where a deed referred to includes a bill of sale of personal property on which the vendor claims a lien, it has been held that the vendee is not presumed to have notice of such fact. Mueller *v.* Engeln, 12 Bush (Ky.) 444.

In Boggs *v.* Varner, 6 W. & S. (Pa.) 469, the court by Rogers, J., said: "A purchaser is not bound to carry in his recollection those parts of a deed which have no relation to the particular purchase he was then about to make nor to take notice of more of the deed than affected his then purchase. See also Attorney-Gen'l *v.* Backhouse, 17 Ves. 291; Burch *v.* Carter, 44 Ala. 115; Reed *v.* McCourt, 41 N. Y. 435; Champlain etc. R. Co. *v.* Valentine, 19 Barb. (N. Y.) 484; Lash *v.* Spayd, 141 Pa. St. 360; Carpenter *v.* Buller, 8 M. & W. 209; O'Brien *v.* Bughee, 46 Kan. 1.

Date of a Deed.—It seems that when the date of a deed is immaterial it may be denied. For illustrations see Dyer *v.* Rich, 1 Met. (Mass.) 180; Cady *v.* Eggleston, 11 Mass. 282; Washington Co. Ins. Co. *v.* Colton, 26 Conn. 42.

1. Simson *v.* Eckstein, 22 Cal. 581; Osborne *v.* Endicott, 6 Cal. 149; 65 Am. Dec. 498; Jackson *v.* Parkhurst, 9 Wend. (N. Y.) 209; Chautauqua Co. Bank *v.* Risley, 4 Den. (N. Y.) 480; Stow *v.* Wyse, 7 Conn. 214; 18 Am. Dec. 99.

In Young *v.* Raincock, 7 C. B. 310; 62 E. C. L. 310, Coltman, J., said: "It seems clear that when it can be collected from the deed that the parties to it have agreed upon a certain admitted state of facts as the basis on which they contract, the statement of those facts, though but in the way of recital, shall estop the parties to aver the contrary."

See Doe *v.* Wagstaff, 7 C. & P. 477; Metropolitan L. Ins. Co. *v.* Bender, 124

N. Y. 47; Brokaw *v.* Field, 33 Ill. App. 138; Provost *v.* Morgan's L. etc. R. Co., 42 La. Ann. 809; Pratt *v.* Nixon, 91 Ala. 192; Ætna L. Ins. Co. *v.* Ford, 89 Ill. 252; U. S. Mortgage Co. *v.* Gross, 93 Ill. 483.

When it was recited in the condition of a bond that the obligor had received divers sums of money for the obligee, which he had not brought to account, it was held that the obligor was estopped to deny that he had received any money for the use of the obligee. Shelley *v.* Wright, Willes 9. See St. Louis *v.* Wiggins' Ferry Co., 15 Mo. App. 227.

Replevin Bond.—The obligors in a forthcoming bond which has been forfeited cannot be permitted, when the suit is on the bond, to controvert the defendant's property in the replevied things by showing either an entire or a partial want of title. Mitchell *v.* Ingram, 38 Ala. 395; Beacon *v.* Butler, 15 Mo. 73; Gray *v.* MacLean, 17 Ill. 404. *Contra*, Decherd *v.* Blanton, 3 Sneed (Tenn.) 373.

A vendee of land is bound by facts recited in deeds through which he claims and so are his representatives. Talbott *v.* Bell, 5 B. Mon. (Ky.) 320; 43 Am. Dec. 126.

The recitals in a deed made by a mortgagee under a power of sale contained in the mortgage, showing that the requirements of the statute have been complied with show *prima facie* that the notice was good. The fact that certain essentials are particularly recited and certain others omitted, does not repel the conclusion that the notice was good. Tartt *v.* Clayton, 109 Ill., 579.

In Annandale *v.* Harris, 2 P. Wms. 432, it appeared that A had seduced a woman and had a child by her; and that afterwards A executed a deed poll reciting that he had given a bond to her for the payment of £2,000 within a year after his death. By the deed A covenanted that £2,000 should be laid out in an annuity for her use and that of her child. After A's death the bond could not be proved. But the deed poll reciting the bond was proved and read. The Lord Chancellor said: "The recital in the deed that the covenantor had given such a bond is a sufficient evidence of there having been such; it is a concession by the obligor himself, and stronger than a verbal concession, it being under his hand and seal."

In Acer *v.* Westcott, 1 Lans. (N. Y.) 193, W had taken a mortgage fr
who held the premises mortgaged
a deed from B, which contained t
lowing recital: "This conveyance is
in pursuance of a contract of sale
premises, made and entered into
party of the first part, for a conve
thereof to one Ezra W. Acer, of
the said party of the second pa
become the assignee, or purchase
as such, entitled to a fulfillment t
by virtue of this conveyance."
that, at the time he took the mor
W presumptively knew of the ri
equity which A had acquired,
same title in fee which the dee
ported to convey to C, and also t
knew the provisions of the cont
sale or assignment so far a
affected the title encumbered
mortgage.

In Payne *v.* Abercrombie, 10
(Tenn.) 161, A sold land to D, e
ing a bond for title. D then so
land to S, executing a bond in w
was recited he still owed A $1,
the land and that S's first note of
was to be appropriated to the sa
tion of the amount due A. Thi
further directed that upon paym
S of this note to A, the land sho
conveyed to S, a lien being retai
the face of the deed to secure pa
of the other two notes of $1,33
given to D by S. D indorsed
these two notes to P. A, on pa
of the first note, conveyed the
H—S joining in the deed—res
no lien. The bond from D to
registered before conveyance
The land was conveyed to N
bought and paid for it without
notice. *Held*, that the recitals
deed were sufficient to charg
notice of the contents of the bon

For further illustrations see B
v. Fauber, 21 Gratt. (Va.) 446; L
Weller, 29 Gratt. (Va.) 348; W
Krebbs, 30 Gratt. (Va.) 708; Gr
Early, 39 Md. 223; Pruden *v.* Alc
Pick. (Mass.) 184; 34 Am. De
Fitzhugh *v.* Barnard, 12 Mich
Case *v.* Erwin, 18 Mich. 434;
bridge Valley Bank *v.* Delano.
Y. 326; Robson *v.* Flight, 4 DeG
S. 608; Coles *v.* Sims, 6 DeG.
G. 1.

Limitations.—But a recital in a
of a former deed between the
parties admits no more than that
is recited. Gillett *v.* Abbott,
& E. 783.

And recitals of a grantor c

But in order that a recital may bind all the parties to an strument, it must be intended to be a statement of facts ich all admit to be true. Where it is intended to be the state-ent of but one party, that party only is bound.[1]

and the estate granted by a prior d to the injury of an intervening title. itney *v.* Wheeler Cotton Mills, 151 ss. 396.

A recital in a deed that it is subject he right of way of a railroad whose d is not recorded, is not notice to grantee that such right of way is reater extent than is then actually upied by the railway. Cincinnati R. Co. *v.* Smith, 127 Ind. 461.

round of the Rule.—In Joeckel *v.* ston, 11 Mo. 118, the court by Scott, said: "There is no doubt of the cor-tness of the proposition of the plain- that a recital in a deed of a , will generally conclude both the ntor and his privies, whether in od, or in estate, or in law, and this ether the deed be indented or a deed l. The acceptance of a deed will ate an estoppel against the grantee those claiming under him. Such ppels are founded on principles of l policy and this would seem to be test of their efficacy.

'he cases on this subject are numer- and there is no want of harmony ong them. The principle on which ppels created by mere recitals are ding, is the same as that which es the admissions of a party evi-ce. The declarations of a grantor le at the time of the execution of a d, are evidence against his grantee those claiming under him. Judge ven says, the mere admissibility of recital will depend upon the same ciple as the admissibility of a de-ation of the person executing the ting deed. Hence, in general, in er to determine whether a recital is lence in a given case against a ty we have only to ascertain ether an acknowledgment or con-ion of the person who executed the d would be competent."

n Carver *v.* Jackson, 4 Pet. (U. S.), court, by Story, J., said: "We are he opinion, not only that the recital he lease in the deed of marriage lement was evidence between these ties of the original existence of the e, but that it was conclusive evi-ce between these parties of the inal existence, and superseded the necessity of introducing any other evidence to establish it.

The reasons upon which this opinion is founded will now be briefly expounded. To what extent and between what parties the recital of a lease in a deed of release (for we need not go into recitals generally) is evidence, is a matter not laid down with much accuracy or precision in some of the elementary treatises on the subject of evidence. It is laid down generally that a recital of one deed in another binds the parties and those who claim under them. Technically speaking, it operates as an estoppel and binds parties and privies; privies in blood, privies in estate and privies in law. But it does not bind mere strangers or those who claim by title paramount the deed. It does not bind persons claiming by an adverse title or persons claiming from the parties by title anterior to the date of the reciting deed. Such is the general rule. But there are cases in which such a recital may be used as evidence even against strangers. If, for instance, there be the recital of a lease in a deed of release, and in a suit against a stranger the title under the release comes in question, then the recital of the lease in such release is not *per se* evidence of the existence of the lease. But if the existence and loss of the lease be established by other evidence, then the recital is admissible as secondary proof in the absence of more perfect evidence, to establish the contents of the lease; and if the transaction be an ancient one and the possession has been long held under such release and is not otherwise to be accounted for, then the recital will of itself under such circumstances materially fortify the presumption from lapse of time and length of possession of the original existence of the lease."

1. See Stroughill *v.* Buck, 14 Q. B. 781; Hayes *v.* Askew, 5 Jones (N. Car.) 63.

In Bower *v.* McCormick, 23 Gratt. (Va.) 310, the court, by Christian, J., said: "The general rule, as often stated, that parties and privies are estopped from denying the recitals in a deed, when taken in its broad and literal sense, is not altogether

f. STRANGERS.—Only parties to an instrument and th claiming under them are estopped by recitals in the instrume

accurate. The rule, properly understood and more accurately stated, is this, when it can be collected from the deed that the parties to it have agreed upon a certain admitted state of facts, as the basis on which they contract, the statement of these facts though but in the way of recitals, shall estop the parties to aver the contrary."

In Stroughill *v.* Buck, 14 Q. B. 781, a deed from the plaintiff to the defendant recited among other things, that B had advanced money to O for which he was secured by bond and warrant of attorney; and that B had assigned the bond and warrant to the defendant, and that, after the assignment, the defendant had advanced £269, which was still owing, upon the security; that the defendant was interested in the said bond, &c.; that the plaintiff advanced to O £200, and that in treaty for this advance the defendant agreed to assign his interest in the bond, &c., to the plaintiff to secure his advance. The deed is then stated to witness that the defendant did assign the bond &c., to the plaintiff, and covenanted that the money advanced to O by the defendant remained due to him. In an action for a breach of this covenant alleging that the defendant had not made any advance and that no part of the £269 was due, it was held that the recital was the statement of the covenantor only and that the plaintiff was not estopped from denying that the defendant had made advances.

Feme Covert.—In a deed of trust of the separate estate of a married woman made by her and her husband, a recital that it is given as security for her indebtedness as evidenced by her and his notes, does not estop her from showing that they were for supplies furnished for a plantation which he cultivated in his name and for his benefit. Bank of America *v.* Banks, 101 U. S. 240.

In this case, the court, by Clifford, J., said: "In order to work an estoppel, the parties to a deed must be *sui juris*—competent to make it effectual as a contract. Hence, a married woman is not estopped by her covenants. Plainly the wife was not competent to purchase supplies for the plantation of her husband, and therefore cannot be estopped by these recitals. Bigelow on Estoppel, 276; Jackson *v.* Vanderheyden, 17 Johns. (N. Y.) 167; 8 Dec. 378."

1. Stevenson *v.* McReary, 12 S & M. (Miss.) 9; 51 Am. Dec. Borst *v.* Corey, 16 Barb. (N. Y.) 1

In Miller *v.* Miller, 63 Iowa 387 plaintiffs claimed title to land by scent. B, one of the defendants, so to establish a title derived from M ceased, through the deed of the execu The deed recited the provisions o will. *Held*, that to establish title u this deed, B must, in addition to in ducing it in evidence, prove the the probate thereof, and lawful proc ing ending in the execution of the d that the recitations of the deed did bind plaintiffs, they not being privi the grantor.

Nor are the recitals in a judgme a case to which a person was n party, competent evidence against Castello *v.* Burke, 63 Iowa 361.

"In Ford *v.* Grey, 1 Salk. 285, it held that a 'recital of a lease in a of release is good evidence of such against the releasor and those that c under him; but as to others it is without proving there was such a d and it was lost and destroyed.'"

In commenting on this case in Ca *v.* Jackson, 4 Pet. (U. S.) 1, the c by Story, J., said: "The same case i ported in 6 Mod. 44, where it is that it was ruled 'that the recital lease in a deed of release is g evidence against the releasor those claiming under him.' It is stated that 'a fine was produced, bu deed declaring the uses; but a deed offered in evidence which did rec deed of limitation of the uses, and question was whether that (recital) evidence, and the court said that bare recital was not evidence; but if it could be proved that such a had been, and lost, it would do, i were recited in another.' This doubtless the same point asserte the latter clause of the report in keld; and, thus explained, it is perfe consistent with the statement in keld, and must be referred to a where the recital was offered as dence against a stranger."

In Doe *v.* Errington, 8 Scott 210, Boileau who had in 1832 been admi for life by the benchers of the soc of Lincoln's Inn to certain chambe

d strangers to an instrument cannot take advantage of the tals contained therein.[1]

Inn, by indenture of July, 1833, ing that he was "seised or well en- for an estate for his own life in or e said chambers," etc., conveyed to the lessor of the plaintiff to se- an annuity, and afterwards, in the year, surrendered them to the so- with a view to the admission there- the defendant. *Held*, that inas- as the defendant did not claim gh Boileau he was not estopped e recital in the deed of July, 1833, denying that Boileau had a life e in the premises.

anklin *v.* Dorland, 28 Cal. 175; 87 Dec. 111, was an action of eject- . A mortgage executed by one of arties was introduced in evidence. , that the other party being an en- tranger, its recitals could be used as admissions of the party execut- . So, a finding by the court on a ion of boundary, of the fact as re- in the mortgage, as against the nony of five unimpeached witnesses o far contrary to evidence as to y the awarding of a new trial. also Satterlee *v.* Bliss, 36 Cal.

was trustee for a married woman r a post-nuptial agreement between nd her husband. The instrument re- that "whereas, a marriage has late- en solemnized between said M and d it having been agreed before said iage between the said parties there- at the sum of $1,300, the gross nt of the said R's right of dower e real estate of her said former nd, now deceased, shall be secured r separate use in the manner here- r mentioned." *Held*, that as this l did not purport to be of a fact n the knowledge of C, and he did ffirm the truth of it and the lan- was applicable only to the two acting parties, so far from being toppel, the recital was not even ev- e as against him of the fact re- A mere recital never concludes ty. There must be a direct affir- n.

rst *v.* Corey, 16 Barb. (N. Y.)

ants in Common.—One of two ts in common is not estopped by a l in a deed made to a stranger by her tenant. Thomason *v.* Day- o Ohio St. 63.

Recitals as Proof Against Creditors.—The recitals in a deed are not proof against creditors attacking the deed. If such recitals were proof against creditors it would be putting into the hands of a fraudulent debtor a most dangerous weapon. As was said by the Master of the Rolls in Battersbee *v.* Tarrington, 1 Swanst. 106, "Such a doctrine would give to every trader a power of excluding his creditors by a recital in a deed to which they are not parties." De Targes *v.* Ryland, 87 Va. 404.

In Tolman *v.* Smith, 85 Cal. 280, the owner of property made a deed containing the following recital: "The above described premises have been purchased by the grantee with her own money and are owned and held as her personal property." This deed was made subsequent to the execution of a certain mortgage. *Held*, that the mortgagee 'ought not to be bound by a recital which the mortgagor chose to have inserted in the deed, especially in view of the covenant in the mortgage, that both husband and wife were owners. Furthermore, such a recital does not conclude a creditor seeking to subject the property to the payment of his debt.

See also Swain *v.* Duane, 48 Cal. 360.

1. C owned land which he sold in twenty-fourth parts. He and some of the grantees subsequently executed a mortgage to a stranger in which it was recited that C was the owner of eleven twenty fourths. Before the mortgage was recorded, but after its execution, one of C's creditors issued a writ of attachment, obtained judgment, and, on execution, bought the land. An action of ejectment having been brought against the persons in possession, who had been tenants of C, they alleged that, when the attachment was served, C had no title. The plaintiff offered the mortgage containing the recital on which he relied as an estoppel. On trial the court instructed the jury that the effect of the recital was to estop the defendants, as tenants of C, from denying his title as recited. This was declared erroneous and judgment reversed. It was held that the recital in the mortgage with the subsequent purchase of the plaintiff at the sheriff's sale, did not estop the grantees who had joined in

[illegible]

[illegible] against a stranger. But in the case of a patent, who can be considered a stranger? Every person in possession of land and claiming it, must be considered as holding it either mediately or immediately from the commonwealth. The commence-

rth Carolina the decisions are not in line with the general rent of authority.[1]

2) *Title to Land.*—It is a principle of the law of estoppel that a ntor of land by warranty deed may estop himself, by his re-ls of title and ownership, from setting up an after acquired e, as against the grantee or his privies.[2]

ers in respect to matters of law, as cated either by the ultimate act of ng the patent or by recitals in-d in that instrument, is not, and, the nature of the powers and du-of such officers, cannot be conclu- Foscalina *v.* Doyle, 47 Cal. 437." also Boatner *v.* Ventress, 8 Mart., . (La.) 644; 20 Am. Dec. 268; Al-*v.* Rankin, 7 S. & R. (Pa.) 269; rose *v.* Griffiths, 4 Binn (Pa.) 231; grich *v.* Foltz, 19 Pa. St. 40; 57 Dec. 631; Broad Top Coal Co. *v.* llesburg Coal etc. Co., 65 Pa. St.

an action of ejectment to recover ain lands which the city of San ncisco held in trust, the plaintiff of-d in evidence a deed made to him he city which recited facts to show under the statute he was a bene-ry. No evidence was offered *de-* the deed to show the truth of recitals. *Held*, that the recital was clusive against the defendant who not claim to be a beneficiary. Mc-ery *v.* Duane, 52 Cal. 293, *citing* Creery *v.* Sawyer, 52 Cal. 257.

ant for Commercial Purposes.—A al in a grant from the State that the t is made for commercial purposes , does not restrict the absolute title. ott *v.* Curran, 98 N. Y. 665.

efects in Assignments.—Recitals in nts of assignments by persons who the right to convey give no pre-ptive notice of latent defects in the gnments. Bell *v.* Duncan, 11 Ohio

exican Grants.—In White *v.* Moses, al. 34, an alcalde's deed recited that grant of the lands therein described made "by virtue of the authority in vested, and in pursuance of the or-of the Ayuntamiento, or Town Coun- *Held*, that the recital did not re-t the ordinary powers of the al-e to grant lots, and that grant was perly admitted in evidence without of of the order of the town council. Berreyesa *v.* Schultz, 21 Cal 513, Mexican grant contained a recital the grantees had petitioned "for r personal benefit and that of their families and that of their parents and brothers." It was contended that the grant was intended, not merely for the benefit of the grantees named, but also for the benefit in equal shares of all the members of the Berreyesa family. To support this contention they relied, among other things, on the recital in the grant.

The court, by Field, C. J., said: "The recital in the grant does not control the direction of the title . . . the recital discloses the inducements which operated upon the governor to make the grant, but these inducements have no effect upon the character of the grant, or the course of the title." See also White *v.* Moses, 21 Cal. 34; Lewis *v.* Cavilland, 21 Cal. 178; Nieto *v.* Carpenter, 7 Cal. 527; Ferris *v.* Coover, 10 Cal. 589; Scott *v.* Ward, 13 Cal. 458.

1. In Wallace *v.* Maxwell, 10 Ired. (N. Car.) 110, the court, by Nash, J., said: "The sovereign cannot be estopped. It acts by agents and is a trustee for the people, and for their benefit the truth can always be shown. Taylor *v.* Shufford, 4 Hawks (N. Car.) 116; 15 Am. Dec. 412; Candler *v.* Lunsford, 4 Dev. & B. (N. Car.) 407, is to the same effect, with the additional principle, that when the sovereign is not bound his assignee is not." See also State *v.* Graham, 23 La. Ann. 402; People *v.* Brown, 67 Ill. 435.

2. A grantor who recites in a deed of warranty, that a certain tract of land had been conveyed to him, etc., is estopped from denying that fact in a suit commenced against him by his grantee or any person to whom his grantee has conveyed. Green *v.* Clark, 13 Vt. 158.

A party shall not be permitted to prove he had no title to land by virtue of a deed under which he holds when it contains a recital inconsistent with the proof offered. Thompson *v.* Thompson, 19 Me. 235; 36 Am. Dec. 751.

In Van Rensselaer *v.* Kearney, 11 How. (U. S.) 322, the court, by Nelson, J., said: "The principle deducible from these authorities seems to be that whatever may be the form or nature of the

3. Recital as a Covenant.—Whether a recital may amount covenant is a question which some courts have answered i affirmative.[1]

conveyance used to pass real property, if the grantor sets forth on the face of the instrument, by way of recital or averment, that he is seised or possessed of a particular estate in the premises, and which estate the deed purports to convey; or, what is the same thing, if the seisure or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was so seised and possessed at the time he made the conveyance. The estoppel works upon the estate and binds an after-acquired title as between parties and privies."

An instrument purporting to be a will executed by one Peralta, after reciting that he had already portioned out to his sons their respective lands, contained the following clause: "I declare that these lands comprehend all my property of the Rancho de San Antonio, the title of whose concession and possession is in the hands of my son Ygnacio, and which lands I have already divided among my sons as a donation *inter vivos*, to their entire satisfaction, and which donation, by these presents, I hereby ratify." *Held*, that the heirs at law of Peralta, and persons claiming under them, were estopped by these recitals from denying the title of the sons, and that these recitals operated as a ratification of the previous gift. Adams *v.* Lansing, 17 Cal. 629 See also Toledano's Succession, 42 La. Ann. 914, where it was held that a recital, in a conveyance of property of a wife, intended only for the purpose of identification, that she acquired by donation from her mother, was not such an admission as to estop her from showing the true source of her title.

Title in Another.—In Stevenson *v.* Saline Co., 65 Mo. 425, it appeared that an order was procured from the court for the sale of land by the county; and that the order recited that the land was "formerly owned" by the person who procured the order. It was held that he was estopped to deny this recognition of title after he had made it and another had acted on it and expended money and made improvements. And

see generally on the subject of t estoppel, ESTOPPEL, vol. 7, p. 1.

1. In Farrall *v.* Hilditch, 5 C. S. 840; 94 E. C. L. 840, the reci as follows: "Whereas, etc., it ha agreed between the said F (the tiff) and H (the defendant) that said H shall be at liberty to sign ment in the said action so com against the said F, as aforesa that no execution shall issue until the present security is rea Williams, J., in delivering the of the court said: "In the course argument, a case of Barfoot *v.* F was cited from 3 Keble 465, wh faithfully reported, appears to b much in point. In that case, in nant against two on a demise o mine by two, except the fourt whereby it was recited that befo sealing of the indenture it was on consideration that the p should have a third part of the digged, on demurrer to the decla it was excepted that there is no nant to pay the third part, but a of an agreement to have it. I Hale, C. J., 'were it but a recit before the covenant they were it is a covenant; and so, to say, " as it was agreed to pay £20;" f the indenture itself confirms the ment and intent precedent, the be relative to the former act i when it is declared by deed it i covenant by indenture;'" and ju was given for the plaintiff. . .

"There are several authorities recital in a deed may amount to nant. Thus in Severn *v.* Clerk, 122, it was held that, where A, deed-poll, after reciting that possessed of certain lands for ye certain term, assigned the sam with divers covenants, articl agreements in the said deed co it was held that this recital (whe was, etc.) amounted to an agr within the meaning of the cond the obligation, which was to p all agreements in the deed. S Johnson *v.* Proctor, Yelv. 175, remarks of Lord Eldon on that Browning *v.* Wright, 2 B. & P. in Holles *v.* Carr, 3 Swanst. Mod. 86, Lord Chancellor N

ıt the better opinion seems now to be that a recital is not valent to a covenant.[1]

held (contrary to the opin-
f Wilde, J., and Windham, J.,
he had called to his assist-
, that, where both parties to a
recited 'whereas it is intended a
hall be levied,' this declared an
ment to levy, and that every agree-
under seal amounts to a cove-
on which an action lies. We may
nention, that, in Adams *v.* Gib-
Bing. 656; 4 M. & P. 491, al-
h the citation of the case in Keble
forth a strong remark from Park,
the considered judgment of the
seems to take it for granted that
ital may amount to a covenant.
n the other hand, it is plain that the
ought to be cautious in spelling a
ant out of a recital of a deed."
Simson *v.* Eckstein, 22 Cal. 581, it
aid that a recital has been held to
nt to a covenant of the existence
act when that fact is supposed to
culiarly within the knowledge of
rty reciting it or his attorney.
Kentucky it has been held that a
l in a deed that a certain agree-
had been previously made is
alent to making the agreement
and that covenant will lie on such
l. 18 Am. Law Rev. 732.
n Whitehill *v.* Gotwalt, 3 P. &
Pa.) 313, the court, by Kennedy,
d: "Wherever a recital has been
o amount to an agreement or cov-
, in a deed disposing of real es-
t must have been exclusively on
round of intention, for upon no
principle can it be supported.
first case referred to and
on by the counsel for the de-
nts in error, is Severn *v.* Clerks,
from Powell on Contracts and
ed in 1 Lev. 122. . . . It
be observed that this was not the
f the deed passing the inheritance
l estate, but a mere term for
partaking more of the character
ods or chattels than real estate.
I think it also manifest from
port of this case of Severn *v.*
s. that it was not upon the mat-
one contained in the recital that
so decided, but upon that, in con-
n with the other parts of the
for Clench, J., said that 'recital of
was nothing, but being joined and
ered with the rest of the deed,
material, as there.' The case of Johnson *v.* Proctor, Yelv. 175, has also been relied on as being directly in point. The ground upon which this case was decided has been misapprehended by the counsel for the defendants in error, as well as by the learned judge who delived the opinion of a majority of this court in this case upon a former occasion. See Christine *v.* Whitehill, 16 S. & R. (Pa.) 112. Indeed, Lord Eldon seems first to have fallen into the mistake in Browning *v.* Wright, 2 B. & P. 13, and to him most likely the misapprehension all around is attributable. He says, speaking of it, 'the recital itself amounted to a warranty.' In it A and B were joint tenants for years of a will. A assigned all his interest to C without the assent of B, and died. B afterward, by indenture reciting the lease, and that it came to him by survivorship, granted the residue of the term to J S, and covenanted for quiet enjoyment of it, notwithstanding any act done by him. B also gave the purchaser a bond conditioned to perform the covenants, grants, articles, and agreements in the assignment; and the purchaser, having been evicted by C of the moiety assigned to him by A, brought an action on the bond and obtained judgment. The decision of the court, according to the report of the case, is placed most expressly and distinctly upon the force of the word 'grant' in the deed of assignment, which, by the court, was held to amount to a warranty of the title, and that the recital was merely explanatory of the subject-matter of the grant, showing the extent of it—that it was the residue of the whole term, and not an undivided moiety of it that was granted. The words of the court are, 'Proctor expressly granted by precise words, the mill and land, and therefore the condition of the bond being to perform all grants, etc., the grant being defective, at first, as to a moiety, which is the substance of the agreement of the parties, etc.'

"This case and Lord Eldon's misapprehension of it, are noticed by Mr. Sugden, in his treatise on the Law of Vendors, 574, 575, who says: 'It seems material to refer the case of Johnson *v.* Proctor to the true grounds of the decision, because, if the case turned solely

4. Recital in Deed of Receipt of Consideration.—See DEEDS, 5, pp. 435–437; ESTOPPEL, vol. 7, p. 8.

5. Recitals as Affecting with Notice of Trust.—See TRUST.

6. Recitals as Affecting with Notice of Vendor's Lien.—See TICE, vol. 16, p. 787; VENDOR AND PURCHASER.

II. RECITALS IN PLEADINGS[1]**— 1. Definition.**—A recital in plea is the statement of matter as introductory to some positive a tion, begining in declarations with the words, "For whereas."[2]

2. Recitals of Statutes—*a.* PUBLIC STATUTES.—Recitals of lic statutes are not necessary, for of these the courts take no

b. PRIVATE STATUTES.—Where a party relies on a pr statute he must recite it.[4]

c. FOREIGN STATUTES.—One who relies on a statute foreign State must in his plea set out the statute.[5]

3. Recitals of Records.—Where a record is the foundation o action it must be recited correctly. A variance will be fa

4. Recitals of Deeds.—A party reciting an instrument unde is bound to prove it as recited.[7]

on the recital, it might perhaps be thought a general recital in a conveyance of the inheritance of an estate, that the vendor is seised in fee, which would amount to a general warranty and would not be controlled by the limited covenants for the title—a proposition which certainly cannot be supported."

1. See also PLEADING, vol. 18, p. 467.

2. Black's L. Dict.

3. 2 Hale, P. C., 172; Stephen on Pleading (Tyler's ed.) 313.

This rule holds in civil as well as in criminal actions. Crawford *v.* Planter's etc. Bank, 6 Ala. 289.

If, however, the statute be recited, a variance in a material point will be fatal. If the language of the statute be substantially preserved it is sufficient. State *v.* Noel, 5 Blackf. (Ind.) 548.

4. Stephen on Pleading (Tyler's ed.) 313.

The Title of an act need not be recited, for it is not material. But though the title need not be recited, yet if the party seeking to avail himself of the provisions of the act, refer to it merely by its title he makes it material and must recite it correctly, that is, so that there be no material departure from the sense or sound. Eckert *v.* Head, 1 Mo. 593.

5. Walker *v.* Maxwell, 1 Mass. 103; Holmes *v.* Broughton, 10 Wend. (N. Y.) 75; 25 Am. Dec. 536.

Callett *v.* Keith, 2 East, 260, was an action of trespass for the seizing and taking of a vessel at the Cape of Hope. The defendant pleaded th Cape of Good Hope was, at the t the alleged trespass, under Dutc and that certain proceedings ha there in a court having jurisd *Held*, that the plea was too gener the statute under which the cou jurisdiction should have been rec

6. Lackland *v.* Pritchett, 12 M Ditto *v.* State, 30 Miss. 126; St Williams, 17 Ark. 371; Ashley *v* inson, 29 Ala. 112.

But where the record comes laterally as evidence, the rule is ent. State Bank *v.* Gray, 12 Ark

In State Bank *v.* Magness, 11 344, the replication alleges that former suit there was a judgm non-suit. The record produced s the case to have been dismissed court. *Held*, that the varianc immaterial. See McKimmon *v.* 2 Ill. 152.

7. Smith *v.* Woodward, 4 Ea Wilbur *v.* Brown, 3 Den. (356. In this case the plaintiff h quired by deed of partition, the r the surplus waters of a stream should rise, from time to time, the bottom of the plate then dam remaining after a full sup the operation of a mill, etc. In claration he claimed property much of the stream and of the might rise above the bottom of t It was held that here was fatal v

The rule applies also to instruments not under seal.[1]

RECITE.—See note 2.

RECKLESSNESS.—Is an indifference whether wrong is done or t,—an indifference to the rights of others.[3]

RECOGNIZANCE—(See also BAIL, vol. 2, p. 1; BONDS, vol. 2, 448; BREACH OF THE PEACE, vol. 2, p. 516; CONTRACTS, vol. p. 830; SURETYSHIP).—A recognizance is an obligation of ord which a man enters into before some court of record, or gistrate duly authorized, with condition to do some particular .[4] The term is commonly applied to all forms of security for appearance of the accused in criminal proceedings, whether the form of the common law recognizance or of a common bond,

ee also Baltimore Cemetery Co. *v.* st Independent Church, 13 Md. 117; liams *v.* Bryant, 5 M. & W. 447, cases cited Bishop *v.* Quintard, 18 n. 394.

ut in Henderson *v.* Stringer, 6 tt. (Va.) 130, the court by Daniel, id: "I am also of opinion, that in re- g the paper in question in the aration, it was only necessary to t out according to its legal effect and as there was nothing in it to quali- he obligation of the defendant and suit was against him only, it was necessary so to describe it as to w that he was bound; and that efore no variance arises from the that the defendant recites a bond ling the defendant, and that the d offered in evidence is one binding defendant and his heirs."

ee also, Dodge *v.* Barnes, 31 Me. 290. Ulrick *v.* Ragan, 11 Ala., N. S. 529; gins *v.* Lee, 16 Ill. 495; Smith *v.* wn, 3 Blackf. (Ind.) 22; Gragg *v.* e, 32 Me. 283; Atlantic Mut. F. *v.* Sanders, 36 N. H. 252.

A *Kansas* statute required that a iff's deed should "recite the exe- on," the names of the parties, etc. Ogden *v.* Walters, 12 Kan. 290, it held that the word "recite" as used his connection "does not mean to y or to repeat *verbatim*, but only to e the substance of the execution etc."

eciting a Statute Distinguished from ding or Counting Upon a Statute.— ere is a material distinction, not ays observed by writers on plead- —and the non-observance of which sometimes occasioned confusion veen pleading, counting upon, and ting a statute. Pleading a statute, erely stating the facts which bring se within it, without making men- or taking notice of the statute itself. Counting upon the statute, consists in making express reference to it —as by the words, against the form of the statute ('or by force of the statute') in such case made and provided. Reciting a statute, is quoting or stating its contents. A statute may, therefore, be pleaded without reciting or counting upon it; and may be counted upon without being recited. Gould on Pleading ch. 3, note 3." Hart *v.* Baltimore etc. R. Co., 6 W. Va. 348. See generally STATUTES.

3. Kansas Pac. R. Co. *v.* Whipple, 39 Kan. 531. That case was an action for damages brought by the plaintiff for injuries alleged to have been caused by running defendant's engine "recklessly and wantonly over and upon him." Defendant's counsel contended that "recklessly and wantonly" were not synonymous with "purposely and willfully:" and that, therefore, the plaintiff meant to charge defendant with negligence only. But the court held that "in popular use and by our decisions 'recklessness' and 'wantonness' are stronger terms than mere or ordinary negligence, and therefore, if a person recklessly or wantonly injures another, such person may be subject to damages, even if the other party has been guilty of some negligence or is a trespasser." See also CONTRIBUTORY NEGLIGENCE, vol. 4, p. 80.

4. State *v.* Walker, 56 N. H. 178, *quoting* Jacob's Law. Dict.; Comfort *v.* Kittle (Iowa 1890), 46 N. W. Rep. 988; 2 Bl. Com, 341, 465.

The recognizance must be entered into "before a court or officer duly authorized;" therefore where an instrument purporting to be a recognizance is entered into before an unauthorized officer it is of no binding force whatever. Clink *v.* Russell, 58 Mich. 242.

to appeal bonds, and to bonds to keep the peace. "Bond not unfrequently used as a general term including "reco zance," which is but one kind of a bond.[1]

A recognizance, however, differs from a bond in several mat points. A bond is witnessed by the seal of the obligor; wh recognizance is entered upon the record of some court or up magistrate's docket, and need not be sealed nor signed by recognitor.[2] At common law, a recognizance has priority point of payment over a common obligation, but this distinc has been done away with in some of the States and modifie others by statute.[3] But the principal difference between two forms of obligation lies in the fact that a recognizance is ter of record in the nature of a conditional judgment, and is ceeded upon by *scire facias* or summons;[4] while a bond is b superior evidence of a debt, for the recovery of which an ac must be brought.[5]

RECOMMENDATION.—See MASTER AND SERVANT, vol. 14 799; PRIVILEGED COMMUNICATIONS; VERDICT.

RECONVENTION—(See generally SET-OFF).—A plea of the law, adopted in *Louisiana* and *Texas*, in the nature of a ple set-off or counter-claim. It is more extensive in its applica than set-off, it not being requisite that the claim opposed in convention should be liquidated; but the matter embraced in plea must be connected with, and incidental to the main acti

RECONVERSION.—See EQUITABLE CONVERSION, vol. 6, p. PARTNERSHIP, vol. 17, p. 952.

1. *In re* Brown, 35 Minn. 397; 2 Bl. Com. 341; And. L. Dict.

2. 2 Bl. Com. 392; *In re* Brown, 35 Minn. 307; Com. *v.* Emery, 2 Binn. (Pa.) 431; Madison *v.* Com., 2 A. K. Marsh. (Ky.) 131.

3. DEBTS OF DECEDENTS, vol. 5, p. 238, *et seq.*; Priority of Demands Against a Decedent's Estate, by J. Woerner, 17 Am. L. Rev. 236; *In re* Brown, 35 Minn. 307.

4. A recognizance is matter of record in the nature of a judgment. The process upon it, whether a *scire facias* or a summons, is intended to carry it into execution, and is judicial; it is an original suit, in the sense that the defendant may plead to it. When final judgment is given, the whole of the proceedings constitutes one record. Respublica *v.* Cobett, 3 Dall. (U. S.) 475.

A recognizance is a debt of record in the nature of a conditional judgment, which a recorded default makes absolute. It is subject only to such matters of legal avoidance as may be shown by the plea, or to such matters of relief as may induce the court to remit or mitigate the forfeiture. The object of *facias* is to notify the cognizor to pear and show cause why exec should not issue for the sum ackn edged. State *v.* Warren, 17 Tex. See also Smith *v.* Collins, 42 Kan.

5. BONDS, vol. 2, p. 448.

Blackstone's Distinction.—Black declared the chief difference betw bond and a recognizance to be th former "is the creation of a fresh or obligation *de novo*, while a re nizance is an acknowledgment of mer debt upon record." 2 Bl. 341. It may well be doubted wh this distinction is founded in reaso though in form a recognizance ma ways be the acknowledgment prior debt, in fact, it is more freque the creation of a new obligation. the case of recognizances entered for the appearance of a defenda court; and a bond is often given m as additional security for a former

6. Lanusse *v.* Pimpienella, 4 N. S. (La.) 439; Egery *v.* Pow Tex. 502; Walcott *v.* Hendricks, 6 406; Agaisse *v.* Guedron, 2 Mart S. (La.) 83; Bouv. L. Dict.

RECORD.—(See also APPEAL, vol. 1, p. 616; AUDITORS, vol. 1, 1009; AUTHENTICATION, vol. 1, p. 1020; BILL OF EXCEP-ONS, vol. 2, p. 218; BOOKS AS EVIDENCE; vol. 2, p. 467; CERTI-ARI, vol. 3, p. 60; COUNTY COMMISSIONERS, vol. 4, p. 373; EFAULT, vol. 5, p. 460; DOCKET, vol. 5, p. 849; ESTOPPEL, vol. p. 1; EXECUTIONS, vol. 7, p. 117; EXEMPLIFICATION, vol. 7, p.); EVIDENCE, vol. 7, p. 42; FALSIFYING, vol. 7, p. 801; FOR-GN LAWS, vol. 8, p. 435; GARNISHMENT, vol. 8, p. 1096; IN-CTMENT, vol. 10, p. 450; JUDGMENTS, vol. 12, p. 58; JUDICIAL OTICE, vol. 12, p. 151; JURISDICTION, vol. 12, p. 244; JUSTICE THE PEACE, vol. 12, p. 391; LOST PAPERS, vol. 13, p. 1059; ANDAMUS, vol. 14, p. 88; MECHANICS' LIENS, vol. 15, p. 1; EMORANDUM, vol. 15, p. 262; MINUTES, vol. 15, p. 618; NEW IAL, vol. 16, p. 501; ORDINANCES, vol. 17, p. 235; RECITALS; RVICE OF PROCESS; STATUTES; WRITTEN INSTRUMENTS; RITINGS.)

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II. **Legislative Records**, 474.
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I. **Definition.**—A record, in its broad and general sense, memorial of what has been done; authentic written evider considered as either public or private, but usually public.[1] I a written account of some act, transaction, or instrument, dra up, under authority of law, by a proper officer, and designed remain as a memorial or permanent evidence of the matters which it relates.[2]

The common division of records is into judicial and legislati

This article will deal not only with judicial and legisla records, but with what may be termed *quasi* public records, will not touch upon purely private records.[4]

II. **Legislative Records.**—In *England*, general acts were ways enrolled by the clerk of the Parliament and delivered into chancery, and the enrollment in chancery was the orig record;[5] but as to private acts, the bill itself, filed and sealed remaining with the clerk of the Parliament, is the original reco In the *United States*, the practice is to enroll all acts, both eral and private; but the practice in regard to the manner of rollment varies in the different States.[7] The legislative rec which is regular upon its face, is conclusive evidence of due passage, and the terms of the act. It is of such abso

1. Anderson's Law Dict.

2. Black's Law Dict. The definition from Bouvier's Law Dict. is similar: "A written memorial made by a public officer authorized by law to perform that function, and intended to serve as evidence of something written, said or done."

Pencil Writings in Public Records—(See also Writings; Written Instruments). Writing in pencil is not sufficient in papers drawn to be used in legal proceedings, which must become public records. Stone *v.* Sprague, 24 N. H. 309; Meserve *v.* Hicks, 24 N. H. 295.

A petition for a new highway will be dismissed if the objection that it is signed with a pencil is made seasonably. Lord *v.* Dunbarton, 55 N. H. 245. See Caldwell *v.* Center, 30 Cal. 539; 89 Am. Dec. 131.

And while it seems that the rule applies to all public records, it may be relaxed for good cause; thus, a memorandum made in the treasury department of the republic of Texas in 1837, when the republic was struggling for an existence, and when its records were carelessly kept, was held properly admitted in evidence as a public record, although made in pencil. Franklin *v.* Tiernan, 62 Tex. 92.

But see Kerr *v.* Farish, 52 Miss. Fail *v.* Presley, 50 Ala. 342.

Print in Public Records.—It is n objection to the validity of an nance that it was recorded by pa a printed copy in the record-b Ewbanks *v.* Ashley, 36 Ill. 177. Maxwell *v.* Hartmann, 50 Wis. 66

3. The term record signifies, firs legislature's roll; second, the judg roll of a court of competent juri tion. Bigelow on Estoppel 3. Re "are the memorials of the legisla and of the king's court of jus Gilb. Ev. 5.

4. The legislative record wi more fully treated under the ti Statutes.

5. College of Physicians and Co *v.* Herbert, 3 Keb. 587; 5 Comyn Parliament, G. 22.

6. Rex *v.* Arundel, Hob. 11 Coke's Rep. 58.

7. Commonly a bill, having p both houses, is reported by a com tee as properly enrolled; this enr bill is signed by the presiding of of both houses, and then by the ernor of the State. Then it is p in the proper custody. See Pang *v.* State, 32 N. J. L. 29, for the cu in *New Jersey*. In *California* Sherman *v.* Story, 30 Cal. 253; 8 Dec. 93. See Statutes.

nclusiveness that it may not be contradicted by any manner of xtrinsic evidence.[1]

III. **Judicial Record.**—1. **Definition.**—A record, in judicial proceedings, is the written history of the proceedings and transactions of a court, kept as a memorial thereof.[2]

At common law the strict mode of procedure is to enter pon a parchment roll all the pleadings and proceedings up to the sue and the award of a *venire*, and the subsequent proceedings the judgment inclusive. The roll, when completed by e entry of final judgment, has the name of the judgment

1. 3 Bl. Com. 331; 1 Phil. Ev. (3rd n. ed.) 316; Sherman *v.* Story, 30 l. 253; 89 Am. Dec. 93; Pangborn Young, 32 N. J. L. 40; Hart *v.* Elroy, 72 Mich. 446. See STATES.

2. Sayles *v.* Briggs, 4 Met. (Mass.) ; Willard *v.* Whitney, 49 Me. 235; ble *v.* Shearer, 6 Ohio 426. See o Gregory *v.* Sherman, 44 Conn. 5, and note.

A record, in judicial proceedings, is precise history of the suit from its mmencement to its termination, inding the conclusion of law thereon, awn up by the proper officer, for e purpose of perpetuating the exact te of facts. Davidson *v.* Murphy, Conn. 217.

In the *United States*, paper has iversally supplied the place of rchment as the material of the recd, and the roll form has, on that count, fallen into disuse; but in er respects the forms of the Engh records have, with some modifitions, been generally adopted. Burr. w Dict, tit. "Record;" Davidson Murphy, 13 Conn. 217.

Records are memorials or rememances, in rolls of parchment, of the oceedings and acts of a court of tice, which hath power to hold plea cording to the course of the comn law. Co. Litt. 260, a; Wright *v.* nder, *cited* Hardr. 120.

At common law a record signifies a l of parchment upon which the oceedings and transactions of a urt are entered or drawn up by its icers, and which is then deposited its treasury *in perpetuam rei memriam*. 3 Steph. Com. 583; 3 Bl. Com. ; 2 Burr. Law Dict., tit. "Record;" Com. Dig, tit. "Record."

History of the Judicial Record.—(See rr. Pr. 16, 17. 247; Steph. Pl. 25, 27, 111, Appendix, p. 13, note 11; Bigelow on Estop. p. 35.) The origin of the practice of recording the proceedings of a court, which is a peculiarity of the English law, is not definitely known. The term record is itself, in its immediate derivation, French, and that the practice itself is French is shown by the fact that, while no trace of it is to be discovered among the Anglo-Saxons, it existed in the law of *France* at large, at least as early as at the Norman Conquest, and in a shape exactly similar to that which it bore in Normandy. It appears that in the Norman law *recorder* anciently signified to recite or testify on recollection, as occasion might require, what had previously passed in court, and that this was the duty of the judges and other principal persons who presided at the Placitum, thence called *recordeurs*. A vestige of this is found in the principle anciently recognized, that the record is properly not in the parchment, but in the breast of the judge. Year Book, 7 Henry VI, p. 29. It appears that the early practice was to put the proceedings down in writing at the time of judgment rendered or at convenient intervals, such as an adjournment. From this the necessity of greater accuracy naturally developed the practice of making contemporaneous minutes, and although they were, perhaps, at first merely subordinate to the final judicial record or report, they soon became themselves vested with that name and character.

The time when the practice of recording, in the present sense of the term began, may be said to be shortly after, if not at the date of Glanville's Treatise. The series of records now extant begins with the reign of Richard I. See report of the Commissioners on Public Records, and 1 Reeves Hist. Com. L. 218.

roll, and is deposited and filed of record in the treasury of
court.[1]

The common-law practice in making the record is still i
measure followed in some States, and the papers in the cause
required to be copied with more or less detail into books kept
that purpose.[2] But, in the modern practice, the usual custor
to file the pleadings, process, etc., with the clerk of the court,
the file so made, supplemented by other necessary writings
entries by the clerk,[3] constitutes the record.[4] The matters in
record are stated in the third person[5] and present tense.[6] A
this is the better form, although records which did not obs
the strict form as to tense and person have been sustained.[7]

2. What Constitutes the Record.—There must be a record
memorial of the proceedings of a court of record in every ca
in order to support and give effect to such proceedings,[8] and
to enable a party to the action to present those matters
review to a superior court, by a writ of error.[9]

As a memorial of the cause necessary to support and give ef
to the action of the court therein the question that arises is
course, to its sufficiency. But, from the fact that this wh
matter of the parts of the judicial record is largely a matte
practice, a specification of the essential constituents of the rec
of a cause, which will hold true under all circumstances and in
courts, cannot be made. It may, however, be stated, as a gen
rule, that the record must show that the court had jurisdictio

1. Stephen on Pl. (Tyler's ed.), 61, 116, 114, 126, 142–44; Freeman on Judgments, 51, § 75; Abbott's Law Dict., *Verb.* Judgment Record or Roll, *citing* Smith's Act. at Law 184; Boote's Suit at Law, 136, 142, 143.

2. Black on Judgments, § 124; Ansley *v.* Carlos, 9 Ala. 973; Willard *v.* Harvey, 24 N. H. 344.

As an illustration of the statutes to this effect, see *Ohio* Civ. Code of Proc., § 1246.

And for a form of such record under this statute, see Yaple's Code of Prac. & Proc. 130, form 112.

3. See Stimson *v.* Huggins, 9 How. Pr. (N. Y.) 86; 16 Barb. (N.Y.) 658.

4. See Vail *v.* Iglehart, 69 Ill. 332; Stevison *v.* Earnest, 80 Ill. 513; Emery *v.* Whitwell, 6 Mich. 486; Myer *v.* Verner, 10 W. N. C. (Pa.) 138; Clark *v.* Depew, 25 Pa. St. 509; 64 Am. Dec. 717.

5. Steph. on Pl. 63.

6. Steph. Pl. 60; Hamilton *v.* Com., 16 Pa. St. 129.

In regard to the record in a criminal action, Mr. Chitty says: "In the record, all the acts of the court ought to be stated in the present tens *praeceptum est* not *praeceptum* but the acts of the parties thems may be properly stated as past Chit. Crim. L., p. 720, *citing* Ha Clarke, 1 Mod. 81; Rex *v.* Young Comb. 358; Rex *v.* Perin, 2 St 303; Rex *v.* Hall, 1 J. R. 320. " therefore, if it is stated that the sh was commanded instead of is manded, the error will be fatal Chit. Crim. L., p. 720; Rex *v.* Pe Saund. 393.

7. State *v.* Martin, 2 Ired. (N. 101; State *v.* Reeves, 8 Ired. (N. 19; Hamilton *v.* Com., 16 Pa. St. 25 Am. Dec. 485; Taylor *v.* Com Pa. St. 131.

8. See *infra*, this title, *Whether mary Evidence; How Proved.*

9. See ERROR, WRIT OF, vol. 820, n. 2.

10. Philadelphia R. Co. *v.* Tri 10 Wall. (U. S.) 367; Fisher *v.* Co ell, 5 Pet. (U. S.) 254; Kenned Pickering. Minor (Ala.) 137; Bri *v.* Jamison, 46 Iowa 68; State *v.* H well, 35 Me. 129; Turns *v.* Com Met. (Mass.) 224; Com. *v.* Hogan,

less jurisdiction is presumed,[1] and that a judgment was in ct rendered[2] in the cause.[3] If there are any other matters hich materially affect the judgment, these also should appear in e record.[4] Thus, when issues have been joined, it should be ade to appear that those issues have been tried in some man- r prescribed by law so as to authorize the judgment.[5] These quirements should be particularly observed in criminal cases, pecially when the prosecution is for a capital offense, because,

ss. 7; Kenyon *v.* Baker, 16 Mich. ; 97 Am. Dec. 158; State *v.* Metz-, 26 Mo. 65; People *v.* Powers, 7 rb. (N. Y.) 462; aff'd in 6 N. Y. 50; berts *v.* Orr, 56 Pa. St. 176; Brittick McEwen, 7 Heisk. (Tenn.) 1.

Where a confession of judgment by orney is entered in vacation by the rk, it is indispensable that the power ttorney should be made a part of record. Durham *v.* Brown, 24 Ill. It has been said that the court ac- res jurisdiction over the parties and subject-matter by virtue of the ver of attorney. Frear *v.* Commer- Nat. Bank, 73 Ill. 473; Anderson Field, 6 Ill. App. 313.

ranscript on Change of Venue.—The nscript filed in a court on the re- val of a case thereto on a change of ue (see CHANGE OF VENUE, vol. 3, 106, note 2) becomes a record of t court. State *v.* Rayburn, 31 Mo. p. 385. As a certified transcript is essary to the jurisdiction of the rt to which the removal is made oades *v.* Delaney, 50 Ind. 468), it robably a necessary part of the ord. See *infra*, note 1, p. 478.

See JUDGMENTS, vol. 12, p. 147 v, *eq.*; JURISDICTION, vol. 12, pp. 270–

Page *v.* Coleman, 9 Port. (Ala.) Leathers *v.* Cooley, 49 Me. 337; en *v.* Com., 12 Allen (Mass.) 155; gers *v.* M'Daniel, 3 How. (Miss.) Story *v.* Kimball, 6 Vt. 541.

the record does not show a judg- t, it will not support a writ of r. Rogers *v.* McDaniel, 3 How. ss.) 172; National L. Ins. Co. *v.* effer, 4 Morr. Trans. 541; 15 Cent. . 196.

n an action for malicious prosecu- , the plaintiff alleged three distinct secutions against him, which he set h in several counts. To support third count, the plaintiff introduced mplaint only, and showed no war- of arrest, and no other record of a harge than the entry of the magis- trate, stating that after a full hearing of the case, the complainant withdrew his prosecution, and it was therefore ordered that the said Franklin O. (the plaintiff) be discharged. *Held*, that, as the record was not sufficient to show that a warrant was issued against the plaintiff, nor an acquittal, on the third count, it did not support the allegation of prosecution in the third count. Sayles *v.* Briggs, 4 Met. (Mass.) 421.

3. See Ellsworth *v.* Learned, 21 Vt. 535; Knapp *v.* Abell, 10 Allen (Mass.) 485; Gregnon *v.* Astor, 2 How. (U. S.) 340; 1 Bish. Crim. Proc., § 1347.

See GARNISHMENT, vol. 8, p. 1261, notes 4 and 5.

Probably in harmony with the rule of the text, although no such rule was expressed in the decision, is the requirement of a record that it shall state the time when a judgment is defaulted, the court, that the defendant was called and failed to appear, and the conclusion of law, that is, the judgment. Wales *v.* Smith, reported in a note to Davidson *v.* Murphy, 13 Conn. 217; O'Connell *v.* Hotchkiss, 44 Conn. 51. See West *v.* Hayes, 51 Conn. 533.

4. In Sayles *v.* Briggs, 4 Met. (Mass.) 421, the count by Hubbard, J., said: "A record is a memorial or history of the judicial proceedings in a case, commencing with the writ or complaint, and terminating with the judgment; and the design is, not merely to settle the particular question in difference between the parties, or the government and the subject, but to furnish fixed and determinate rules and precedents for all future like cases. A record, therefore, must be precise and clear, containing proof within itself of every important fact upon which the judgment rests."

5. See DEFAULT, vol. 5, p. 496 m, note 7.

In summary proceedings, every fact which is necessary to give the court jurisdiction and to authorize the judgment, must appear of record. Curry *v.*

in such cases, it is considered that there is little that is not ma of substance.[1] In many States, statutes have been passed sp

Munford, 5 Heisk. (Tenn.) 61; Wynne *v.* Taylor, 5 Heisk. (Tenn.) 691; Gunn *v.* Boone, 7 Heisk. (Tenn.) 8.

If a cause is tried exclusively on the agreed statement of facts, the statement should be made part of the record. Boyd *v.* Carroll, 30 Ark. 527.

Placita.—The record should have a placita, that it may appear that the record presents the proceedings of a court. Lawrence *v.* Fast, 20 Ill. 338; Dukes *v.* Rowley, 34 Ill. 210; Rich *v.* Chicago, 59 Ill. 286; Keller *v.* Brickey 63 Ill. 496.

Confession of Judgment in Vacation.—In accordance with the practice in *Illinois*, the proper and indispensable papers in such proceeding are the plaintiff's declaration on his cause of action, a warrant of attorney with proof of its execution, and a plea of confession. Durham *v.* Brown, 24 Ill. 94; Roundy *v.* Hunt, 24 Ill. 598; Stein *v.* Good, 16 Ill. App. 516. And if the power of attorney is more than a year and a day old it is necessary to file an affidavit that the debt is unpaid and the defendant living. Hind *v.* Hopkins, 28 Ill. 344; Stein *v.* Good, 16 Ill. App. 516. When the proper papers are filed they become a part of the record. Durham *v.* Brown, 24 Ill. 94.

1. Gaiter *v.* State, 45 Miss. 441; Mulligan *v.* State, 47 Miss. 304; Hamilton *v.* Com., 16 Pa. St. 129; 55 Am. Dec. 485; Foust *v.* Com., 33 Pa. St. 338; Drake *v.* Brander, 8 Tex. 351; Shapoonmash *v.* U. S., 1 Wash. Ter. 219.

But "there are many rights of an accused person, some constitutional and others not, of which the record takes no notice—such as the right to compulsory process of witnesses, the right to call witnesses, or to cross-examine those of the prosecution; and the right to be heard by himself and counsel is one of them. The safety of the accused is not imperiled by the silence of the record; for, if any of these rights be denied, there is an easy method of bringing upon the record the fact of the denial." See Cathcart *v.* Com., 37 Pa. St. 108.

But, while greater exactness is required of the record of a criminal cause than need be observed in making the record of a civil action, many of the technical rules relating to criminal practice, which had their o in that period of English history the most trivial offense was punisl with death, have long since becom solete. From a humane desire t leviate the excessive rigor of the judges, in those times, often atta great importance to technicaliti favor of the defendant. An adva civilization, and a more humane ministration of the law have rem the causes which gave rise to technical rules, and there is ther no good reason for retaining t See McKinney *v.* People, 7 Ill. 54 Am. Dec. 65; People *v.* Bennett, Y. 117; 93 Am. Dec. 551; Sta Pearce, 14 Fla. 153. The conten the record in criminal as well as cases depends mostly upon the pra in vogue in each jurisdiction. State *v.* Pearce, 14 Fla. 153; Tu Com., 6 Met. (Mass.) 224. But are certain general principles go ing the construction of this ju history of a criminal case that more or less widely recognized.

"The leading purpose of the re wherein, if it fails, it is certainly equate, is to set down and justify punishment. Hence it must what will affirmatively show th fense, the steps without which sentence cannot be good, and the tence." 1 Bish. Crim. Proc., § 13

Mr. Chitty says that "the reco case of felony, states the session of and terminer, the commission o judges, the presentment by the of the grand jurymen by name, th dictment, the award of the *capi* process to bring in the offende delivery of the indictment into the arraignment; the plea, the the award of the jury process, the dict, the asking the prisoner why tence should not be passed on him judgment of death passed by judges." 1 Chit. Crim. L. 720.

In the case of McKinney *v.* Pe 7 Ill. 552; 43 Am. Dec. 65, the cou Lockwood, J., said: "In a criminal after the caption stating the time place of holding the court, the r should consist of the indictment erly indorsed, as found by the jury; the arraignment of the acc his plea, the impanelling of the tra jury, their verdict, and the judgme

[illegible]

...ng said [illegible] ...ther than he [illegible] ...upon passed [illegible] ...s substantia[illegible] ...om., 44 Pa. St. [illegible]

...e and Place of Holding the Court. ...e record must set [illegible] ...ich the court was held. [illegible] ...n., 113 Mass. [illegible] Grandison v. ..., 2 Humph. (Tenn.) 451; Bob v. ..., 7 Humph. (Tenn.) 129.

[illegible]

Arraignment and Plea.—See Criminal Procedure, vol. 4, p. [illegible]

3–6.) Since the object of the arraignment is to obtain a plea, if the record shows a plea, a formal arraignment need not also be shown. Harmon *v.* State, 11 Ind. 311; Sohn *v.* State, 18 Ind. 389; Turpin *v.* State, 80 Ind. 148; State *v.* Braunschweig, 36 Mo. 397; Plasters *v.* State, 1 Tex. App. 673; Wilson *v.* State, 17 Tex. App. 525. *Compare* Grigg *v.* People, 31 Mich. 471.

The defendant's plea, being necessary to a legal trial and conviction, must be shown by the record. Johnson *v.* People, 22 Ill. 314; Aylesworth *v.* People, 65 Ill. 301; Yundt *v.* People, 65 Ill. 372; Price *v.* People, 9 Ill. App. 36; Hoskins *v.* People, 84 Ill. 87; 25 Am. Rep. 433; Avery *v.* People, 11 Ill. App. 332; Graeter *v.* State, 54 Ind. 159; Tindall *v.* State, 71 Ind. 314; Grigg *v.* People, 31 Mich. 471; Pringle *v.* State, 2 Tex. App. 300; Parchman *v.* State, 3 Tex. App. 225; 27 Am. Rep. 435; Peeler *v.* State, 3 Tex. App. 347; Satterwhite *v.* State, 3 Tex. App. 428; Perry *v.* State, 4 Tex. App. 566; Morehead *v.* State, 7 Tex. App. 126; Pate *v.* State, 21 Tex. App. 191; Douglass *v.* State, 3 Wis. 820.

A record of proceedings upon a criminal complaint, which sets forth that the defendant, on his arraignment, was "asked by the court whether he guilty or not guilty of the offense charged upon him;" sufficiently shows that the defendant was asked to plead to the charge. The omission of the word "is" does not leave the meaning of the record in doubt. Com. *v.* Harvey, 103 Mass. 451.

Joinder in Issue.—It is not essential that any issue should be stated as having been joined between the State and the defendant. 1 Chit. Cr. L. 720; Rex *v.* Purchase, 15 How. St. Tr. 651; Rex *v.* Royce, 4 Burr. 2073; State *v.* Carroll, 5 Ired. (N. Car.) 139; Hawkins *v.* State, 7 Mo. 190, Berrian *v.* State, 22 N. J. L. 9; State *v.* Smith, Peck (Tenn.) 165. See also Henry *v.* State, 33 Ala. 389; Com. *v.* McCauley, 105 Mass. 69. *Contra*, State *v.* Fort, 1 Law Repos. (N. Car.) 510.

Trial by Jury.—The requirement that certain matters be entered of record, in regard to many matters, as the entry of the names of the jurors, the fact that they properly qualified, that they were in legal custody, etc., depends so greatly upon local usage and practice that a compilation of the authorities on these questions can be of small general value, and will not be attem
Thus, in Turns *v.* Com., 6 Met. (M
224, in regard to an objection t
record relied on as error, that it
not appear by the record that
prisoner was tried and the ve
rendered on the oath of twelve
and that the record did not co
the names of the jurors by whom
was tried, nor show that they
good and lawful men, the cour
Shaw, C. J., said: "This is a matt
usage and practice, and each Stat
this respect, may have its own
lations; and the practice of one
have little weight, as authority, in
other. In this commonwealth,
appears to have been considerabl
versity of practice in different c
ties, as to inserting the names o
jurors in the record, and a simila
versity in the same county at diffe
periods. But there is no positive
of law, requiring the names of
jurors to be inserted in full, in
record of each particular case.
is a convenient practice, and
proper to be recommended and
served; and in most counties
adopted; but, in point of law,
court are of opinion that the
of it is not error, for which the j
ment may be reversed."

But see the following cases as i
trating these requirements: Gar
v. People, 4 Ill. 83; McKinne
People, 7 Ill. 540; 43 Am. Dec.
Pate *v.* People, 8 Ill. 644; Knou
People, 6 Ill. App. 154; Holme
People, 10 Ill. 478; Morgan *v.* Pe
(Ill. 1891), 26 N. E. 651; Beauchan
State, 6 Blackf. (Ind.) 299; Jeffri
Com., 12 Allen (Mass.) 145; Kie
S, 27 Fed. Rep. 351.

See also INDICTMENT, vol. 10, p.
n. 3.

When the record shows that the
fendant was tried by a jury of six
it must also show that he waived
right to a panel of twelve ju
State *v.* Van Matre, 49 Mo.
Vaughn *v.* Scade, 30 Mo. 600; Br
v. Hannibal etc. R. Co, 37 Mo. 29

Swearing of the Jury.—The re
must show that the jurors who
the issue were sworn. Lawso
State, 25 Ark. 106; Barbour *v.* Stat
Ark. 61; State *v.* Gates, 9 La. Ann
State *v.* Phillips, 28 La. Ann.
State *v.* King, 28 La. Ann. 425;
v. Campbell, 1 How. (Miss.) 24;
v. Mills, 4 Smed. & M. (Miss.)
Nels *v.* State, 2 Tex. 280; Drak

ler, 8 Tex. 351. *Compare, contra,* *v.* Schlagel, 19 Iowa 169.
d it must appear that the grand who found and returned an in-ent were sworn. Cody *v.* State, v. (Miss.) 27; Foster *v.* State, 31 421. It has been stated that the d must show the impaneling of the jury returning an indictment. *v.* Cheek, 25 Ark. 206. But see NEL, vol. 9, p. 950, n. 1.
neither the oath of grand nor jurors need be shown; it will be med that it was in proper form. r *v.* State, 2 Stew. (Ala.) 388; aniel *v.* Hanauer, 25 Ark. 48; rson *v.* State, 34 Ark. 257; *v.* Pearce, 14 Fla. 153; State *v.* nder, 18 Iowa 435; Dyson *v.* 26 Miss. 362; Edwards *v.* State, ss. 581; State *v.* Schoenwald, 31 47; Johnson *v.* State, 1 Tex. App. Russell *v.* State, 10 Tex. 288; *v.* State, 12 Tex. 210; Anderson te, 42 Tex. 389; Leschi *v.* Wash-Ter., 1 Wash. (U. S.) 13. If th administered to the jury is set in the record, and it is thus af-ively shown to have been insuffi-n form, the presumption in favor regularity will be overthrown. on *v.* State, 47 Ala. 9; Bugg *v.* 47 Ala. 50; Horton *v.* State, 47 8; Johnson *v.* State, 47 Ala. 62; *v.* State, 47 Ala. 516; Gardner te, 48 Ala. 263; Murphy *v.* State, 178; Bell *v.* State, 10 Ark. 536; s *v.* State, 11 Ark. 455; Harper *v.* 25 Ark. 83; Arthur *v.* State, 3 403; Smith *v.* State, 1 Tex. 408; Smith *v.* State, 1 Tex. 516; Smith *v.* State, 1 Tex. App.

also JURY AND JURY TRIAL, , p. 363, notes 1, 2 and 3.
ge of Venue.—When there has a change of venue, the record how that the matters transmitted trial court were the record of the proceedings, and that there has a change of venue. Jenkins *v.* 30 Miss. 408; State *v.* Denton, 6 (Tenn.) 539; Calhoun *v.* State, ph. (Tenn.) 477.
CONSTITUTIONAL LAW, vol. 3, n. 2.
inuances.—There is no necessity owing a continuance from day to the same term—the whole term in contemplation of law, but one Berrian *v.* State, 22 N. J. L. 9; *v.* Martin, 2 Ired. (N. Car.) 101; *v.* Com., 44 Pa. St. 131.

Presence of Defendant.—When the presence of the defendant at the trial is necessary to the validity of the conviction, it must be shown by the record. Graham *v.* State, 40 Ala. 659; Brown *v.* State, 24 Ark. 620; Bearden *v.* State, 44 Ark. 331; Scaggs *v.* State, 8 Smed. & M. (Miss.) 722; Gaiter *v.* State, 45 Miss. 441; Stubbs *v.* State, 49 Miss. 716; Long *v.* State, 52 Miss. 23; State *v.* Matthews, 20 Mo. 55; State *v.* Cross, 27 Mo. 332; State *v.* Braunschweig, 36 Mo. 397; State *v.* Ott, 49 Mo. 326; State *v.* Barnes, 59 Mo. 154; State *v.* Jones, 61 Mo. 232; State *v.* Allen, 64 Mo. 67; Burley *v.* State, 1 Neb. 385; Sperry's Case, 9 Leigh (Va.) 623; Hooker *v.* Com., 13 Gratt. (Va.) 763; Shapoonmash *v.* U. S., 1 Wash. Ter. 219.

See CONSTITUTIONAL LAW, vol. 3, p. 735.

In *Pennsylvania*, this is a requisite in the record of a criminal case, where there is a conviction for a capital felony. Dunn *v.* Com., 6 Pa. St. 384; Hamilton *v.* Com., 16 Pa. St. 129; 55 Am. Dec. 485; Dougherty *v.* Com., 69 Pa. St. 286. But, in felonies not capital, unless the contrary appears of record, the presence of the prisoner will be presumed. Holmes *v.* Com., 25 Pa. St. 221.

It will be deemed sufficient if the presence of the prisoner is shown with reasonable certainty by recitals in the record, or it may be properly inferred from the whole record. Kie *v.* U. S., 27 Fed. Rep. 351; Sweeden *v.* State, 19 Ark. 205; State *v.* Wood, 17 Iowa 18; Schirmer *v.* People, 33 Ill. 276; Rhodes *v.* State, 23 Ind. 24; Dodge *v.* People, 4 Neb. 220; Stephens *v.* People, 19 N. Y. 549; 4 Park. Cr. Rep. (N. Y.) 510; State *v.* Cartwright, 10 Oregon 193.

Allocution.—It seems that the weight of authority holds that, when it is a requisite to a valid trial and conviction, that the *allocution*, or formal address of the judge to the prisoner, asking him if he has anything to say why sentence should not be pronounced against him be delivered, the record must show that this has been done. 1 Bish. Crim. Proc., § 1358; 1 Chit. Crim. L. 700, and n. (n); Rex *v.* Geary, 2 Salk. 630; Rex *v.* Speke, 3 Salk. 368; Grady *v.* State, 11 Ga. 253; James *v.* State, 45 Miss. 572; Safford *v.* People, 1 Park. Cr. Rep. (N. Y.) 476; Graham *v.* People, 63 Barb. (N. Y.) 468; 6 Lans. (N. Y.) 149; Hamilton *v.*

fying the constituents of the judicial record, or judgment rol both civil and criminal cases.[1] The purpose of the statute thus enumerating the contents of the judgment roll, is to c out the common-law rule which has been stated.[2]

Com., 16 Pa. St. 129; 55 Am. Dec. 485; Dougherty *v.* Com., 69 Pa. St. 286.

But it has been held that this is not necessary in cases where the conviction is for offenses not capital. State *v.* Stiefle, 13 Iowa 603; State *v.* Ball, 27 Mo. 324.

And it has been said that it will be presumed that the court did its duty in this matter unless it appears from the bill of exceptions that it was not done. Carper *v.* State, 27 Ohio St. 572; Bartlett *v.* State, 28 Ohio St. 669. But in neither of these cases was the prosecution for a capital offense.

Where the record stated that the court "after hearing the defendant," proceeded to pronounce sentence, this entry, although informal, was held to be sufficient. Edwards *v.* State, 47 Miss. 581.

The expression in the decree of the court that "the prisoner having been brought into court, and having nothing to offer in arrest of judgment" was held to imply that the prisoner was asked if he had anything to say why sentence should not be pronounced against him, and was deemed sufficient. State *v.* Fritz, 27 La. Ann. 360; State *v.* Hugel, 27 La. Ann. 375.

Charge to the Jury.—When a statute provides that "charges made by judges to juries in all criminal cases, shall be reduced to writing and filed in the case," if a charge to the jury has been given, but is not of record, such record is defective. Duggan *v.* State, 9 Fla. 516.

1. See People *v.* O'Brien (Cal. 1891), 26 Pac. Rep. 362.

2. See Thomas *v.* Tanner, 14 How. Pr. (N. Y.) 426; Reid *v.* Case, 14 Wis. 429.

Summons and Proof of Service.—As the only way a person can be got into court is by summons issued and served. the summons and proof of the service of the summons are a necessary part of the judgment roll, when the judgment in the action is obtained by default for want of appearance. As to the summons: Hahn *v.* Kelly, 34 Cal. 391; Cany *v.* Governor, 4 Blackf. (Ind.) 2; Cochnower *v.* Cochnower, 27 Ind. 253; Honk *v.* Barthold, 73 Ind. 21. As to the service of summons: Ha Kelly, 34 Cal. 391; 94 Am. Dec Weeks *v.* Gold Min. Co., 73 Cal Barney *v.* Vigouseaux, 75 Cal. Carver *v.* Carver, 64 Ind. 194; comber *v.* Mayor etc. of N. Y Abb. Pr. (N. Y.) 35.

See DEFAULT, vol. 5, p. 496 n, 2 and 3; p. 476, n. 2.

But if jurisdiction is othe shown, *e. g.*, if the defendant ap the summons and the proof of s need not appear. As to sum Hoffnung *v.* Grove, 18 Abb. Pr. Y.) 14; Miller *v.* White, 10 Ab N. S. (N. Y.) 385; Baldwin *v.* ster, 68 Ind. 133. As to the pro service: Bosworth *v.* Vandewalk N. Y. 597; Christal *v.* Kelly, 8 Y. 285; Dean *v.* Roseboom, 12 Week. Dig. 123.

Proof of No Answer.—When pr no answer is required upon judg by default it should appear of r Hahn *v.* Kelly, 34 Cal. 391; 94 Dec. 742. See *dictum* to this in Thomas *v.* Tanner, 14 How Y.) 426, by Harris, J.

Decision of the Court and the V of the Jury.—The decision of the should be made a part of the judg roll. Thomas *v.* Tanner, 14 How (N. Y.) 426; Weyman *v.* Na Broadway Bank, 59 How. Pr. (N 332. If there is a trial by jur verdict of the jury should be m part of the record. Overton *v* tional Bank, 3 N. Y. St. Rep. 169 CRIMINAL PROCEDURE, vol. 4, n. 4; VERDICT.

But a verdict, in order to be properly a part of the record, m received by the court. U. S. *v.* son, 6 Wall. (U. S.) 291. See Ma *v.* Ashton, 4 Har. & M. (Md. Thus, a verdict without a judg cannot be given in evidence. De son *v.* Jude, 2 Bibb (Ky.) 57; H *v.* Carruth, Treadw. Const. (S. 471.

The reason for this, probably, such unaccepted verdicts or fin are not adjudications or parts judications. Hawks *v.* Truesde Mass. 557; Boston Blower C Brown, 149 Mass. 421. In A

ese provisions generally direct that the judgment roll be e and filed after entering the judgment in the judgment t. But it was not intended that the omission to do so ld affect the existence of the judgment.[1] The provision the judgment roll be filed immediately after the entry of udgment must be observed in regard to sequence; the filing e judgment roll, when there is no entry in the judgment , will not be a sufficient record of the cause for any purpose.[2] the omission of the clerk or judge to sign the judgment, gh directed by law to do so, being merely a clerical error, not affect the validity of the judgment.[3] Since it is the of the clerk of court to make up the judgment roll, if the d, by reason of misprision of the clerk, is defective, the court

. 23 Kan. 65, the court by tine, J., said: "Final judgments of course, adjudications; and gs of courts and verdicts of and reports of commission- r referees, may also some- be considered as adjudications; ey can be considered such only es where they themselves are or in cases where a final judg- has afterwards been rendered them sustaining and confirming and even when confirmed by a udgment, they are adjudications o far as they are necessarily in- l in and become a part of such ent. A finding or verdict, par- sustained by a judgment and lly not, is an adjudication or ce in a subsequent suit only so it is sustained by the judgment. ng contained in the finding or t, but not included in or con- by the judgment, cannot be ered as an adjudication, or used lence, unless some other ground e found for its use than merely is contained in such finding or t."

ment Entry.—The judgment must be incorporated in the ent roll. Schenectady etc. Plank Co. *v.* Thatcher, 6 How. Pr. (N. 6.

Villiams *v.* McGrady, 13 Minn. ck *v.* Stockdale, 18 Cal. 223.

provisions of the code regulat- mode of making up and filing the ent roll are not considered as tive, but as merely directory. n *v.* Huggins, 9 How. Pr. (N. ; 16 Barb. (N. Y.) 658.

utions may be issued as soon as gment is entered, although the ent roll has not been made up and filed. Sharp *v.* Lumley, 34 Cal. 611.

But filing the judgment roll has been treated as a prerequisite to the entry in the judgment docket. If the roll is not filed, but the entry in the docket is made, held to be an unauthorized act and creates no lien on the lands of the debtor. Townshend *v.* Wesson, 4 Duer (N. Y.) 342.

2. Emeric *v.* Alvarado, 64 Cal. 529; Rockwood *v.* Davenport, 37 Minn. 533; Lentilhon *v.* New York, 3 Sandf. (N. Y.) 721. But see Appleby *v.* Barry, 2 Robt. (N. Y.) 689.

A strict compliance with this provision of the code would seem to make it the duty of the clerk to enter a judgment on the verdict and make up and file a judgment roll immediately on receiving the verdict, unless otherwise ordered by the court. This, however, is not so regarded, and such is not the the practice. In practice the judgment roll is not usually made up and filed until the costs are adjusted and the party is prepared to have the judgment perfected and docketed. Stimson *v.* Huggins, 16 Barb. (N. Y.) 659.

Entry of Costs in the Record.—The theory of the code is that on making up the judgment roll and entering the proper judgment, the clerk shall leave blanks for the insertion of the costs and fill them up after taxation. Cotes *v.* Smith, 29 How. Pr. (N. Y.) 326; Petrie *v.* Fitzgerald, 2 Abb. Pr. N. S. (N. Y.) 354; Graham *v.* Pinckney, 7 Robt. (N. Y.) 147; Stimson *v.* Huggins, 16 Barb. (N. Y.) 658.

3. Secombe *v.* Steele, 20 How. (U. S.) 94; Bartlett *v.* Lang, 2 Ala. 161; Platte Co. *v.* Marshall, 10 Mo. 345; Van Alstyne *v.* Cook, 25 N. Y. 489; Osburn *v.* State, 7 Ohio 212. *Compare* Morris

upon appeal will not usually treat it as a nullity, but, if neces will order the defects remedied as of the date of filing the But the maxim that equity looks upon that as done which o to have been done does not supply the omission of part of record of judicial proceedings by the clerk of the court w duty it was to have recorded them.[2]

But many matters may be properly made part of the ju record, although they are not always a necessary part. Th ord of a case is very often introduced in evidence for other poses than merely to prove the adjudication,[3] and it is brought before a superior court of appeal for other purposes merely to ascertain whether or not the record is sufficient to port the judgment. All matters properly a part of the r and properly incorporated therein,[4] will be considered by appellate court when brought before it by a writ of error, wi employing a bill of exceptions.[5] But as the court on a will consider those matters only which are a part of the r of the cause,[6] when it is wished to bring the appellate c

v. Patchin, 24 N. Y. 394; 82 Am. Dec. 311. See also Artisans' Bank *v.* Treadwell, 34 Barb. (N. Y.) 553.

1. Thus, the omission of the answer is not necessarily fatal. Renouil *v.* Harris, 2 Sandf. (N. Y.) 641; nor the omission of the verdict. Cook *v.* Dickerson, 1 Duer (N. Y.) 679. See also Schenectady etc. Plank Road Co. *v.* Thatcher, 6 How. Pr. (N.Y.) 226; Doe *v.* Grimes, 1 Pet. (U. S.) 469.

2. King *v.* French, 2 Sawy. (U. S.) 445.

3. See *infra*, this title, *The Judicial Record in Evidence—In General.*

4. Valentine *v.* Norton, 30 Me. 194; Paul *v.* Hussey, 35 Me. 97; Carroll *v.* State, 24 Tex. App. 318.

A plea, which has not been so indorsed and filed as to require the notice of the lower court, cannot be regarded by the court on appeal. Cates *v.* Wooldridge, 1 J. J. Marsh. (Ky.) 267.

Upon an appeal from a foreign consular court, in view of the provisions of § 4093 of the U. S. Rev. Stat., if not for other reasons, separate, loose papers, wholly unauthenticated, do not constitute a record. Tazaymon *v.* Twombley, 5 Sawy. (U. S.) 79.

5. Wetherbee *v.* Carroll, 33 Cal. 549; Weeks *v.* Gold Min. Co., 73 Cal. 599; Baylor *v.* M'Gregor, 5 Port. (Ala.) 103; Whiting *v.* Fuller, 22 Ill. 33; Safford *v.* Vail, 22 Ill. 327; Durham *v.* Brown, 24 Ill. 93; Bennett *v.* Butterworth, 11 How. (U. S.) 669; Coughlin *v.* District of Columbia, 106 U. S. 7; Wheeler *v.* Winn, 53 Pa. St. 122; 91 Am 186; Van Cott *v.* Sprague, 5 Ill 99; Gates *v.* Hayner, 22 Fla. 32 BILL OF EXCEPTIONS, vol. 2, n. 6; p. 222, n. 6; GARNISHMEN 8, p. 1262, n. 1; BILL OF REVIE 2, p. 265. n. 1.

It has even been held in *Miss* that a matter which is, by part of the record cannot be c to the appellate court throu medium of a bill of exceptions. *v.* Nichol, 26 Miss. 109; Barrin Mississippi Cent. R. Co., 32 Mi New Orleans etc. R. Co. *v.* All 38 Miss. 242; 75 Am. Dec. 98; *v.* Calcote, 41 Miss. 656; Fis Fisher, 43 Miss. 212. See Gil Dickson, 33 Ark. 107.

Where, on appeal, the record did not contain the judgment s a nonsuit to have been entere though it was stated in the bill ceptions to have been rendere court cannot render a final jud as the power of the circuit court der a peremptory nonsuit agai will of the plaintiff. The plainti apply for a *certiorari* to brin perfect record, or dismiss the error, and proceed anew. Grimes, 1 Pet. (U. S.) 469.

6. Davis *v.* Packard, 6 Pet. (41; Wetherbee *v.* Carroll, 33 Ca Rogers *v.* M'Daniel, 3 How. (172; Dodds *v.* Dodds, 9 Pa. St Moore *v.* Lyman, 13 Gray (Mas Cathcart *v.* Com., 37 Pa. St. 10

ntion to matters not, *per se*, a part of the record, such matters ıld be incorporated in the record by a bill of exceptions,[1] or erwise.[2] The mere fact that certain matters have been cop- into the record by the clerk of the court, or the fact that a er is found among the files in a cause, does not make any matter a part of the record unless it properly belongs to it.[3]

lampitt, 95 U. S. 188; McKenzie ate, 26 Ark. 334; Perteet *v.* Peo- o Ill. 171; NEW TRIAL, vol. 16, p. n. 3; GARNISHMENT, vol. 8, p. n. 3.

d, under the statutes enumerating onstituents of the judgment roll, ers which do not come within the tory definition of the judgment will not be considered if they are ıcorporated in a bill of exceptions. lly *v.* Conolly, 8 How. Pr. (N. 224; Batchelder *v.* Baker, 79 Cal. Vanderkarr *v.* State, 51 Ind. 91. Wilcox *v.* Hawley, 31 N. Y. 648; *v.* Wyckoff, 18 N. Y. 45; Magie *v.* r, 14 N. Y. 435; Oldfield *v.* New etc. R. Co., 14 N. Y. 310; Smith ant, 15 N. Y. 590; Goldsmith *v.* , 30 Ohio St. 208; Zoll *v.* Soper, o. 460.

See BILL OF EXCEPTIONS, vol. 2, , *et seq.*

also BILL OF REVIEW, vol. 2, p. . 1.

when the proceeding is by a bill ity, no bill of exceptions is nec- to bring upon the record the and admissions of the parties. *v.* Smith, 16 Wall. (U. S.) 390.

t is not warrantable to include any r in the record by means of the of exceptions. See Moody *v.* l, 26 Miss. 109; Barrington *v.* ssippi Cent. R. Co., 32 Miss. 370; Orleans, etc., R. Co. *v.* Allbritton, ss. 242; 75 Am. Dec. 98; Smith lcote, 41 Miss. 656; Fisher *v.* r, 43 Miss. 212.

check the practice of unneces- extension of the record by im- r inclusion and imperfect ar- ment, the court will not hesitate ly the remedy of requiring each to pay his own costs. Union R. Co. *v.* Stewart, 95 U. S. 279. en the whole record on appeal is essarily profuse, bringing up in a ess mass a portion of what oc- at the trial, apparently in the hat something might somewhere nd that would justify a reversal judgment, those assignments hat have any apparent soundness will be noticed. Hall *v.* Weare, 92 U. S. 728. If the record is incumbered with irrelevant matter, only that part which regularly presents the true points of controversy will be considered. McMicken *v.* Webb, 6 How. (U. S.) 293.

Though the supreme court on appeal in an equity case finds the record in such a confused and defective condition that it might remand the case for correction, yet where the case has been fully argued on its merits, and enough appears from the record to enable the court to dispose of the controversy between the parties, it will be retained and disposed of. May *v.* Le Claire, 11 Wall. (U. S.) 227.

2. It has been said that the only legitimate modes by which matters of fact may be spread upon the record are orders of the court to that effect, by agreement of the parties, by demurrer to the evidence, by oyer, by special verdict and by bill of exceptions. Lenox *v.* Pike, 2 Ark. 14; Scott *v.* State, 26 Ark. 521.

By Oyer.—See PLEADINGS, vol. 18, p. 510, n. 2.

Oyer of an instrument sued on does not make the assignments of the instrument part of the record. Dardenne *v.* Bennett, 4 Ark. 458.

By Order of the Court.—There are *dicta* to the effect that a matter may be made part of the record by an order of the court. Lenox *v.* Pike, 2 Ark. 14; Spurlock *v.* Fulks, 1 Swan (Tenn.) 289.

But in the decision of Anderson *v.* Oliver, 138 Pa. St. 156, the court, by Paxton, C. J., said: "The filing of the notes of evidence did not bring them into the body of the record, because they were not filed in obedience to any law. The mere direction of the trial judge to have a paper filed does not make it a part of the record, unless the law declares that it shall become so upon such filing."

3. Seargeant *v.* State Bank, 12 How. (U. S.) 372; Kibble *v.* Butler, 14 Smed. & M. (Miss.) 210, and case cited; Stone *v.* Bennett, 4 Ark. 71; Ice *v.* Manning, 3 Ala. 121; McDonald *v.* Arnout, 14

From these considerations, the question whether a certain m is or is not properly a part of the record frequently arises.

But this is largely a matter of practice, and no absolute can be stated. By referring to the definition of the rec is seen that the record is defined to be a "history." And ing out of consideration all methods of incorporating ext matters into the record, as by bill of exceptions, perhaps no definite rule can be stated when it is said that every matte stituting a part of the history of a cause is a part of the re This may be followed up by stating what matters have, i eral, been considered by the courts as forming part of sue tory. A record is constituted of the pleadings and acts parties in courts, and the acts and doings of the court and thereon.[2] And even a pleading, which is stricken out,[3] an murrer which is overruled,[4] unless abandoned,[5] are parts record. And a paper which is a part of the pleading beco part of the record with the pleading.[6] When a bill of

Ill. 58; Anderson *v.* Field, 6 Ill. App. 307; State *v.* Jones, 11 Iowa 11; Nichols *v.* Bridgeport, 27 Conn. 465; England *v.* Gebhardt, 112 U. S. 502; Schultz *v.* State, 32 Ohio St. 276; Grounds *v.* Ralph, 1 Arizona 227.

When the judgment roll is regulated by statute, if papers, which are not designated by the statute as belonging to the judgment roll, and do not belong thereto, are incorporated in the record on appeal, they generally have no effect and are to be simply disregarded. Sharp *v.* Daugney, 33 Cal. 513; Chester *v.* Jumel, 24 N. Y. St. Rep. 229.

1. See Pauckett *v.* Graves, 6 Smed. & M. (Miss.) 384.

2. State *v.* Godwin, 5 Ired. (N. Car.) 401; 44 Am. Dec. 42. Thus the declaration is a part of the record. Cobb *v.* Com., 3 T. B. Mon. (Ky.) 391.

And a demurrer, being a pleading, is, of course, a part of the record. Gibbs *v.* Dixon, 33 Ark. 107.

3. Abbott *v.* Douglass, 28 Cal. 298.

If a plea be stricken from the files, it still remains a part of the record for the purpose of presenting the question of the propriety of the action of the court in striking it from the file. Whiting *v.* Fuller, 22 Ill. 33.

4. Thornton *v.* St. Paul etc. R. Co., 6 Daly (N. Y.) 511; Strathem *v.* Dakin, 63 Cal. 478; Gibbs *v.* Dickson, 33 Ark. 107.

5. Thus, where an amended pleading is filed, covering all the matters contained in the original pleading, besides the amendments thereto, the original pleading ceases to be a part of ord, and the answer to the origi out of the record with it. Sp Williamson, 46 Ind. 599.

When a pleading is demu and the demurrer is overrule party demurring pleads over, murrer will thus be virtuall drawn and abandoned, and fo part of the record. Peck *v.* C Den. (N. Y.) 222; Brown *v.* S R. Co., 18 N. Y. 495; Sullenb Gest, 14 Ohio 204.

6. **Affidavit of Merits.**—There affidavit of merits to a plea is a the record. Whiting *v.* Fuller 33. In a *dictum* in Graves *v.* 17 Neb. 593, the court by R said: "Of course affidavits wh intended to be used as pleadi affidavits of verification simpl are not used as evidence, but purpose of entitling a pleadi place in the record, and not be upon a hearing as evidence, w fall within the rule here stated fidavits used upon motions are of the record), but would co be a part of the record withou of a bill of exceptions."

And as it would seem upon that, like pleadings, the affi merits would not be a part of ord if it is abandoned, it shoul ticed that certain things amoun abandonment. See MERITS, AFFIDAVIT OF, vol. 15, p. 373, n. 2.

Affidavit For Change of Ve has been held that affidavit

ions is properly executed it becomes a part of the record on ppeal.[1]

But it is not true that whatever is before a court of common ıw is a part of the record.[2] And it has been stated that, in ases at common law, the course of the courts has been uniform ot to consider any paper as a part of the record which is not ıade so by the pleadings, or by some opinion of the court referring o it.[3] The evidence offered or used in a cause, unless, possibly, ll the evidence is incorporated in an agreed statement of facts,[4]

ıange of venue, when filed, become a art of the record like a demurrer. IcGovern *v.* Keokuk Lumber Co., 61 owa 265; Winet *v.* Berryhill, 55 Iowa 11.

Interrogatories to and Answers of a arnishee.—The interrogatories to and ıe answers of a garnishee, as they onstitute a part of the pleadings in ıe cause, have been held to be prop-ly a part of the record. Rankins *v.* imonds, 27 Ill. 352.

But see GARNISHMENT, vol. 8, pp. 261–1262. Other courts have held ıat the answer of a garnishee is erely evidence and not a pleading, nd therefore is not, *per se*, a part of the ecord. Brainard *v.* Simmons, 58 owa 464.

1. Haynes New Tr. & App. 687; edric *v.* Hopson, 62 Iowa 562; eauchamp *v.* Mudd, Hard. (Ky.) 170; nonymous, 4 Wend. (N. Y.) 193. ee Brown *v.* Caldwell, 10 S. & R. Pa.) 114; 13 Am. Dec. 660.

See also BILL OF EXCEPTIONS, vol. p. 222, n. 5.

Under the statutes expressly making lls of exceptions part of the judg-ent roll, a bill of exceptions will be a ırt thereof, notwithstanding the fact ıat it may be settled after the roll is ade up. Caldwell *v.* Parks, 47 Cal. o; Berry *v.* San Francisco etc. R. o., 47 Cal. 643.

2. Kirby *v.* Wood, 16 Me. 81; Ham-on *v.* Com., 16 Pa. St. 129; 55 Am. ec. 485.

In the case of Nichols *v.* Bridge-ort, 27 Conn. 465, the court by Storrs, J., said: "Although in the general escription of a judicial record in the ementary books, it is said to be a emorial or history of the proceed-gs in a cause, it is not true, as is ap-ırent from the precedents of entries, r is it intended to be understood, at it necessarily or usually embraces l those proceedings; for, as is well own, there are many proceedings of a court, during the progress of a case, of which no minute or record is made, or notice in any manner taken by the recording officer; among which may be instanced motions to amend pleadings, for bonds for prosecution, for an extension of the time to plead, for the postponement or continuance of a case, and for a bill of particulars. These are intermediate proceedings of an informal, collateral, and, so to speak, accidental and unsolemn character, not involving directly the merits of the case, but usually appertaining rather to the modes of proceeding, and of which it is not considered necessary or important that they should be noticed in the record. But even rulings of the court on the trial of a case in regard to the admission or rejection of evidence, and the instructions of the court to the jury, which affect in the most direct and vital manner the rights of the parties are not entered on the record as a matter of course, and no notice is there taken of them unless they are brought upon it, and thus made a part of it by a bill of exceptions allowed for that purpose." See also Van Cott *v.* Sprague, 5 Ill. App. 99.

3. See Fisher *v.* Cockerell, 5 Pet. (U. S.) 248.

Where the order of the court below, setting aside a judgment, referred to the notice of motion and the annexed affidavits as the foundation of that order, and identified those papers as found in the transcript, it was held that they might be considered as part of the record, so far as the authority of the court to make that order was involved. Bronsen *v.* Schulten, 104 U. S. 410.

4. In McGonnigle *v.* Arthur, 27 Ohio St. 257, the court by Ashburn, J., said: "The office of a bill of exceptions, taken to the judgment of a court in overruling a motion for a new trial on the facts, is to bring all the testimony before the reviewing court, offered to

is no part of the record.[1] And this includes the writte
struments,[2] and accounts[3] sued on, bills of particulars,[4]
affidavits used in support of motions,[5] or as evidence for o
purposes.[6] It follows that the rulings of the court on ques
relating to the evidence are not entitled to enrollment.

As the record is a history of the proceedings of a cour
matter *in pais* are no part of it. Thus bonds for costs,[7] forth
ing or delivery bonds,[8] or other transactions *in pais* betwee

the court or jury on the trial. Where the parties agree upon all the facts that are to be used on the trial, and that agreed statement of facts goes into and forms part of the record in the case, and remains in the record as the agreed facts, and the trial court sends us word in their judgment that no further testimony was offered on either side, this court will not dismiss the case for want of a formal bill of exceptions embodying all the testimony. There appears to us no sound reason why a vain thing should be required." See also Boyd *v.* Carroll, 30 Ark. 527.

1. Collins *v.* McPeak, 10 Ark. 556; Puckett *v.* Graves, 6 Smed. & M. (Miss.) 384; Spurlock *v.* Fulks, 1 Swan (Tenn.) 289; Fisher *v.* Cockerell, 5 Pet. (U. S.) 254; Scott *v.* State, 26 Ark. 521; Grounds *v.* Ralph, 1 Arizona 227; Kibble *v.* Butler, 14 Smed. & M. (Miss.) 207; Lenox *v.* Pike, 2 Ark. 14; Kirby *v.* Wood, 16 Me. 81; Ice *v.* Manning, 3 Ala. 121; Storer *v.* White, 7 Mass. 448; Peirce *v.* Adams, 8 Mass. 383; Mitchell *v.* Nicholson, 8 Yerg. (Tenn.) 194; Mansfield *v.* Mansfield, 6 Conn. 561; 16 Am. Dec. 76; Ralston *v.* Kohl, 30 Ohio St. 92; Burk *v.* Clark, 8 Fla. 9; McKay *v.* Friebels, 8 Fla. 21; Waddell *v.* Cunningham (Fla. 1891), 8 So. Rep. 643.

Thus, in an action on a delivery bond, the proceedings in the original suit and the execution and delivery bond were held not to be a part of the record in this cause; they were nothing more than evidence in this new action. McKnight *v.* Smith, 5 Ark. 409.

2. Clark *v.* Gibson, 2 Ark. 109; Bornie *v.* Kay, 5 Ark. 19; Adams *v.* Bradshaw, Hard. (Ky.) 564; Williams *v.* Duffy, 7 Humph. (Tenn.) 255.

A note upon which a judgment is confessed under a warrant of attorney is no part of the record or judgment roll. Reid *v.* Case, 14 Wis. 429.

3. Cornelius *v.* Merritt, 2 Head. (Tenn.) 97.

4. Com. *v.* Davis, 11 Pick. (M
432; Com. *v.* Farrell, 105 Mass.
See BILL OF PARTICULARS, v
p. 252, n. 1.

5. England *v.* Gebhardt, 112
502; Hatch *v.* Potter, 7 Ill. 7
Am. Dec. 88; Edwards *v.* Va
mack, 13 Ill. 633; McDonald v
nout, 14 Ill. 58; Roundy *v.* Hu
Ill. 598; Schlump *v.* Reidersdo
Ill. 68; Gross *v.* Haisley (Ind.
1891), 28 N. E. Rep. 123; App
v. Baxley, 93 Ind. 147; Jerau
Watkins (Ind. 1891), 27 N. E.
872; Backus *v.* Clark, 1 Kan. 3
Am. Dec. 437; Hill *v.* Peop
Mich. 351; Grant *v.* Planters' B
How. (Miss.) 326; Graves *v.* Sc
17 Neb. 593; Richards *v.* Sta
Neb. 145; Strunk *v.* State (Neb.
47 N. W. Rep. 640; Van Ett
Kosters (Neb. 1891), 47 N. W.
916; Plattsmouth *v.* Boeck (Neb.
49 N. W. Rep. 167; Van Ett
Butt (Neb. 1891), 49 N. W. Rep
State *v.* Godwin, 5 Ired. (N.
401; 44 Am. Dec. 42; Garn
White, 23 Ohio St. 192; Schu
State, 32 Ohio St. 276; Dod
Dodds, 9 Pa. St. 315; Curry *v.*
kane Falls (Wash. 1891), 27 Pac
477. See NEW TRIAL, vol. 16,
n. 1.

6. Affidavits introduced on the
ing of a motion for a tempora
junction, in resistance, thereof,
part of the record. Hart *v.* Fol
Iowa 407.

7. Montgomery *v.* Carpenter,
264; McQuaid *v.* Tait, 5 Ark
Cox *v.* Garvin, 6 Ark. 431; Hic
Smith, 6 Ark. 456; Pearce *v.*
ridge, 7 Ark. 413. But this m
different in those States where
security for costs is an absolute p
uisite to commencing an acti
a non-resident. See COSTS, vol
325, n. 2.

8. Grigsbey *v.* Francis, 2 How.(
845; Shields *v.* Graves, 6 How. (

rties,[1] and certain doings of the judge,[2] are considered as not rming part of the history of a cause. The swearing of a wit-ss is not a matter of record.[3] Nor are the motions made in a use such matter.[4]

But, since the record of a cause is now largely governed by atutory enactment or local custom, it may be stated that what-er proceedings, facts, or papers the law or the practice of the urts requires to be enrolled are properly a part of the record,[5] d there need not be any express order of the court making it

1; Mattheny *v.* Totten, 2 Smed. & (Miss.) 52.

1. San Francisco Sav. Union *v.* My-, 76 Cal. 624.

2. **Report of Facts By the Trial Judge.** The report of the trial judge, con-ning a statement of the facts is mere tter *in pais*, to regulate the discre-n of the court as to the propriety of anting relief, or sustaining a motion a new trial, and is not a part of the ord. Inglee *v.* Coolidge, 2 Wheat. S.) 363; McFadden *v.* Otis, 6 Mass. 3. See also Parker *v.* Framington, Met. (Mass.) 260.

Where a case has been reserved by e superior court upon a statement of ts made by the judge for the advice the supreme court as to the judg-ent to be rendered, the statement of ts made by a judge of the superior urt in such a case is not a judicial ding of the facts, and does not be-me a part of the record of the case, t is a mere informal statement for e single purpose of taking advice ereon; and when the advice is ndered, has performed its office, and of no further effect. Nichols *v.* idgeport, 27 Conn. 459.

Charge to Jury.—The charge or in-uction given by the court to the y, or proposed charges which the urt refuses to give, are no part of e record. Struthers *v.* Drexel, 122 S. 487; Jones *v.* Buzzard, 2 Ark. 5; Ellbarger *v.* Swiggett (Ind. 1891), N. E. Rep. 110; Parker *v.* Pierce, 4 eene (Iowa) 452; Claussen *v.* La anz, 1 Iowa 226; Ewing *v.* Scott, 2 wa 447; Pierce *v.* Locke, 11 Iowa 4; Hallam *v.* Jacks, 11 Ohio St. 692; ckhart *v.* Brown, 31 Ohio St. 431; ttett *v.* Van Fleet, 31 Ohio St. 536.

Opinion of Court.—Neither is the inion of the court, in rendering its cision, a part of the record. England Gebhardt, 112 U. S. 502; Wixson *v.* evine, 67 Cal. 341; Coolidge *v.* In-e, 13 Mass. 50; Cathcart *v.* Com., 37 Pa. St. 108. See Thomas *v.* Tanner, 14 How. Pr. (N. Y.) 426.

3. Gilman *v.* State, 1 Humph. (Tenn.) 59.

4. Cook *v.* Steuben Co. Bank, 1 Greene (Iowa) 447; Abbee *v.* Higgins, 2 Greene (Iowa) 535. See Mays *v.* Deaver, 1 Iowa 216; U. S. *v.* Gamble, 10 Mo. 457; Christy *v.* Myers, 21 Mo. 112; London *v.* King, 22 Mo. 336.

See ERROR, WRIT OF, vol. 6, p. 823, n. 1.

Motions, etc., for New Trial.—As to whether or not the notice of intention to move for a new trial, the motion itself and the affidavits in support of it, are, *per se*, a part of the record, see NEW TRIAL, vol. 16, pp. 686, 687, n. 4; p. 687, n. 1; pp. 687, 688, n. 2; p. 688, n. 1. A motion for a new trial is not a part of the record. State *v.* Harvey (Mo. 1891), 16 S.W. Rep. 886.

Affidavits read in the court below upon motion for a new trial are no part of the record. Saunders *v.* McCollins, 5 Ill. 419; Applegate *v.* Baxley, 93 Ind. 147; Jerauld *v.* Watkins (Ind. 1891), 27 N. E. Rep. 872; Backus *v.* Clark, 1 Kan. 303; 83 Am. Dec. 437; State *v.* Godwin, 5 Ired. (N. Car.) 401; 44 Am. Dec. 42; Van Etten *v.* Butt (Neb. 1891), 49 N. W. Rep. 365.

5. State *v.* Dawson, 6 Ohio 250; Noble *v.* Shearer, 6 Ohio 426.

Where it was the practice to indorse receipts for payment of a judgment on the record, such receipt becomes part of the record. Lothrop *v.* Blake, 3 Pa. St. 483.

With the transcript of the proceedings at law, the clerk certifies a copy of a release of errors, as written on a bill filed in the the same court, for the purpose of obtaining an injunction; the release is part of the record. Thompson *v.* Ayres, 1 Stew. (Ala.) 171.

Findings of the Court or Referee.—The findings of the court is a part of the judgment roll. Hidden *v.* Jordan, 28 Cal. 302; Kimball *v.* Stormer, 65

a part thereof.[1] It has been said that, where a statute assu to specify the constituents of the judgment roll, it cannot tain any matters not enumerated by the statute.[2] Although opinion of the court is not ordinarily a part of the record, under a statute which directs that in all cases in which the ion of the court shall be delivered, if either party requires it opinion, with the reasons therefor, shall be reduced to wri and filed of record in the cause, such opinion, if made and by a party's request[3] appearing of record,[4] is unquestionab part of the record.[5]

The record made on the first trial of a cause is no part of

Cal. 116; Harner *v.* Batdorf, 35 Ohio St. 113. And so as to the accepted report of a referee. Thompson *v.* Patterson, 54 Cal. 542. See Thomas *v.* Tanner, 14 How. Pr. (N. Y.) 426. But when a report has been returned to the referee for amendments making it more definite, the original or first report is no part of the roll. Lyddy *v.* Chamberlain, 24 Hun (N. Y.) 377.

Orders.—An order sustaining or overruling a demurrer is a part of the judgment roll. Packard *v.* Bird, 40 Cal. 378. See Abadie *v.* Carillo, 32 Cal. 172. And so is an order striking names of parties from the complaint. Tormey *v.* Pierce, 49 Cal. 306.

1. Smith *v.* Bucyrus, 27 Ohio St. 44.

2. Cook *v.* Dickerson, 1 Duer (N. Y.) 679; Hayne's New Trial & App., p. 690. But there are probably no reported cases that have, by the application of this principle, held any matter which might have been incorporated in the record at common law, to be improperly enrolled. It has been held that an interlocutory judgment, although not by name included in the statutory enumeration of the parts of the judgment roll, is yet a proper part thereof, but chiefly because it was implied by naming the judgment as a part of the roll. In Packard *v.* Bird, 40 Cal. 378, the court by Rhodes, C. J., said: "The statute does not expressly provide that an interlocutory judgment shall constitute a portion of the judgment roll, but as such judgments often determine the rights of the respective parties, there is a manifest propriety in inserting them in the judgment roll. We are of the opinion that an interlocutory judgment comes within the spirit and meaning of the statutory requirement, that the judgment shall constitute a portion of the judgment roll."

3. The opinion must be requ Meese *v.* Levis, 13 Pa. St. 384; L Valley R. Co. *v.* Hall, 61 Pa. S Bartolett *v.* Dixon, 73 Pa. St. 12 exander *v.* Weidner, 82 Pa. St. 4

Under § 462 in the *California* Pr. Act, which enumerates the co ent parts of the record of the and among other things the "w charges asked of the court, if th any," it is held that the charge gi a jury by the court, upon its ow tion, forms no part of the jud roll. People *v.* Hart, 44 Cal. 5

4. The fact that a party to the requested the filing of a writte ion must appear by the record. caster *v.* De Normandie, 1 Wha 49, *overruling* Brown *v.* Caldwel & R. (Pa.) 114; 13 Am. Dec. 66 Alexander *v.* Weidner, 82 Pa. S

5. Satterlee *v.* Matthewson, 2 P S.) 380; Parker *v.* Framingham, (Mass.) 260; Downing *v.* Bald S. & R. (Pa.) 300; Wheeler *v.* W Pa. St. 122; 91 Am. Dec. 186.

Thus in Northumberland Bank *v.* Eyer, 58 Pa. St. 97, th by Sharswood, J., said: "The contained the charge of the cou notes of the evidence. There ca doubt that this formed a part record. By the act of Febru 1806, § 25, 4 Sm. Laws 276, it i the duty of the presidents of the of common pleas, if either p their counsel require it, to redu opinion in any cause to writing, file the same of record. It ha held that the opinion thus filed positive command of the law is body of the record, and that the tends that the judge shall pla the record also such facts as are sary to explain his opinion. D *v.* Baldwin, 1 S. & R. (Pa.) 29 derbach *v.* Lutz, 14 S. & R. (Pa

record of the second trial.[1] On an appeal after a second trial the judgment record upon the second trial cannot contain the record of the first trial.[2] The return on the first appeal may properly be referred to by the court for the purpose of ascertaining facts which do not appear on the return and paper book presented on the second appeal.[3]

3. Minute Books[4] and Court Records Other than the Technical Record.—The doings of the court are in some courts taken down in brief notes by the clerk intrusted with the duty of keeping the records, and in other courts by the judge. This is usually done in the minute book called the docket, from which a full, extended, and intelligible record is afterward to be made up. The daily minutes taken by the clerk, and sanctioned by the court, or those taken by the court itself, are only memoranda to assist the memory of the clerk or judge in making up the records of the court.[5] When the clerk has once made out

1. Mahoney *v.* Ashton, 4 Har. & M. (Md.) 295.

But when profert is made, and oyer craved and given, of the record of another suit for the same cause in the same court, the record will be assumed to be part of the record of the latter suit. Kendall *v.* Talbot, 1 A. K. Marsh. (Ky.) 321.

2. Wilcox *v.* Hawley, 31 N. Y. 648; Gulf etc. R. Co. *v.* Booton (Tex. 1891), 15 S. W. Rep. 909.

3. Upon an appeal from the award of county commissioners, none of the proceedings prior to the report of the commissioners was contained in the return and paper book before the court on the appeal; but as the case had previously been before the court on an appeal from an order dismissing the petition and subsequent proceedings, it was held competent and proper for the court to refer to the return then made and on file for the purpose of ascertaining the character of the petition and order which constituted the foundation of the proceedings. Rippe *v.* Chicago etc. R. Co., 23 Minn. 18.

Where two cases are pending in the appellate court between the same parties, to be determined by the same evidence, it has even been held that such court is justified in looking into both records for the purpose of determining whether the error, if any, which has intervened in the trial of one could have been such as substantially affects the merits of the controversy, so as to warrant the reversal of the judgment. Kinion *v.* Kansas City etc. R. Co., 39 Mo. App. 574.

4. See MINUTES, vol. 15, p. 618, notes 2, 3 and 4; JUDGMENTS, vol. 12, p. 149 e, note 4.

5. Barnes *v.* Lee, 1 Cranch (C. C.) 430; Keller *v.* Killion, 9 Iowa 329; Moore *v.* Brown, 10 Ohio 198.

See LIMITATION OF ACTIONS, vol. 13, p. 717, n. 1.

The entries in the minute book of a former trial in ejectment between the same parties are not competent evidence, for the purpose of showing who were the jurors, the length of time occupied in the trial, the verdict, and the whole proceedings of the trial. Hood *v.* Hood, 2 Grant Cas. (Pa.) 229.

Minutes Entered in the Judge's Docket or Calendar.—(See also JUDGE, vol. 12, p. 16, note 1, and p. 32, note 2.) The judge's docket not required to be kept, by law, does not constitute part of the records of the court. Lewis *v.* May, 22 Iowa 599; Rogers *v.* Morton, 51 Iowa 709; McCormick *v.* Wheeler, 36 Ill. 114; 85 Am. Dec. 388; Steele *v.* Steele, 89 Ill. 51; Young *v.* Buckingham, 5 Ohio 488. And an entry therein will not constitute a judgment. Traer *v.* Whitman, 56 Iowa 443; Case *v.* Plato, 54 Iowa 64; Stark *v.* Billings, 15 Fla. 318. Nor are these minutes evidence of the rendition of judgment, Miller *v.* Wolf, 63 Iowa 233; Gurnea *v.* Seeley, 66 Ill. 500; JUDGMENTS, vol. 12, p. 149 e, note 4; nor to show which of two judgments was rendered first, Burney *v.* Boyett, 1 How. (Miss.) 39; nor of the dismissal of the suit, Towle *v.* Lacox, 59 Iowa 42; State *v.* Manley, 63 Iowa 344.

But these minutes are a proper

this history and written it in the record book, his power ove it ceases, and the record of the court is that which is entere at length in the record book.[1] The minute book or docket o the clerk, is the record until the technical record is made u in proper form by the proper recording officer.[2] When a forma

means of amending the record. McCormick *v.* Wheeler, 36 Ill. 144; 85 Am. Dec. 388. But they are not evidence by which the judgment can be amended after the term at which it was rendered. Dickson *v.* Hoff, 3 How. (Miss.) 165; Boon *v.* Boon, 8 Smed. & M. (Miss.) 318. But as to this see *infra*, this title, *Amendment*. The judge's minutes are not evidence, *per se*, of testimony given at the trial. Schoonover *v.* Myers, 28 Ill. 308; Grimm *v.* Hamel, 2 Hilt. (N. Y.) 434; State *v.* DeWitt, 2 Hill (S. Car.) 282; 27 Am. Dec. 371.

The rule that the minutes of the court is not the record, has been relaxed and the minutes admitted in evidence as the record of the court, when, in the early settlement of the Territory and crude state of judicial administration, these were the only records kept. Boal *v.* King, Wright (Ohio) 223.

The entries in the minute book may, as secondary evidence, have the same effect as a record. Browning *v.* Flanagin, 22 N. J. L. 567; Harvey *v.* Thomas, 10 Watts (Pa.) 63; 36 Am. Dec. 141; Boyd *v.* Com., 36 Pa. St. 355.

1. Barnes *v.* Lee, 1 Cranch (C. C.) 430; Willard *v.* Whitney, 49 Me. 235; Taylor *v.* Com., 44 Pa. St. 131.

2. State *v.* Carroll, 38 Conn. 449; Read *v.* Sutton, 2 Cush. (Mass.) 115; Fay *v.* Wenzell, 8 Cush. (Mass.) 317; Benedict *v.* Cutting, 13 Met. (Mass.) 181; McGrath *v.* Seagrave, 2 Allen (Mass.) 443; 79 Am. Dec. 797; Townsend *v.* Way, 5 Allen (Mass.) 426; Longley *v.* Vose, 27 Me. 185; Chamberlain *v.* Sands, 27 Me. 467; Leathers *v.* Cooley, 49 Me. 337; Jay *v.* Livermore, 56 Me. 107.

See Fitzgibbon *v.* Brown, 43 Me. 170. This is true of the docket of a municipal court, Good *v.* French, 115 Mass. 201; and of a superior court, Tracy *v.* Maloney, 105 Mass. 90.

The Minutes of a Justice of the Peace.—The rule extends to the minutes and files of a justice of the peace.

Thus, when a justice of the peace has died before making the extended record, the minutes made upon his docket have been regarded as substantially a record of his proceeding Baldwin *v.* Prouty, 13 Johns. (N. Y 430; Davidson *v.* Slocomb, 18 Pic (Mass.) 464; Story *v.* Kimball, 6 V 541; Ellsworth *v.* Learned, 21 Vt. 53

In *Connecticut*, it was held in som early cases, that the minutes of justice of the peace do not constitu the record. Davidson *v.* Murphy, Conn. 213. But the law has bee changed by statute. It is provided b the *Connecticut* Gen. Statutes, p. 44 § 34, that "when any suit has bee heard and determined by any justi of the peace who shall have neglect to make up a record of the same, h files and minutes thereof shall be a missible as evidence in all actior brought on such judgment after h decease or removal from the State See West *v.* Hayes, 51 Conn. 53 where the statute was applied to adm in evidence the minutes of a decease justice.

But if the magistrate is still aliv and can perfect his record, the mi utes will not be allowed to take t place of the regular or statutory re ord. Strong *v.* Bradley, 13 Vt. Nye *v.* Kellam, 18 Vt. 594. The fa that the justice is out of the State immaterial. Wright *v.* Fletcher, Vt. 431.

A written statement, made a signed by the justices before whom poor debtor took the oath, not pu porting to be a part of their record, inadmissible as evidence. Randall Bradbury, 30 Me. 256. See Debrel Ponton, 22 Tex. 686.

A minute upon a magistrate's bo of a continuance of the examination a poor debtor, not in the magistrat handwriting, nor signed by him, a of which he has no independent rec lection, is not sufficient evidence o legal adjournment of the heari Wetherbee *v.* Martin, 10 Gray (Mas 245.

Coroner's Minutes.—The minutes k by a coroner of an inquest held by h are not competent evidence. T facts contained in them should proved by the testimony of the coron Bass *v.* State, 29 Ark. 142.

record is not required by law, those entries, such as the files and the entries in the minute books, which are permitted to stand in the place of it, are admissible in evidence as the record.[1]

There have been statutes enacted in many States providing that there be kept among the records of courts divers other books, such as judgment books,[2] judgment dockets,[3]

1. Reg. *v.* Yoeveley, 8 Ad. & El. 306; 35 E. C. L. 536; Arundell *v.* White, 14 East 216; Jones *v.* Randall, Cowp. 17; Prentiss *v.* Holbrook, 2 Mich. 372; Com. *v.* Bolkom, 3 Pick. (Mass.) 281; Philadelphia etc. R. Co. *v.* Howard, 13 How. (U. S.) 307; Boteler *v.* State, 8 Gill & J. (Md.) 381; Washington etc. Packet Co. *v.* Sickles, 24 How. (U. S.) 333.

See State *v.* Dawson, 6 Ohio 250.

See also, Boal *v.* King, Wright (Ohio) 223.

But it has been held, that the provision of *New York* Rev. Stat. 80, § 27, requiring that the testimony taken by a surrogate in a controversy in reference to the granting of letters of administration, etc., shall be entered in a proper book, does not affect the character or evidence of the original minutes from which the entry is made. Haddow *v.* Lundy, 50 N. Y. 320.

When the *Michigan* Revised Statutes of 1840 repealed the former laws regulating the making of the court record, but failed to substitute any provisions on the subject, the files and journal entries of the court are to be deemed a substitute for such record, and as constituting the record itself. Norvell *v.* McHenry, 1 Mich. 227; Prentiss *v.* Holbrook, 2 Mich. 372.

Where docket entries stand in the place of any other record, and are regarded by the court which makes them as the record, they receive from other courts the same consideration, as a record, which is accorded to them by the court which permits them to stand in the place of any other record, provided there is no express provision of law prescribing any other record. *In re* Coleman, 15 Blatchf. (U. S.) 26.

2. **Judgment Book.**—By statute in many States it is provided that the clerk must keep among the records of the court a book for the entry of judgments, styled the judgment book. See, as illustrating the provisions of these statutes, *New York* Code Civ. Proc., § 279, 280; 2 Rev. Stat. 360, § 9. In *Iowa* a similar book is called the "record book." *Iowa* Code, § 197, subd. 1. In *Ohio* it is called the "journal." *Ohio* Code Civ. Proc., § 5331.

Under these statutes there will be no judgment in a cause until it is entered in the judgment book. Rockwood *v.* Davenport, 37 Minn. 533; Case *v.* Plato, 54 Iowa 64. But as to what is a sufficient compliance with the provision as between the parties to the judgment, see Appleby *v.* Barry, 2 Robt. (N. Y.) 689.

The entry in the judgment book is the original record of the judgment, and therefore may be used as evidence of it. Williams *v.* McGrade, 13 Minn. 46. See also JUDGMENTS, vol. 12, p. 149 e, n. 5.

It has been said that it is a part of, and has the characteristics of the records of the court. Furguson *v.* Kumler, 25 Minn. 183. By this it is probably meant, as has been stated in another case, that the judgment book is one of the records of the court, but not that it is any part of the record in the case—that it is not a part of the technical record. Young *v.* Buckingham, 5 Ohio 485.

It has been held that when the complete record has not been made up, the journal may be given in evidence to prove facts required to be put upon the record. Morgan *v.* Burnet, 18 Ohio 535.

Although it may not be required by law, there can be no objection to the practice of the clerk in keeping two judgment books; one for the entry of a judgment in a legal action; the other for the entry of a judgment in an equitable action. An entry of a judgment in the wrong book, when such two books are kept, is at most a mere irregularity, and must be disregarded. Thompson *v.* Bickford, 19 Minn. 17.

3. **Judgment Docket.**—A book is generally required to be kept for docketing in a prescribed manner, each judgment. See *New York* Code Civ. Proc., § 1245. And a judgment will not be treated as docketed unless entered in this particular book. Sheridan *v.* Linden, 81 N.

execution dockets;[1] and various other books of lesser impor ance.[2]

4. **Justice's Docket.**[3]

5. **The Judicial Record in Evidence**—*a.* IN GENERAL.—At co mon law the entire judgment entry alone is sufficient to prove domestic judgment.[4] And it seems that this principle exten

Y. 182. But the provisions requiring a judgment docket to be kept are merely directory in their character; and omissions and variances which cannot work any prejudice are immaterial. Sears *v.* Burnham, 17 N. Y. 445. In this case the entry in the docket, stating the entry of the judgments to have been one year later than they were actually obtained, was held to be a sufficient compliance with the statute. In the decision of the case the court by Strong, J., said: "In the present case the error in the docket could not possibly prejudice the appellant. It simply postponed the lien of the judgment for a year; the dockets gave as ample notice of the judgments as they would have done if the error had not occurred; the like search which would have been required if the dockets had been correct would have disclosed the judgment and the mistake."

Since the purpose of the statutes requiring the docketing of judgments is generally to make a money judgment a lien upon the real estate of the debtor (see JUDGMENTS, vol. 12, pp. 104 *et seq.*), and sometimes as a preliminary to the issuing of an execution, the docketing is not necessary to the validity or regularity of the judgment. Sheridan *v.* Andrews, 49 N. Y. 478; Whitney *v.* Townsend, 67 N. Y. 40.

This book being for the docketing of the judgment, and as there can be no judgment unless it is entered in the judgment book, the entry in the judgment docket, without an entry in the judgment book, is of no avail. Rockwood *v.* Davenport, 37 Minn. 533; Case *v.* Plato, 54 Iowa 64. But the docket has been used as secondary evidence of the judgment where the record book has been made, but is not obtainable. Moore *v.* McKinley, 60 Iowa 367; Taylor *v.* Wendling, 66 Iowa 562.

1. **Execution Docket.**—When a statute requires the clerk of the court to keep a book in his office, and, when returned, enter therein every writ of execution which may issue from his office, such book becomes a record of the court. Green *v.* Goodrum, 4 Metc. (Ky.) 274. See Hartley *v.* Chandler, Ala. 857.

When the execution itself is lost t execution docket is competent secon ary evidence in its place. Dunlap Berry, 5 Ill. 327; 39 Am. Dec. 4 Becker *v.* Quigg, 54 Ill. 390.

2. There are also a number of oth books required by statute to be ke but which are only of local importan Among them are the following:

Appearance Docket.—Haverly *v.* A cott, 57 Iowa 171; O'Driscoll *v.* Sop 19 Kan. 574.

Incumbrance Book.—Blodgett Huiscamp, 64 Iowa 548.

Register of Actions.—A provisi that a register of actions be kept, co taining the title of the action, and br notes under it from time to time of papers filed and proceedings had the in, such entries are merely minutes proceedings and are not admissible evidence of judgment. Brown Hathaway, 10 Minn. 303.

Trial Lists.—Trial lists of cases not part of the records, and memora da made upon them by the judge private entries. Moore *v.* Kline, 1 129. But a trial list of a stated term a monument, from the entries up which the record may be made up any time. Wilkins *v.* Anderson, Pa. St. 399.

3. See JUSTICE OF THE PEACE, v 12, pp. 502, *et seq.*

4. Locke *v.* Winston, 10 Ala. 8 Haynes *v.* Cowen, 15 Kan. 637; Chi *v.* Caldwell, 4 Bibb (Ky.) 543; McGu *v.* Kouns, 7 T. B. Mon. (Ky.) 386; Am. Dec. 178; Rathbone *v.* Rathbo 10 Pick. (Mass.) 1; Doe *v.* Gildart How. (Miss.) 267; Cockerel *v.* Wy 12 Smed. & M. (Miss.) 117; Lee *v.* L 21 Mo. 531; Gardere *v.* Columbia I Co., 7 Johns. (N. Y.) 518. See Low *v.* M'Durmott, 5 Yerg. (Tenn.) 2 The production of the judgment be, at least, *prima facie* sufficient. Pa ard *v.* Hill, 7 Cow. (N. Y.) 434; H *v.* Packard, 5 Wend. (N. Y.) 375.

Compare, contra, Kenyon *v.* Bak 16 Mich. 373; 97 Am. Dec. 158; Irv *v.* Lumberman's Bank, 2 W. & S. (P

ther, so that it may be stated as a general rule that only the
t of the record concerning the matter in issue need be pro-
ced in proof of such matter.[1] But a part of the record can
ve only that which upon its face it purports to prove.[2]
The whole record of a cause may be introduced in evidence if
y part of it is admissible.[3] And it is generally the better prac-
e to put the whole record in evidence, and, when it is sought

; Edmiston *v.* Schwartz, 13 S. &
(Pa.) 135; Christine *v.* Whitehill,
S. & R. (Pa.) 107; Hampton *v.*
ckenagle, 9 S. & R. (Pa.) 212; 11
. Dec. 704.

roof of Judgments Rendered in Sister
es.—The entry of a judgment recov-
l in a court of another State is held
admissible to prove the judgment,
o other part of the record is pro-
ed. Ashley *v.* Laird, 14 Ind. 222;
Am. Dec. 67; Brown *v.* Eaton, 98
. 591. See Baringer *v.* King, 5 Gray
ass.) 9. See JUDGMENTS, vol. 12, p.
v, notes 3–6.

ffect of Presumptions in Aid of Rec-
—As the reason advanced in sup-
t of the requirement that the whole
ord must be produced, is that the
rt can, from an inspection of the
ole record, see whether the court
jurisdiction to render judgment, it
ld, upon principle, seem that the
sumptions entertained in favor of the
sdiction of superior courts of general
sdiction, make it unnecessary that
facts giving jurisdiction should ap-
r on the record. See JURISDIC-
N, vol. 12, pp. 270-282, as to presump-
s in aid of jurisdiction; see also
GMENTS, vol. 12, p. 147 v *et seq.*
s, the judgment book, which is re-
ed by the code to be kept for the
y of judgments, is held sufficient to
ve as a fact a domestic judgment of
perior court. Williams *v.* M'Grade,
Minn. 46.

n Ogden *v.* Walters, 12 Kan. 282,
court by Valentine, J., said: "It is
. . immaterial whether the rec-
introduced in evidence be consid-
l the whole of the record, or only a
ion thereof; for in either case the
sumptions are that the proceedings
e regular and valid."

Francis *v.* Hazling, 1 A. K.
rsh. (Ky.) 93.

hus the copy of a bill was admitted
vidence for the purpose of showing
admissions of the defendant. Smith
IcGehee, 14 Ala. 408.

n a suit involving the question of marriage between two persons, a bill filed by one of those persons against the other for a divorce, and the answer thereto, in which it is charged and admitted that a marriage was legally solemnized between them, was held admissible in support of the marriage without a production of any other part of the record. Henderson *v.* Cargill, 31 Miss. 367.

Bankruptcy and Insolvency Proceedings.—Since proceedings in bankruptcy or insolvency do not constitute one entire proceeding, and the record is usually very voluminous, it is not necessary to produce the whole record of such proceeding when only a certain part thereof is sought to be proved. Michener *v.* Payson, 13 Nat. Bankr. Reg. 49; Succession of Stafford, 2 La. Ann. 886; Price *v.* Emerson, 14 La. Ann. 137.

2. In Haynes *v.* Cowen, 15 Kan. 641, the court by Valentine, J., said: "It" (the part of a record admitted in evidence) "cannot prove more than it purports to prove. No liberal presumptions can be entertained or resorted to for the purpose of supplying omissions, aiding or extending the import of its language. It is only when the whole of the record is introduced in evidence that liberal presumptions can be invoked to aid the record." And this language is quoted with approval in Capitol Bank *v.* Huntoon, 35 Kan. 577. See Foot *v.* Glover, 4 Blackf. (Ind.) 314; Williamson *v.* Foreman, 23 Ind. 340; 85 Am. Dec. 475; Miller *v.* Deaver, 30 Ind. 371.

3. Miles *v.* Wingate, 6 Ind. 458; State *v.* Hawkins, 81 Ind. 486; Smith *v.* Smith, 22 Iowa 516; Succession of Patrick, 20 La. Ann. 204; Morrell *v.* Foster, 33 N. H. 379; Numbers *v.* Shelly, 78 Pa. St. 426.

Where part of the record of a suit has been introduced in evidence by one party, the other party may introduce the whole. Fowler *v.* Stonum, 6 Tex. 60; State *v.* Hawkins, 81 Ind. 486.

matters by the record than simply the
it is often necessary to do so. Thus, when it is s
record in a cause, to establish a former adjudication
subject-matter between the same parties, the whole
should be produced.[1] And, as the record of an inferior c
liberally aided by presumptions as to jurisdiction, e
courts of general jurisdiction, it would seem t
the judgment of a court of inferior jurisdiction, the
must be introduced, so as to affirmatively show th
had jurisdiction to render the judgment.[2] The same
applies in special proceedings in which jurisdiction
presumed.[3]

The objection made against the admission of a record
that which is properly in the record, and, when im
is incorporated therein, it should be specifically ob
it is not a part of the record.[4] A record admissible fo
but not for all purposes may be rejected *in toto*, unless the
offering it state the facts proposed to be proved by it.[5]
the fact of the existence of a record is not in issue, witnesse
refer to it for the purpose of aiding their recollection w
the record being produced in evidence.[6] The principle of
pretation applicable to many kinds of legal instruments, viz
the whole record must be taken together, and that uncertai
one part may be made clear by certainty in another part,
wise applied to records.[7]

5. Of What Evidence.—The record of an action is a
admissible in evidence to prove the fact and time of ren
the terms, and the effect of the judgment.[8] The same pri

1. Mason *v.* Wolff, 40 Cal. 246; Walls *v.* Endel, 20 Fla. 86; Ashmead *v.* Wilson, 22 Fla. 255; Vail *v.* Iglehart, 69 Ill. 332; Foot *v.* Glover, 4 Blackf. (Ind.) 313; Clark *v.* Hebert, 15 La. Ann. 279.

Where a party intends to avail himself of a decree as an adjudication upon the subject-matter in controversy, and not merely to prove collaterally that the decree was made, he must show the proceedings upon which the decree was founded, and the whole record which concerns the matter in question ought to be produced. Clark *v.* Hebert, 15 La. Ann. 279.

2. See Judgments, vol. 12, p. 148, notes 2 and 3.

3. Goodrich *v.* Burdick, 26 Mich. 39.

4. Chance *v.* Summerford, 25 Ga. 602.

5. Kenan *v.* Holloway, 16 Ala. 53; 50 Am. Dec. 162.

6. M'Ilvoy *v.* Cochran, 3 Litt. (Ky.)

7. Loper *v.* State, 3 How. (Mi

8. Legatt *v.* Tollervey, 14 E
King *v.* Norman, 4 C. B. 884;
v. Sandford, 21 Ala. 157; Wat
Cunningham, 71 Cal. 30; Com
Bank *v.* Eddy, 7 Met. (Mas
Head *v.* McDonald, 7 T. B. Mo
203; Com. *v.* M'Pike, 3 Cush.
181; 50 Am. Dec. 727; Fox *v.*
La. Ann. 135; Splahn *v.* Gille
Ind. 397; Johnson *v.* Culver, 1
278; Key *v.* Dent, 14 Md. 86; J
Talbot, 9 Mo. 121; Paul *v.* Sla
Vt. 231; 54 Am. Dec. 75; Tayl.
1667, 1668. See Beyer *v.* Schu
N. Y. Super. Ct. 212; Gisriel
rows, 72 Md. 366. The reason
is that the mere fact that such
ment was given, being a thing
public authority, can never be
ered as *res inter alios acta*,
can the legal consequence of
judgment be so considere
Spencer *v.* Dearth, 43 Vt. 98; J
Talbot, 9 Mo. 121.

tances.—Thus, under the principle d in the text, the record of a con- on may be shown, in order to e the legal infamy of a witness; in to let in proof of what was sworn e trial, or to justify proceedings in ution of the judgment; to show a suit has been determined; or, in er cases, to prove the amount h a principal has been compelled y for the default of his agent; or amount which a surety has been pelled to pay for the principal or. 1 Greenl. Ev., § 527. The wing cases serve as illustrations: here a judgment of a court of law, decree of a court of chancery, s a link in a chain of title, the fact e existence of such judgment or e may be shown by the record, in oversies with third persons, as as between the parties. Den v. ilton, 12 N. J. L. 109; Barr v. Gratz, heat. (U. S.) 213. See Turpin v. non, 3 McCord (S. Car.) 261.

here the existence or validity of col- l proceedings between strangers out in issue by the allegations in laintiff's petition, the transcript of proceedings may be introduced in nce on the part of the defendant. v. Bennett, 18 Tex. 794.

an action by partners, in a mer- e firm, to recover damages for the gful and vexatious suing out of an nment against them, in conse- ce of which their credit was de- ed and their business broken up, cord of the attachment and pro- ngs thereon is proper evidence to bmitted to the jury. Donnell v. , 17 Ala. 689; 52 Am. Dec. 194.

an action of trespass for breaking tiff's close and carrying off a stock uors, where the defense was justi- on under a warrant issued by a e, under the act for the prevention illegal sale of liquors, the record e warrant and of the proceedings e the justice in regard thereto is etent evidence. Plummer v. Har- Iowa 308.

e record of the appointment of a rvator by the court of probate is ssible to prove his appointment, in ninal prosecution against the ward assault upon him while entering welling-house of the ward to dis- e the duties of his appointment. v. Hyde, 29 Conn. 564.

an action against an officer for g process in an attachment suit, cord of that suit is competent evi- dence for him. The plaintiff having taken a non-suit upon its admission in the court below, there is no ground for setting it aside. Snead v. Wegman, 23 Mo. 263.

The transcript of an attachment suit was held to be properly admitted in evidence, to show when the funds in question were discharged from the garnishment, that being the time at which the defendant had promised to pay them over to the plaintiff. White v. Leavitt, 20 Tex. 703.

The record of proceedings in partition among certain heirs is evidence of the fact of partition. Archer v. Bacon, 12 Mo. 149; Warren v. Fredericks, 76 Tex. 647; Shanks v. Lancaster, 5 Gratt. (Va.) 110; 50 Am. Dec. 108.

In assumpsit for money paid to the use of the defendant, a record of court is admissible to show a decree against the plaintiff and defendant for the same thing, and full satisfaction by the plaintiff. Davidson v. Peck, 4 Mo. 438. For the application of the principle to somewhat similar facts, see Taylor v. Williams, 120 Ind. 414; Ray v. Clemens, 6 Leigh (Va.) 600.

Where one of two makers of a joint and several note, having been sued thereon alone and paid the judgment, sues his co-debtor for a contribution, the record of the former suit, in the absence of the note or any evidence of its execution or consideration, cannot support the action. Beck v. Hunter, 3 La. Ann. 641.

In an action by a bailee of goods against the owners of a steamboat, to recover damages paid by him to the owners of the goods, resulting from the negligence of the servants of the steamboat owners, the record of a judgment recovered against him by the owners of the goods for the injuries thereto, and their receipt for the money paid by him in satisfaction of their demand, are competent evidence to prove a demand of compensation upon the plaintiff by the owners of the goods. McGill v. Monette, 1 Ala. Sel. Cas. 285.

When goods have been attached as the property of a debtor, and another person has interposed a claim to them, and has executed a claim bond which recites the levy and the interposition of the claim, and an action has been brought to try the right of property between the attaching creditor and the claimant, the claim bond is evidence for the plaintiff of the levy of

to prove other matters by the record than judgment, it is often necessary to do so. Thu by the record in a cause, to establish a forme same subject-matter between the same parti should be produced.[1] And, as the record not so liberally aided by presumptions as t superior courts of general jurisdiction, i proving the judgment of a court of inferio record must be introduced, so as to affir court had jurisdiction to render the judg ciple applies in special proceedings in presumed.[3]

The objection made against the a only that which is properly in the r matter is incorporated therein, it sho that it is not a part of the record.[4] but not for all purposes may be reje offering it state the facts proposed the fact of the existence of a recor refer to it for the purpose of ai the record being produced in evid pretation applicable to many kin the whole record must be taken one part may be made clear by wise applied to records.[7]

b. OF WHAT EVIDENCE.—T admissible in evidence to pro the terms, and the effect of t

1. Mason *v.* Wolff, 40 Cal. Walls *v.* Endel, 20 Fla. 86; Ash *v.* Wilson, 22 Fla. 255; Vail *v.* hart, 69 Ill. 332; Foot *v.* Gl Blackf. (Ind.) 313; Clark *v.* 15 La. Ann. 279.

Where a party intends to a self of a decree as an adjudic on the subject-matter in co and not merely to prove c that the decree was made show the proceedings upo decree was founded, and record which concerns th question ought to be prod *v.* Hebert, 15 La. Ann. 2

2. See JUDGMENTS, v notes 2 and 3.

3. Goodrich *v.* Burdi

4. Chance *v.* Sumn 662.

5. Kenan *v.* Hollo 50 Am. Dec. 162.

6. M'Ilvoy *v.* Co 454.

N. H. 9; Mo. 168 illustrations the record of shown to let orn to at the tri is offered only t, to be followed on the trial of th not evidence unl is properly e Thomas, 44 Pa. St 422.

ssessory action to judgment roll of pr s in the probate court i ary evidence to war tion of proof of a Gilmore *v.* Taylor, 5 O regard to the expression is offered as inducen ton says: ". . . it v correct to say that as gers a judgment is adm e its existence and legal Ev., § 823.

De Forrest *v.* Butler, 62 rison *v.* Chapin, 97 Mass. etc. Bank *v.* Erie R. C Turpin *v.* Branno S. Car.) 261; State *v.* rd (S. Car.) 442; Vigel How. (U. S.) 208. See 20 Conn. 564. It seems e does not depend upon a peculiar to the law re records, but is simply e application of the prin dence may be given in any of any fact relevant to an See EVIDENCE, vol. 7, stances.—In an action b st his father, in respect t erty, the record of an a en the father and a thi ing a claim, by the property, is admissibl ence. Adams *v.* Adams, 2 In an action brought upo e record and proceedings in

· between the same
troverted fact which
ion.[1] But it is essen-
.t both parties shall be
ordance with the legal
ere non debet,[2] it is not
a stranger to the action.[3]

ıdence in a subsequent suit between
ıe same parties, although a motion
for a new trial in the former suit is
pending. Chase *v.* Jefferson, 1 Houst.
(Del.) 257.

The record of a former suit be-
tween the same parties is not conclu-
sive, unless the subject-matter passed
upon in the former suit be the same
with that in dispute in the case at bar.
Clemens *v.* Murphy, 40 Mo. 121.

To make a record, in a former suit,
conclusive evidence on any point, it
should appear from the record that
such point was in issue. And evidence
aliunde is not admissible to show that
a matter not in issue on the record was
taken into consideration by the jury.
Manny *v.* Harris, 2 Johns. (N. Y.) 24;
3 Am. Dec. 386; Jackson *v.* Wood, 3
Wend. (N. Y.) 27.

If a plaintiff, on a trial, waive any
particular portion of his claim, and
afterwards bring a new suit for such
claim, the record in the former action
is no bar to the new suit. Louw *v.*
Davis, 13 Johns. (N. Y.) 227.

Master's Report.—A master's report
is not evidence as an adjudication be-
tween the parties until it has been ac-
cepted, and judgment rendered upon
it. Nash *v.* Hunt, 116 Mass. 237. See
MASTER IN EQUITY, vol. 14, p. 937, *et
seq.*

2. 2 Smith's Lead. Cas. 812; Broom's
Max. 954.

3. Proctor *v.* Johnson, Salk. 600; 1
Ld. Raym. 669; Snodgrass *v.* Branch
Bank, 25 Ala. 161; 60 Am. Dec. 505;
Wilson *v.* Campbell, 33 Ala. 249; 70
Am. Dec. 586, and note; Costello *v.*
Burke, 63 Iowa 361; Henderson *v.*
Western Ins. Co., 10 Rob. (La.) 164;
43 Am. Dec. 176, and note; Clagett *v.*
Easterday, 42 Md. 617; Archer *v.* Ba-
con, 12 Mo. 149; Cravens *v.* Jameson,
59 Mo. 69; Harrington *v.* Wadsworth,
63 N. H. 400; Dows *v.* McMichaels, 6
Paige (N. Y.) 139; Briley *v.* Cherry,
2 Dev. (N. Car.) 2; 18 Am. Dec. 561;
Wilson *v.* Harper, 5 S. Car. 294;
Bracken *v.* Neill, 15 Tex. 109; Pratt *v.*

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37 Ala. 333.
an *v.* Greenwoods Turnpike
onn. 1; Spinks *v.* Glenn, 67
Boyer *v.* Berryman, 123 Ind.
wry *v.* M'Murtry, Sneed (Ky.)
routman *v.* Vernon, 1 Bush
482; Buchanan *v.* Smith, 75 Mo.
iller *v.* Brenham, 68 N. Y. 83;
v. Saunders, 4 Neb. 569; Spen-
Dearth, 43 Vt. 98; Lehi Irriga-
o. *v.* Moyle, 4 Utah 327; James
zard, Hempst. (U. S.) 240. See
v. Smith, 19 Nev. 259. See
UDICATA.
record of a suit is admissible in

Therefore, such record cannot be used by a stranger ag
party to it.[1]

By the application of these principles it follows that the
of a criminal case is not evidence, in either a civil action,
another criminal prosecution,[3] of the facts upon which th
ment is founded, *i. e.*, the facts in issue; but it would be
sible to prove a collateral fact.[4]

Jones, 64 Tex. 695; Frazier *v.* Frazier, 2 Leigh (Va.) 642; Duncan *v.* Helms, 8 Gratt. (Va.) 68; Laidley *v.* Kline, 8 W. Va. 218.

See also JUDGMENTS, vol. 12, p. 84, n. 4.

The record of a suit erroneously brought in the name of A upon a bond cannot be given in evidence in a suit rightly brought upon the same instrument in the name of B. Kauffelt *v.* Leber, 9 W. & S. (Pa.) 93.

In an action on a bond against the administrator of the surety, a judgment on an award against the principal in a former action brought by the plaintiff against the principal, is not evidence. Beall *v.* Beck, 3 Har. & M. (Md.) 242.

A bill was filed in the court of equity for partition, on the death of J W and his wife, stating that the parties claimed as remaindermen after the wife's death, and a copy of the will under which they claimed was exhibited. A sale of the land was ordered and made, and a title deed executed to the plaintiff, one of the remaindermen. *Held*, that the proceedings in equity, though admissible as showing the foundation of plaintiff's deed, and pertinent to establish the identity of the land, could not furnish evidence, as against a stranger, to show that the parties were entitled as remaindermen. Wardlaw *v.* Hammond, 9 Rich. (S. Car.) 454.

The record of other suits between the defendant and other plaintiffs cannot be read in evidence by the plaintiffs, to show fraud in the dissolution of partnership. Bank of Alexandria *v.* Mandeville, 1 Cranch (C. C.) 575.

The pleadings in an equity suit, by one partner against another, are inadmissible to show that the firm was insolvent at the date of a mortgage, on the trial of a claim between the mortgagee levying on his *fieri facias* and another party. Shaw *v.* McDonald, 21 Ga. 395.

1. 1 Greenl. Ev. 524; Davis *v.* Wood, 1 Wheat. (U. S.) 6; Chiles *v.* Conley, 2 Dana (Ky.) 21; Fitzhugh
gaan, 2 J. J. Marsh. (Ky.) 429
Dec. 139. The court in the
by Robertson, J., in stating th
tion to the admission of a reco
"The appellants who attempt
it (being strangers to the acti
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The rule is reciprocal. If th
could not be evidence against
pellants, it should not be for

2. Clark *v.* Irvin, 9 Ohio 13
The record of a criminal
tion against the defendants fo
entry and detainer, wher
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Fulmer, 49 Pa. St. 155.

But where a reward is off
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offender. Borough of
Forscht, 23 Pa. St. 391.

But in an action to recover
for the detection and convict
offender, the record of con
not conclusive evidence of
Mead *v.* Boston, 3 Cush. (Ma

3. Betts *v.* New Hartford,
285; Corbley *v.* Wilson, 71
Beausoliel *v.* Brown, 15 La. A
Mead *v.* Boston, 3 Cush. (M
Com. *v.* M'Pike, 3 Cush. (Ma
50 Am. Dec. 727; Com. *v.* Ch
Mass. 102; 55 Am. Rep. 448;
son *v.* Bank of Wheeling, 41
80 Am. Dec. 596; Moses *v.* B
Whart. (Pa.) 272; Duchess
ston's Case, 2 Sm. L. Cas. 6
v. White, 1 Str. 68; Helsham
wood, 11 C. B. 111; 73 E. C
Justice *v.* Gosling, 12 C. B.
C. L. 37; Smith *v.* Rummen
9; Petrie *v.* Nuttall, 11 Exch

4. State *v.* Foster, 3 Mc
Car.) 442.

record may sometimes be admissible as secondary evidence.[1] where a record is produced by a party to prove a particular the opposite party is not entitled to avail himself of it as a of other facts, for which he could not have used it as nary evidence.[2]

WHETHER PRIMARY EVIDENCE.—The record is the only ence of the proceedings had before,[3] or the acts[4] of a court record.[5] And the time of such proceedings or acts is so

Thus in an action by the guar- against the maker of a note, to er the amount of a judgment st the plaintiff, as guarantor of ote, the record of the judgment, ng the note upon which it pur- d to have been founded, and the tiff's guaranty, is admissible as nce of the note and the guaranty. is v. Bowen, 52 N. H. 416.

record containing copies of a and assignment, being admitted idence without objection, is suf- t evidence of the assignment. es v. Patterson, 3 Dana (Ky.) 408. Herndon v. Givens, 16 Ala. 261.

People v. Reinhart, 39 Cal. 449; le v. McDonald, 39 Cal. 697; Peo- Schenick, 65 Cal. 625; Mills v. es, 4 Blackf. (Ind.) 438; Strom- v. Earick, 6 B. Mon. (Ky.) 578; v. Hamilton, 36 La. Ann. 790; lon v. Frink, 12 Pick. (Mass.) Fleming v. Clark, 12 Allen s.) 191; Smith v. Smith, 43 N. H. Michener v. Lloyd, 16 N. J. Eq. 'ice v. Reeves, 30 N. J. L. 314; e v. Hawn, 5 Johns. (N. Y.) 351; onier v. Union Ins. Co., 1 Nott & . Car.) 155; Lining v. Bentham, (S. Car.) 1; Austin v. Howe, 17 54; Beach v. Baldwin, 9 Conn. Grimes v. Grimes, 1 Dana (Ky.) Harker v. Dement, 9 Gill (Md.) 7; n. Dec. 670.

Lyon v. Bolling, 14 Ala. 753; 48 Dec. 122; Williams v. Cheese- h, 4 Conn. 356; Abrams v. Smith, ackf. (Ind.) 95; Reilly v. Cava- n, 29 Ind. 435; Duvall v. Peach, 1 Md.) 172; Hughes v. Christy, 26 230; Milan v. Pemberton, 12 Mo. State v. Lewis, 80 Mo. 110; State uglass, 81 Mo. 231; Tuttle v. on, 6 Wend. (N. Y.) 213; 21 Am. 306; Tyrrel v. Woodbridge, 27 N. 416; Inman v. Jenkins, 3 Ohio 271; omb v. Smith, 5 Ohio 447; State Alpin, 4 Ired. (N. Car.) 140; Ma- Pelletier, 77 N. Car. 52; Etters ters, 11 Rich. (S. Car.) 413.

5. In addition to the two preceding notes see the following references and cases: FORMER SUIT PENDING, vol. 8, p. 555, n. 4; INFAMY, vol. 10, pp. 609, 610; INSOLVENCY, vol. 11, p. 229, n. 8; JEOPARDY, vol. 11, pp. 966–968; MALICIOUS PROSECUTION, vol. 14, p. 58, n. 5; NATURALIZATION, vol. 16, p. 232, n. 2; PERJURY.

Though the judgment and proceedings before a justice are not technically a record, yet his record of them is the best evidence, and must be produced in preference to parol proof. Grimm v. Hamel, 2 Hilt. (N. Y.) 434.

The docket of a justice of the peace is only primary evidence of those facts which it is required to contain. Scorpion S. M. Co. v. Marsano, 10 Nev. 370.

The pendency of a suit in a court of record can only be proved by record evidence. Smiley v. Dewey, 17 Ohio 156. But see Brown v. Littlefield, 7 Wend. (N. Y.) 454.

A witness cannot testify to the foreclosure and sale of mortgaged premises; the record of the suit is the proper evidence. Kennedy v. Reynolds, 27 Ala. 364.

In an action on a promise to indemnify against the claim of a third person, the party indemnified being bound in good faith not to yield to the demand until compelled by law to do so, the record of a judgment recovered by that third person is the proper evidence of the recovery. Weld v. Nichols, 17 Pick. (Mass.) 538.

The proceedings of the court of admiralty, before whom was tried the question of prize or no prize, is the best evidence, in an action on a policy of insurance, to show the reasons assigned for condemnation or acquittal. Messonier v. Union Ins. Co., 1 Nott. & M. (S. Car.) 155.

Where the magistrate is by the *Georgia* Code, § 457, required to keep a docket and enter his judgments thereon, such judgment cannot be proved by

much a part of them, that it, also, can only be proved b record.[1]

d. CONCLUSIVENESS AS EVIDENCE.—The record of a cou ports verity—imports such absolute verity that no person is all in collateral proceedings, to aver, nor to give proof again

From this doctrine of the absolute verity of records resul rule that parol testimony may not be given to vary or contra

the summons which has the judgment of the case indorsed on it; although § 4143 requires the officer serving the summons to return the original with an entry of service thereon, to the justice of the peace, and that it shall be filed and preserved with the other papers pertaining to his office. Ramsey *v.* Cole, 84 Ga. 147.

The questions, how many terms of court were held in a certain year, what judge presided, and whether juries were in attendance, though these are facts which might appear from the records, are in the nature of matters *in pais* and are susceptible of proof by parol evidence. Massey *v.* Westcott, 40 Ill. 160.

1. Sherman *v.* Smith, 20 Ill. 350; Jenkins *v.* Parkhill, 25 Ind. 473; Weaver *v.* Lammon, 62 Mich. 366; Farnsworth *v.* Briggs, 6 N. H. 561.

2. Co. Litt. 260 a; 3 Steph. Com. 583; 3 Bl. Com. 24; Com. Dig. Rec., A. F.; 9 Bac. Abr. 556; 2 Ph. Ev. C. H. & E. notes, p. 2 and cases cited in note 1; 1 Roll. Abr. 757; Rex *v.* Carlile, 2 B. & Ad. 362; 22 E. C. L. 96; Jones *v.* Junkins, 4 Dev. & B. (N. Car.) 454; 34 Am. Dec. 392; Cline *v.* Cutter, 34 N. J. Eq. 329; 15 Cent. L. J. 289; Murfree *v.* Carmack, 4 Yerg. (Tenn.) 270; 26 Am. Dec. 232; Weigley *v.* Matson, 24 Ill. App. 178; aff'd 125 Ill. 64; 8 Am. St. Rep. 335; Hodges *v.* Bagg, 81 Mich. 243; Weber *v.* Schmeisser, 7 Mo. 600; McCoy *v.* State, 22 Ark. 308; Douglass *v.* Wickwire, 19 Conn. 489; Farley *v.* Budd, 14 Iowa 289; Dows *v.* McMichael, 6 Paige (N. Y.) 139; Maynes *v.* Brockway, 55 Iowa 457; King *v.* Chase, 15 N. H. 13; Kip *v.* Brigham, 7 Johns. (N. Y.) 168; Galloway *v.* McKeiten, 5 Ired. (N. Car.) 12; Spencer *v.* Credle, 102 N. Car. 68; Stephenson *v.* Flournoy (Ky. 1890), 13 S. W. Rep. 210.

Thus a maxim of the law says: "*Quod per recordum probatum, non debet esse negatum.*" Bart. Dig. Leg. Max. 142. And also that "*nemo potest contra recordum, verificare per patriam.*" 2 Inst. 380.

See ESTOPPEL, vol. 7, pp. 2 a

The decisions on the conclus of records are mostly in regard t ments, and the authorities are c under JUDGMENTS, vol. 12, p 148 k.

See also, JURISDICTION, vol. 272, note 1; p. 273, notes 2 and 3 notes 3 and 4; p. 281, note 1; p 311; PARTITION, vol. 17, p. *seq.*

Minute Books of the Court.— before the extended record is m the clerk's or the court's docket is as the record, the same rules sumed verity apply to it as to t ord. Read *v.* Sutton, 2 Cush. 115; Leathers *v.* Cooley, 49 M Jester *v.* Spurgeon, 27 Mo. 477.

3. Dickson *v.* Fisher, 1 W. *In re* Watson, 30 Kan. 753; Mit Insley, 33 Kan. 654; Handley sel, Hard. (Ky.) 152; Triplett len, 6 J. J. Marsh. (Ky.) 564; *v.* Douglass, 22 Ill. 100; Robi Ferguson, 78 Ill. 538; Hard man, 6 Barb. (N. Y.) 621; Pe Powers, 7 Barb. (N. Y.) 462; *v.* Mayor etc. of N. Y., 32 N Rep. 559; Case *v.* State, 5 Jones *v.* Williams, 62 Miss. 183

A return of a justice to a *certiorari* cannot be admitted tradict the record. Weaver mon, 62 Mich. 366.

Minute Book of the Court.—Th excludes even the minutes of th whose record is under consid if offered to vary or contradict ord. Hobbs *v.* Duff, 43 C Davidson *v.* Murphy, 13 Co Cherry *v.* State, 6 Fla. 679; K Kelly, 10 Iowa 104; South Burnham, 1 Me. 369; Willard ney, 49 Me. 235; Mandeville *v.* ett, 28 Miss. 398; Crosswell *v.* 9 Johns. (N. Y.) 289; Den *v.* D 13 N. J. L. 135; Updegraff *v.* Pa. St. 291; Williams *v.* Tenpe Humph. (Tenn.) 176. See also of Savage, J., in Hahn *v.* K Cal. 423; 94 Am. Dec. 742.

add to,[1] the record.[2] While this is the general rule, it is obably a settled principle that, when the record does not show at issue was actually tried at the former suit, parol testimony other extrinsic evidence may be given thereof,[3] and the ques- n submitted to the jury.[4] But the record is *prima facie* evi- nce of a prior adjudication of every demand which might have en drawn into controversy under it.[5] One part of a record y be aided or impeached by another part.[6] But the existence a record may be brought in issue, even collaterally, by the a of *nul tiel record.* And the fact of the existence of the rec- l will be determined by the court from mere inspection reof.[7]

. How Proved.[8]—The record of a court is probable by the ginal record, or a copy of the record, depending upon the court which the proof is to be made.[9]

State *v.* Glover, 3 Greene (Iowa) Sayles *v.* Briggs, 4 Met. (Mass.) Jones *v.* Perkins, 54 Me. 393. *pare*, Knott *v.* Sargeant, 125 Mass. State *v.* Womack, 17 Tex. 237.

arol evidence is inadmissible to ve a service of citation or copy of tion. Gliddon *v.* Goos, 21 La. n. 682.

he record cannot be aided by pa- filed in the case, but not incor- ated into the record. Treat *v.* well, 82 Me. 76.

hen a record does not contain a history of the facts, it would seem the proper procedure would be to e it amended.

See Parol Evidence, vol. 17, p. n. 1; Insolvency, vol. 11, p. 229,

ut see *infra*, this title, *Amendment Record.*

Outram *v.* Morewood, 3 East 353; tin *v.* Thornton, 4 Esp. 180; don *v.* Tutop, 1 Esp. 401; Ravee Farmer, 4 T. R. 146; Russell *v.* e, 94 U. S. 608; Rake *v.* Pope, 7 161; Hughes *v.* Jones, 2 Md. Ch. Whitehurst *v.* Rogers, 38 Md. Standish *v.* Parker, 2 Pick. ss.) 22; 13 Am. Dec. 393; Parker Thompson, 3 Pick. (Mass.) 434; ge *v.* Gray, 14 Pick. (Mass.) 55; m. Dec. 358; Eastman *v.* Cooper, ick. (Mass.) 276; 26 Am. Dec. 600; Dowell *v.* Langdon, 3 Gray (Mass.) Burlen *v.* Shannon, 14 Gray ss.) 433; Dutton *v.* Woodman, 9 h. (Mass.) 261; Hood *v.* Hood, 110 s. 463; Chase *v.* Walker, 26 Me. Dunlap *v.* Glidden, 34 Me. 519; tevant *v.* Randall, 53 Me. 149; Walker *v.* Chase, 53 Me. 258; Lander *v.* Arno, 65 Me. 26; Gardner *v.* Buckbee, 3 Cow. (N. Y.) 120; 15 Am. Dec. 256; Burt *v.* Sternburg, 4 Cow. (N. Y.) 559; 15 Am. Dec. 402; Wood *v.* Jackson, 8 Wend. (N. Y.) 44; 22 Am. Dec. 603; Phillips *v.* Berick, 16 Johns. (N. Y.) 136; 8 Am. Dec. 299; Thurst *v.* West, 31 N. Y. 210; Roberts *v.* Orr, 56 Pa. St. 176; Ward *v.* Price, 1 Pin. (Wis.) 101; Brown *v.* Pratt, 4 Wis. 513; 65 Am. Dec. 330; Driscoll *v.* Damp, 16 Wis. 106; Pfennig *v.* Griffith, 29 Wis. 619.

Compare, contra, Campbell *v.* Butts, 3 N. Y. 173.

4. Burlen *v.* Shannon, 14 Gray (Mass.) 433; Eastman *v.* Cooper, 15 Pick. (Mass.) 276; 26 Am. Dec. 600; Foye *v.* Patch, 132 Mass. 105.

5. Bridge *v.* Gray, 14 Pick. (Mass.) 55; 25 Am. Dec. 358, and cases *supra*, note 3.

6. Jester *v.* Spurgeon, 27 Mo. App. 477.

7. 3 Bl. Com. 24, 331; 9 Bac. Abr. 556; Adams *v.* Betz, 1 Watts (Pa.) 425; 26 Am. Dec. 79.

8. See *infra*, this title, *Lost Record.*

9. See Williams *v.* Brummel, 4 Ark. 129; Betts *v.* New Hartford, 25 Conn. 180; Phelps *v.* Hunt, 43 Conn. 191; Perry *v.* May, 1 Hill (S. Car.) 76; English *v.* Sprague, 33 Me. 440.

Printed Reports of Decisions.—The printed report of a case decided before the supreme court, although issued by authority of law, is not competent original evidence of a judgment rendered therein. Donellan *v.* Hardy, 57 Ind. 393. But such reports may be

(1) *By the Record.*—Where the record to be proved is a r of the court before which the proof is to be made, the rec self should be produced.[1] Since a court takes judicial not its own records, they may be admitted in evidence withou ther proof than is given by their production by the clerk the proper archives.[2] And the original records and files suit, if properly identified may be evidence in other court the one to which they belong,[3] for whenever a certified co a record is admissible, the original, duly proved, is equally petent.[4]

(2) *By Copy of the Record.*—A record, if it does not bel the court in which the proof is to be made, may also be p

good secondary evidence. Taylor *v.* Com., 29 Gratt. (Va.) 780.

1. Adams *v.* State, 11 Ark. 466; Britton *v.* State, 54 Ind. 535; Harrison *v.* Kramer, 3 Iowa 543; Longley *v.* Vose. 27 Me. 179; Ward *v.* Saunders, 6 Ired. (N. Car.) 382; Burk *v.* Tregg, 2 Wash. (Va.) 215.

The Original Papers in a Cause.—The original detached papers in a suit, on file in the office where the court records are kept, may be used in evidence with the same court if the complete record has not been made. Sharp *v.* Lumley, 34 Cal. 611; Peck *v.* Land, 2 Ga. 1; 46 Am. Dec. 368; Sutcliffe *v.* State, 18 Ohio 469; 51 Am. Dec. 459; Buffington *v.* Cook, 39 Ala. 64. It has even been held that the original separate papers in an inferior court may be received in evidence in a superior court. State *v.* Bartlett, 47 Me. 396; Allis *v.* Beadle, 1 Tyler (Vt.) 179.

In an action to recover damages for causing the plaintiff to be indicted, the original indictment is admissible in evidence. Watts *v.* Clegg, 48 Ala. 561.

But such papers are not admissible if the final record has been made up. Brown *v.* Isabell, 1 Ala. 1009. See Watts *v.* Clegg, 48 Ala. 561.

But, in State *v.* Bartlett, 47 Me. 396, it was said that although the records of inferior courts are regularly made up, and though such records or duly authenticated copies thereof are deemed evidence of the highest character and cannot be explained or contradicted by parol testimony or extraneous documents, that fact does not exclude the original papers on which such records are founded.

A bill for an injunction not filed as an original, the order upon wh never been complied with, ca considered as a record of court of itself, to be evidence in a cl suit between the same parties. *v.* Fortner, 5 Port. (Ala.) 9.

The indorsement of a man' on the back of an indictment, a ness, is not sufficient to prove was prosecutor. Hurd *v.* Sl Ill. 354.

Where a writing has been fi court of law, on a suit betw same parties, a copy is inadmis evidence. Handley *v.* Fitzhu K. Marsh. (Ky.) 24.

In a suit against one as inde a writ, the docket entry, togeth the extended record of the action, both stating that the de indorsed the writ, is not suffici dence of that fact. It must be mined by an inspection of t itself, if it be found. Wilson *v.* 32 Me. 85.

2. Prescott *v.* Fisher, 22 I Ward *v.* Saunders, 6 Ired. (N 382; Wallis *v.* Beauchamp, 303.

See also JUDICIAL NOTICE, p. 183, note 1.

3. Gray *v.* Davis, 27 Conn. 4 vison *v.* Earnest, 80 Ill. 513; O Bacon, 6 Cush. (Mass.) 185; Moore, 13 Gray (Mass.) 522; W *v.* Conger, 125 U. S. 397.

But see Bowden *v.* Taylor, 199; Crilley *v.* State, 20 Wis. 23

4. Britton *v.* State, 54 Ind. 53 *v.* Manly, 19 Me. 331; Folsom *v.* 73 Me. 270; Brooks *v.* Dar Pick. (Mass.) 498; People *v.* G Wend. (N. Y.) 465; Miller *v.* I Pa. St. 432; Bruce *v.* Manches R. Co., 19 Fed. Rep. 342.

a certified copy, a sworn copy, and an exemplification of the ord.[1]

IV. **Record of State Acts and State Papers.**—Acts or ordi-nces of State, such as treaties, commissions, pardons, State nts, proclamations, official letters, and State papers generally, recorded in the executive departments.[2] But the printed py of these State papers, purporting to be published in pursu-ce of a statute or resolution of the legislative department, and perly authenticated, is an authentic record of their existence d contents.[3] But a government gazette is not competent to ve a fact of a private nature.[4]

V. **Miscellaneous Public Records**[5]—**1. Definition.**[6]—A public ord is a memorandum made by a public officer authorized to

. See JUDGMENTS, vol. 12, pp. 148s, t, 149e, 149f.

State *v.* Peelle, 124 Ind. 515; rgia Penitentiary Co. *v.* Gordon, Ga. 159. See Lapeyre *v.* U. S., 17 ll. (U. S.) 191; Marbury *v.* Madi-, 1 Cranch (U. S.) 137.

rants or patents from the sover-n are enrolled in the office from ich they emanate, and are then rec-s. Clarke *v.* Diggs, 6 Ired. (N.Car.) ; 44 Am. Dec. 73; Fain *v.* Garth-nt, 5 Ga. 6.

certified copy of the executive utes is not evidence of a witness's don. The pardon or a certified y is necessary. Cox *v.* Cox, 26 Pa. 375; 67 Am. Dec. 432.

Rex *v.* Holt, 5 T. R. 436; Thellu-*v.* Cosling, 4 Esp. 266; Watkins *v.* lman, 16 Pet. (U. S.) 55; Dredge *v.* syth, 2 Black (U. S.) 563; Radcliff United Ins. Co., 7 Johns. (N. Y.) Whiton *v.* Albany etc. Ins. Co., Mass. 24; Milford *v.* Greenbush, Me. 330; Worcester *v.* Northbo-gh, 140 Mass. 397; Talbot *v.* See-n, 1 Cranch (U. S.) 38.

hus a volume of the American te Papers was admitted, on mere in-ction, as evidence of the documents ch it recorded. Gregg *v.* Forsyth, How. (U. S.) 179; Doe *v.* Magru-13 Fla. 602; Nixon *v.* Porter, 34 s. 697; 69 Am. Dec. 408. The erican State Papers are declared to as valid evidence as the originals n which they are copied. Bryan *v.* syth, 19 How. (U. S.) 334; Dutillet Blanchard, 14 La. Ann. 97.

he State Register, in which the lic acts of the governor, which are uired to be made public, are by law uired to be published, is the record eof, and was admitted in evidence to prove the terms and existence of the governor's proclamation. Lurton *v.* Gilliam, 2 Ill. 577; 33 Am. Dec. 430; 1 Greenl. Ev., § 479.

The articles of agreement between the proprietaries of Pennsylvania and Maryland respecting boundaries, are State papers, and need not be proved or acknowledged. Ross *v.* Cutshall, 1 Binn. (Pa.) 399.

But a printed book purporting to be a report of a sub-committee of the House of Representatives, which is in no way authenticated, does not purport to be a part of the authenticated journal, is not identified by it, and is not even a publication required to be made, or a record required to be kept by the House of Representatives, is not admissible in evidence. Marks *v.* Orth, 121 Ind. 10.

4. For example, an application to a foreign government for a patent right, wherein the applicant describes himself as a citizen of *New Jersey*, resident and permanently established within the jurisdiction of the foreign government, is not evidence in a *New Jersey* court in support of an attachment there against the property of the applicant. Brundred *v.* Del Hoyo, 20 N. J. L. 328, *citing* Phillip's Ev. 407; Greenl. Ev. 540; Rex *v.* Holt, 5 T. R. 436; Radcliff *v.* United Ins. Co., 7 Johns. (N. Y.) 38.

5. The term "public record" applies, of course, to all the records treated in the preceding divisions. But the records grouped and treated of under this division, are, in the opinions delivered by the courts, invariably classified under the general title of public records.

6. See Bouv. Inst., § 3096; Gaines *v.* Relf, 12 How. (U. S.) 569.

perform that function, or a writing properly filed in a p office,[1] intended to serve as evidence of something written, or done.

2. In General.—Public officers are largely authorized by st to keep certain records, but, if a memorial or book be kept, is a necessary or even a convenient and appropriate mo discharging the duties of the office, it becomes a public ment, or record.[2] But private memoranda kept by a p officer for his own convenience are not records.[3] A mem dum of the acts of the officer by whom they are made wil be a record if the acts recorded are unauthorized.[4] Every p

1. The distinction must be observed between an original writing which may be properly filed in a public office, referred to in the text, and the record of an instrument, which, although properly recorded in a public office, belongs in private hands. See Bradley *v.* Silsbee, 33 Mich. 328; Ayres *v.* Grimes, 3 Har. & J. (Md.) 95. The latter, being a public record of a private writing, is treated under the title RECORDING ACTS.

2. By the application of this principle, the following have been held to be public records: The record of a person employed by the United States Signal Service. Evanston *v.* Gunn, 99 U. S. 660. A book kept by a county school commissioner, recording his transactions in selling the school lands in his county. Hedrick *v.* Hughes, 15 Wall. (U. S.) 123. The warrant book of the sinking fund, kept in the office of the second State treasurer. Coleman *v.* Com., 25 Gratt. (Va.) 865; 23 Am. Rep. 711. A register of the sales and conveyances of land, kept in the office of the register of State lands. Bell *v.* Kendrick, 25 Fla. 778. Plat books kept in the county recorder's office. Miller *v.* Indianapolis, 123 Ind. 196. A county treasurer's book of tax sales. Groesbeck *v.* Seeley, 13 Mich. 329. A city tax sales' book, made up by the receiver of taxes, and in the custody of the city treasurer. Burton *v.* Tuite, 78 Mich. 363. The books of accounts kept in the office of an alcalde. Kyburg *v.* Perkins, 6 Cal. 675. The records of the proceedings of the board of public improvements of a city. Fruin-Bambuck Construction Co. *v.* Geist, 37 Mo. App. 509. A register of lamps, kept in the city engineer's office, and the register kept by the lamp inspector. St. Louis Gas Light Co. *v.* St. Louis, 86 Mo. 495. Books kept by, and recording the proceedings of justices. Chamberlain *v.* Sands, 27 Me. 467. Books kept by selectme taining accounts of the finances a penses of the town. Thornto Campton, 18 N. H. 20. A book k and recording the proceedings of c school directors. Gearhart *v.* Di Pa. St. 224. Books kept by the recording the issue of liquor lic Albrecht *v.* State, 62 Miss. 516.

See also Howe *v.* Taylor, 9 C 288; Franey *v.* Miller, 11 Pa. St.

But see Toole *v.* State, 88 Ala Attwood *v.* Fricot, 17 Cal. 37; M *v.* Greenbush, 77 Me. 330; B Loan etc. Co. *v.* Knight's Templa Assoc., 56 Hun (N. Y.) 303.

But an account kept by the as of taxes with an acknowledgment debtedness to the State, was hel to be of the dignity of a record, be "there is no statute which require assessors to make such acknow ments, and no statute which giv such a paper as the one in questio dignity of a public record." smith *v.* State, 25 Tex. Supp. 137. the same reason was given for reje a plat book, found in the office o register of deeds, in Smith *v.* rence, 12 Mich. 431; and a book in the custody of the clerk o county court, in Carrington *v.* P 37 Fed Rep. 767. But in none of cases did it appear that these were either necessary or convenie the discharge of the duties of the in which they were kept.

Also see Golden Fleece etc. Min *v.* Cable etc. Min. Co., 12 Nev. 31

3. Thus, the blotters of the office have been held not to be p records. Strimpfler *v.* Roberts, 1 St. 283; 57 Am. Dec. 606; Fo Lyon, 27 Pa. St. 9.

4. Hart *v.* Johnson, 6 Ohio 87.

In *Indiana* the court has even so far as to hold that the assess roll of county taxes of 1822

posited in a public office does not thereby become a public ord,[1] even though necessarily so deposited.[2] It must be of a blic nature or recorded under statutory provisions. But it ems to have been held that a paper filed, or book kept in a blic office may become a public record by the general recogni- n as such for a long period of time.[3] The public officer need t personally make the entries, but it is sufficient if the record kept under his supervision, or by his authority.[4]

3. **Records Required by Statute.**—When, by express direction of tatute, a memorandum is required to be kept, the memorial de in compliance with the statute is a public record.[5] When

dmissible evidence, in support of a title to a town lot, without proof t the valuation of the lot had been ally made. Kinney *v.* Doe, 8 Blackf. d.) 350.

. Brown *v.* Hicks, 1 Ark. 232; Read- *v.* Mullen, 31 Cal. 104; Colnon *v.* , 71 Cal. 43; Haile *v.* Palmer, 5 . 403; Broxon *v.* McDougal, 63 . 193.

. Bouchaud *v.* Dias, 3 Den. (N. Y.)

. The map of the village of St. uis, made by Auguste Chouteau, of the reputed founders of said age about the period of said found- , in 1764, and placed by him in the e of the United States recorder of d titles in the year 1825, having n regarded as a public paper for a g period, and inventoried as such, dmissible in evidence, to show the n upon which the town was laid . St. Louis Public Schools *v.* kine, 31 Mo. 110; S. P. White- se *v.* Bickford, 29 N. H. 471.

ee also Sumner *v.* Sebec, 3 Me.

Kyburg *v.* Perkins, 6 Cal. 675; rney *v.* Howe, 9 Gray (Mass.) 404; Am. Dec. 299; People *v.* Dow, 64 h. 717; Galt *v.* Galloway, 4 Pet. S.) 332; Wetmore *v.* U. S., 10 Pet. S.) 647.

hus the record of weather made by who is appointed for that purpose public, or at least a *quasi* public ord. Knott *v.* Raleigh etc. R. Co., N. Car. 73.

Upon the principle stated in the the following writings have been ted as public records: The legis- ve journals, State *v.* Smalls, 11 S. . 262; the town clerk's book record- the quota of troops furnished by commonwealth to the United es during the civil war, Wayland *v.* Ware, 104 Mass. 46; the book of the collector of internal revenue containing the record of the names of persons paying special taxes, State *v.* Gorham, 65 Me. 270; the books of account of the State house of corrections, People *v.* Kemp, 76 Mich. 410; a book recording the survey of a road, Merrill *v.* Kalamazoo, 35 Mich. 211; the books of a post-office, Merriam *v.* Mitchell, 13 Me. 439; 29 Am. Dec. 514; Gurney *v.* Howe, 9 Gray (Mass.) 404; 69 Am. Dec. 299; tax-assessors or selectmen's books containing assessment of taxes, Pittsfield *v.* Barnstead, 40 N. H. 477; Dudley *v.* Chilton Co., 66 Ala. 593; a book kept by the county clerk for the entry of all proceedings in sales of land for taxes known as "The Sale and Redemption Record," Gage *v.* Davis, 129 Ill. 236; the selectmen's books containing a record of their doings in committing a person to the insane hospital, Jay *v.* Carthage, 48 Me. 353; Eastport *v.* East Machias, 35 Me. 402; the books of the State auditor, State *v.* Masters, 26 La. Ann. 268; Brewer *v.* Watson, 71 Ala. 299; 46 Am. Rep. 318; Vail *v.* McKernan, 21 Ind. 421; poll-books, Phelps *v.* Schroder, 26 Ohio St. 549; State *v.* Hoblitzelle (Mo.), 20 Cent. L. J. 457; maps made by authority of law, Henry *v.* Dulle, 74 Mo. 443; a map and field book of the survey of a tract of land deposited in a public office, People *v.* Denison, 17 Wend. (N. Y.) 312; see also Ott *v.* Soulard, 9 Mo. 581; Dudley *v.* Chilton Co., 66 Ala. 593; a book kept by the county clerk showing the account of the county with its treasurer, Rizer *v.* Callen, 27 Kan. 339; the books of the secretary or clerk of a school district, Sanborn *v.* School District No. 10, 12 Minn. 17; Wormley *v.* Carroll Township, 45 Iowa 666; the county school-superintendent's book

a statute directs that copies of certain documents be made filed in a public office, such copies become public reco Where a person is by law or by authority of law required to r a report or return of his acts the report is a public record of t acts;[2] and, if he is required to ascertain certain facts, and inc in his return a statement thereof, then it is a record of facts.[3]

4. Enumeration of Public Records.—From what has been sa may be stated as a general rule that a memorandum or which has been kept by persons in public office because req

recording the results of examinations of teachers, School District No. 10 *v.* Thelander, 32 Minn. 476; the record of the proceedings of the commissioners of highways, People *v.* Board of Supervisors, 23 Ill. App. 386; People *v.* Madison Co., 125 Ill. 334; the record of the proceedings of county commissioners, Brown *v.* Bon Homme Co. (S. Dak. 1890), 46 N. W. Rep. 173; Beebe *v.* Scheidt, 13 Ohio St. 406; the books kept by the collector of customs, recording a bill of sale of a vessel, Merchants' Navigation Co. *v.* Amsden, 25 Ill. App. 307; the enrollment of a steamboat in the office of the collector of customs, Sampson *v.* Noble, 14 La. Ann. 346; the books of the collector of the port, recording a manifest, U. S. *v.* Johns, 4 Dall. (U. S.) 412; a soldier's private record-book, required to be kept by soldiers in the British service, Hunt *v.* Order of Chosen Friends, 64 Mich. 671; the official book in which the enrollment in a militia company is copied, Thorn *v.* Case, 21 Me. 393; muster-rolls, filed in the general land-office made out from the records in the office of the adjutant-general, Stone Land etc. Co. *v.* Boon, 73 Tex. 548; a book published under a resolve of the legislature, Worcester *v.* Northborough, 140 Mass. 397; indorsements made by the clerk of the county court, of payments of interest upon a bond given under the statutes for a loan of school funds, Lawrence *v.* Dunkle, 35 Mo. 395.

But a book called the "county ledger," required by statute to be kept by the county clerk, was denied the characteristics and effect of a record in evidence, because there was no statute making it admissible in evidence. King *v.* Ireland, 68 Tex. 682. See also Hauser *v.* Com. (Pa.), 5 Am. L. Reg., N. S. 668; Williamson *v.* Doe, 7 Blackf. (Ind.) 12.

1. And, because it becomes a public record, a copy made therefrom i open to the objection that it is a of a copy. Stone Land etc. C Boon, 73 Tex. 548. See also H *v.* Overton, 4 Bibb (Ky.) 406; O *v.* Ulery, 4 Bibb (Ky.) 450; F *v.* Barnett, 4 Bibb (Ky.) 480; son *v.* Lefevre, Litt. Sel. Cas. 191.

2. Erickson *v.* Smith, 38 Ho (N. Y.) 454; Watson *v.* Ins. C North America, 2 Wash. (U. S. Hiner *v.* People, 34 Ill. 297.

3. In Seavey *v.* Seavey, 37 125, the court by Bell, J., said: principle is, that whenever p are appointed by the law, or the authority of law, to inve any matter of fact under oath, a make a return or report upon th ject, the same being the foundat no judgment or judicial decre tween parties, the return or rep made is admissible in evidence be those who were in no sense par the proceeding."

And see *dictum* in Haywa Bath, 38 N. H. 179.

But such reports are records c therefore, admissible in eviden prove only those facts specifical rected to be inquired into. Sv State, 89 N. Y. 52.

But such return, although re to be made by statute, is not a r and therefore cannot be used a dence of things, even though re by statute to be stated, whic simply inferences or conclusions person making the report, such statement it contains that a ve seaworthy, or that a proposed r of public utility. Erickson *v.* S 38 How. Pr. (N. Y.) 454; Coy Boyd, 55 Ind. 166; Bohr *v.* Nen wander, 120 Ind. 449.

But see Eel River Draining *v.* Topp, 16 Ind. 242.

r made useful by the nature of the office, or expressly required o be kept by statute, is a public record.[1]

a. RECORD OF LEGISLATIVE PROCEEDINGS.—The journals of egislative bodies are the record of their proceedings, and are ublic records.[2]

b. RECORDS OF MUNICIPAL CORPORATIONS[3]—(1) *In General.* —The books of corporations and *quasi* corporations established y law for a public purpose are public records.[4]

1. 1 Greenl. Ev., § 483.

In addition to the cases already cited n support of the one or the other ranch of this rule, the following decisions sustain the text generally. Thus, the following writings were ublic records: The official lists of nds belonging to the commissioner f the sinking fund of the State, Kerr . Farish, 52 Miss. 101; the execution ook of the county treasurer, Dent *v.* ryce, 16 S. Car. 1; books called "stub eceipt books," containing the *data* ecord of canceled tax certificates, and f lots sold for delinquent city taxes nd afterwards redeemed, Burton *v.* uite, 80 Mich. 218; the bank passook kept by the State treasurer, Com. . Tate (Tex. 1890), 13 S. W. Rep. 113.

The books of account of a paymasr are so far public books as to authorse the United States to use them in vidence. United States *v.* Kuhn, 4 ranch (C. C.) 401.

2. Jones *v.* Randall, Cowp. 17; Oaknd Paving Co. *v.* Hilton, 69 Cal. 494; outhwark Bank *v.* Com., 26 Pa. St. 46; Law and Prac. of Legisl. Assemlies, § 415; Whart. Ev., §§ 290–295.

Thus the journals of Congress and e State legislatures are admissible in vidence for all legal purposes. Watins *v.* Holman, 16 Pet. (U. S.) 56; iles *v.* Stevens, 3 Pa. St. 42; Albertn *v.* Robeson, 1 Dall. (U. S.) 9.

"They (journals) are doubtless evience from the necessity of the case, n grounds of public convenience, and om the public character of the facts ey contain to prove the proceedings the body whose records they are, ecause the constitution requires them be kept." People *v.* Devlin, 33 N. Y. 9; 88 Am. Dec. 377.

The journals of the House of Lords e evidence to prove not only an adess to the king, but the king's answer the House. Rex *v.* Franklin, 5 T. . 445, n.

3. See MUNICIPAL CORPORATIONS, l. 15, pp. 949, 1075.

4. Owings *v.* Speed, 5 Wheat. (U. S.) 424; 1 Dillon Munic. Corp., § 304; Denning *v.* Roome, 6 Wend. (N. Y.) 651; Weith *v.* Wilmington, 68 N. Car. 24; People *v.* Zeyst, 23 N. Y. 140; Cabot *v.* Britt, 36 Vt. 349; Sawyer *v.* Manchester etc. R. Co., 62 N. H. 135; 13 Am. St. Rep. 541.

But the two following cases, although admitting these records in evidence, do not recognize the rule stated in the text. Thus in St. Louis Gas-Light Co. *v.* St. Louis, 11 Mo. App. 55, the books of account of a municipal corporation, were admitted in evidence by the application of the rule which makes the entries in the books of a merchant or of a bank *prima facie* evidence to charge such merchant or such bank. And in Greenfield *v.* Camden, 74 Me. 56, the records of the town clerk were admitted in evidence because they pertained to the *res gestæ*, are the acts of the town, and are ancient historical records.

As to what constitute the records of the board of surveys of the city of Philadelphia, see Waln *v.* Philadelphia, 99 Pa. St. 330.

Minutes.—Where brief notes of the proceedings of a meeting are first taken for the purpose of a more extended record, until such record is made, the minutes are evidence in the nature of a record. Waters *v.* Gilbert, 2 Cush. (Mass.) 27.

The minutes of a regular meeting of the common council of the city of Neenah, written down at the time by the city clerk, and approved by the council, when verified by the clerk, are evidence of the proceedings of that body, though not taken down in a book nor subsequently copied into a bound volume, there being nothing in the city charter requiring them to be so written or copied. O'Mally *v.* McGinn, 53 Wis. 353. But after the formal record has been made out from them by the proper officer, within a reasonable time, that becomes the original record, and the rough minutes are no longer the

(2) *Municipal Records in Evidence.*[1]—The records of mun palities are the best evidence of their doings; and such acts be primarily proved only by the records.[2]

(3) *Parol Evidence to Contradict or Aid Record.*[3]—The r utes or records of the proceedings of municipal corporations, s as cities, districts, towns, school districts, boards of highway c missioners, and boards of county commissioners, cannot be tradicted by parol or extrinsic evidence in collateral proceedin

best evidence. Board of Education *v.* Moore, 17 Minn. 422.

Police Juries in Louisiana.—Police juries must keep their proceedings, ordinances, and resolutions, in writing; and such writing is a record importing absolute verity in collateral proceedings. State *v.* Simmons, 40 La. Ann. 758.

1. See the same subdivision in the title MUNICIPAL CORPORATIONS, vol. 15, p. 1676. See also the following cases: Bridgewater *v.* West Bridgewater, 7 Pick. (Mass.) 191; O'Dea *v.* Winona, 41 Minn. 424; People *v.* Murray, 57 Mich. 396.

The public records of a city showing authority to widen a certain street, are evidence proper for the consideration of a jury in finding when such street was in fact widened. Barker *v.* Fogg, 34 Me. 392.

When the engineers of the city have cross-sectioned certain grading to be done for the city, made estimates thereof, and filed the same in the engineer's department, such estimates are admissible as *prima facie* evidence of the correctness of such estimates. Clark *v.* Williams (Neb. 1890), 46 N. W. Rep. 82.

A record by a parish clerk, in the parish books, of an oath of office administered to a parish officer by a justice of the peace, is not legal evidence of such officer having been sworn; but the certificate of the justice is the regular and legal evidence. Colburn *v.* Ellis, 5 Mass. 427.

Nor is a record, by a town clerk, of an oath of office administered to a town officer by a justice of the peace, legal evidence that such town officer was sworn, unless it appear that the certificate of the justice who administered the oath was filed with the clerk, from which the record was made. Welles *v.* Battelle, 11 Mass. 477.

The record of an appointment of selectmen, at a town meeting, and proof that they acted under the appointment, is evidence to go to a jury that the town meeting was legally holden, and that the selectmen were sworn. Bi *v.* Cone, 3 N. H. 513.

The statement in the record town or school district, that "purs to notice previously given writing, agreeable to the visions of statute," the legal v of the district met, is *prima facie* dence of regular notice. Sanbor School District No. 10, 12 Minn Isbell *v.* New York etc. R. Co Conn. 556.

2. Owings *v.* Speed, 5 Wheat. S.) 424; Adams *v.* Mack, 3 N. H. Aurora *v.* Fox, 78 Ind. 1; Perrym Greenville, 51 Ala. 507; Rehber Mayor etc. of N. Y., 99 N. Y. Byer *v.* New Castle, 124 Ind. 86.

3. See title, PAROL EVIDENCE, 17, p. 419.

4. Gilbert *v.* New Haven, 40 C 102; Stevenson *v.* Bay City, 26 M 44; Mayhen *v.* Gay Head, 13 A (Mass.) 129; People *v.* Zeyst, 2 Y. 140; Halleck *v.* Boylston, 117 M 469; Sawyer *v.* Manchester etc. R. 62 N. H. 541; 13 Am. St. Rep. note; Third School District *v.* A ton, 12 Met. (Mass.) 105; Camerc School District No. 2, 42 Vt. Eddy *v.* Wilson, 43 Vt. 362; Beel Scheidt, 13 Ohio St. 406; Wei State, 96 Ind. 311; Gaither *v.* Gree La. Ann. 362.

It is held that the records of county cannot be impeached coll ally by the introduction of the rec of another county. Bradbury *v.* ton, 69 Me. 194.

Where the affidavits of commis ers or tax assessors of a town are statute, made evidence of the conse the tax-payers to a contemplated poration act, such affidavits are o nature of a record and import abs verity, and may not be contradicte parol evidence. Pierce *v.* Wrigh How. Pr. (N. Y.) 1; People *v.* M ell, 45 Barb. (N. Y.) 208.

But, in *Ohio*, the records of p corporations or *quasi* corporations

or will parol evidence be admitted to explain or vary such cord.[1]

And, when a record is, by statute, required to be kept, the rule even carried so far as to exclude parol or other extrinsic evi- nce of the proceedings of such public bodies, when there has en no record made, or when there is a defect or omission in e record.[2] But some authorities, while they do not deny that e record may not be contradicted by parol or other extrinsic idence, still maintain that a defect may be explained or an ission supplied by parol,[3] unless the fact omitted is spe- ically required to be noted in the record and the record is made e only evidence thereof.[4] When the law does not require ch record to be made, but one is kept, it may be explained or pplied by parol testimony.[5] When one has been induced to rform work, or expend money on the faith of the proceedings a board of trustees, or common council, the rights of such per- n will not be prejudiced by the failure to keep proper minutes; at was in fact done may be shown by evidence *aliunde* the ord.[6]

regarded to be of that absolute ity that any person shall be estopped show the truth in consequence of matter which they contain. Wes- aven *v.* Clive, 5 Ohio 136; Rey- ds *v.* Schweinefus, 27 Ohio St. 312. Cabot *v.* Britt, 36 Vt. 349.

t is not competent for a town clerk ontradict a particular record made im; but he may testify to his gen- mode of making the records, going xplain a particular record. Taylor Holcomb, 2 Tyler (Vt.) 344.

Moore *v.* Newfield, 4 Me. 44; lan *v.* School District No. 3, '38 164; People *v.* Board of Super- rs, 23 Ill. App. 386; *affirmed* in 125 334; Taylor *v.* Henry, 2 Pick. ss.) 397; Manning *v.* Fifth Parish, ck. (Mass.) 16; Morrison *v.* Law- ce, 98 Mass. 219; Andrews *v.* lston, 110 Mass. 214; Halleck *v.* lston, 117 Mass. 469; Fayette Co. hitwood, 8 Ind. 504; Byer *v* New tle, 124 Ind. 86; Perryman *v.* enville, 51 Ala. 507.

he records of any town or district conclusive evidence of the facts rded in favor of the officers of the n, acting under the authority of records. Saxton *v.* Nimms, 14 s. 315; Thayer *v.* Stearns, 1 Pick. ss.) 109.

he book of selectmen, containing invoice of the inhabitants of a n, and the assessment against them ach year, is not conclusive evidence of the assessment of each individual, but is subject to alteration and correction by the selectmen, until recorded in the town book, or left with the town clerk for that purpose. Wakefield *v.* Alton, 3 N. H. 378.

3. Morgan *v.* Wilfley, 71 Iowa 212; Westerhaven *v.* Clive, 5 Ohio 136; Rock Creek Township *v.* Codding, 42 Kan. 649. See also School District No. 1 *v.* Union School District, 81 Mich. 339.

The official oath of a municipal officer may be proved by parol when there is no record of it. Kellar *v.* Savage, 17 Me. 444; Hathaway *v.* Addison, 48 Me. 440; Farnsworth *v.* Rand, 65 Me. 19.

4. See Bank of U. S. *v.* Dandridge, 12 Wheat. (U. S.) 74; U. S. *v.* Fillebrown, 7 Pet. (U. S.) 28; Langsdale *v.* Boynton, 12 Ind. 467.

In the absence of any statutory provision to the effect that the proceedings of a municipal body can only be proved by written evidence, such proceedings may be proved by parol evidence. White *v.* State, 69 Ind. 273.

5. Gearhart *v.* Dixon, 1 Pa. St. 224.

6. Hutchinson *v.* Pratt, 11 Vt. 402; Bridgford *v.* Tuscumbia, 16 Fed. Rep. 910; Athearn *v.* Millersburg, 33 Iowa 105; Bigelow *v.* Perth Amboy, 25 N. J. L. 297; San Antonio *v.* Lewis, 9 Tex. 69. See Byer *v.* New Castle, 124 Ind. 86.

Thus, the passage of an ordinance was shown by parol testimony. Troy

(4) *Sufficiency of Municipal Records.*[1]

c. MISCELLANEOUS RECORDS.—Other instances of p records may be found in the notes.[2]

v. Atchison etc. R. Co., 11 Kan. 519; 13 Kan. 70; Ross *v.* Madison, 1 Ind. 281.

1. See the same subdivision in title MUNICIPAL CORPORATIONS, vol. 15, p. 1077. See also the following cases:

Where it is by the charter made the duty of the city clerk "to attend the meetings and keep a record of the proceedings of the common council," the minutes of a regular meeting of the common council of the city of Neenah, written down at the time by the city clerk, and approved by the council, when verified by the clerk, are evidence of the proceedings of that body, though not taken down in a book nor subsequently copied into a bound volume, there being nothing in the city charter requiring them to be so written or copied. O'Mally *v.* McGinn, 53 Wis. 353.

Presumptions to Aid the Record.—Where the city charter requires that the city clerk shall keep a journal of all the acts and proceedings of the city council, the court will not presume that a requisite thing has been done, if it does not appear from the journal. Lowell *v.* Wheelock, 11 Cush. (Mass.) 391; Morrison *v.* Lawrence, 98 Mass. 219.

Where the municipal corporation has the power to take the property of the citizen *in invitum*, the prescribed prerequisites to the exercise of that power must be strictly observed and conformed to. To found the power to act against a private right of property, there must be affirmative proof of a compliance with the prerequisites. And when a corporation is required to keep a record of its proceedings, such record is the only evidence thereof, and the jurisdictional facts must appear therein, and may not be presumed or inferred. *In re* Buffalo, 78 N. Y. 362; Aurora *v.* Fox, 78 Ind. 1. See COUNTY COMMISSIONERS, vol. 4, p. 386, note 6.

A municipal ordinance which appears by the records of the corporation to have been passed, may be presumed to have been passed by the full number of votes required by the charter; although the record does not affirmatively show that they were given. Lexington *v.* Headly, 5 Bush (Ky.) 508.

2. **Records of Public Institutions.**—(See also, CRIMINAL PROCE vol. 4, p. 852, note, *Records o pitals*). A written charge m a board of directors of a State tution, such as an insane asylu filed with the custodian of their r does not thereby, in the absenc statutory provision to that effe come a public record. Colnon 71 Cal. 43.

A record of the weather kept State Insane Asylum for a num years, has been admitted in e for the purpose of showing the t ature of the weather on a certai De Armond *v.* Nesmith, 32 Mi But it has been held that in o admit the records of public insti in evidence, it must be shown t record was kept in complianc some law or authority, or by offi performance of duty. If kept the provisions of a law, the law must be produced. Butler *v.* St L. Ins. Co., 45 Iowa 93.

Registers of Meteorological O tions of the United States Signal ice.—The records of the Signal S Department are of a public Chicago etc. R. Co. *v.* Trayes, App. 136; People *v.* Dow, 64 717.

Also, the records of a vol weather observer, appointed United States government are Knott *v.* Raleigh etc. R. Co., Car. 73.

Land Office Records.—The boo files in a United States land off public records. Stephens *v.* wood, 25 Ala. 716; Smith *v.* H 23 Tex. 248; Dubois *v.* New Wash. (U. S.) 74.

The records of the Land Off good evidence of the facts therein erly stated. Galt *v.* Galloway, (U. S.) 332; Beauvais *v.* Wall, Ann. 199; Lane *v.* Bommelma Ill. 95.

The report of the surveyor ge the Commissioner of the General Office, detailing the history of hi ations in making a survey, is ina ble in evidence to prove the loca the land surveyed. Clark *v.* Han 36 Mo. 620.

A *hypotheca especial* (a securit nature of a mortgage) and its t

Use of Public Records in Evidence—*a.* IN GENERAL.—Public rds are admitted in evidence, although not confirmed by the s of truth, the obligation of an oath, or the power of cross-exination, because they are made by authorized and accredited its of the public for the public use.[1] And also, perhaps, from essity, as it would always be difficult and often impossible to e facts of a public nature by means of witnesses.[2] But there often statutory provisions providing for the admission of such rds in evidence.[3]

ecords of a public nature may be introduced in evidence never the interest of any one requires an exhibition of the which they contain.[4] An entry in a public record is evidence in favor of the public officer who made it.[5] Such entries also be admitted against him.[6] And where a record consti- s one entire and connected instrument, if used in evidence, it t ordinarily be put into the case entire.[7] Where a record is er evidence of a fact, it will be admitted, and the opposite y is left to his motion to exclude the irrelevant matter in the rd from the consideration of the jury.[8]

ADMISSIBILITY—(1) *In General.*—A public record, in order e admissible in evidence, must be proper evidence of the fact ssue, properly attested and identified, and come from the er officer, and be taken from the proper custody.[9]

) *Of What Evidence.*—Public records are admissible in evie to prove those matters of which they are the record,[10] but

t papers pertaining to the records General Land Office, nor archives e office, and therefore copies of certified by the Commissioner of and Office are inadmissible in evi- Mapes *v.* Leal, 27 Tex. 345.

ord of Mining Claims.—See S AND MINING CLAIMS, vol. 15, 1–542.

ee Bissell *v.* Hamblin, 6 Duer .) 512; People *v.* Dennison, 17 . (N. Y.) 312; Sturla *v.* Freecia, ., 5 App. Cas. 623; 34 Moak .

ee 1 Greenl. Ev., § 483.

or cases where record may have admissible under the common- les, but were in fact admitted in lance with statute law, see y *v.* State, 88 Ala. 154; State *v.* l, 40 La. Ann. 234; Bush *v.* y, 122 Ill. 406; Blair *v.* Sayre, 29 . 604; Major *v.* Watson, 73 Mo.

arker *v.* Fogg, 34 Me. 392.

issell *v.* Hamblin, 6 Duer (N. Y.)

ee EMBEZZLEMENT, vol. 6, p.

7. English *v.* Johnson, 17 Cal. 107; 76 Am. Dec. 574.

8. Souland *v.* Clark, 19 Mo. 570.

9. Whart. Ev., § 644.

But see Downer *v.* Smith, 24 Cal. 114.

10. Wetmore *v.* U. S., 10 Pet. (U. S.) 647; State *v.* Gorham, 65 Me. 270; U. S. *v.* Eggleston, 4 Sawy. (U. S.) 199; Merchants' Navigation Co. *v.* Amsden, 25 Ill. App. 307; Wormley *v.* Carroll Township, 45 Iowa 666; Williams *v.* Carpenter, 42 Mo. 327; Locke *v.* Bennett, 7 Cush. (Mass.) 445; Swift *v.* State, 89 N. Y. 52.

Thus the treasurer's or the official books and papers of county commissioners in *Pennsylvania*, containing their recorded transactions, are, when proved to be such, evidence in respect to the sale of unseated land for taxes. Dikeman *v.* Parrish, 6 Pa. St. 210; Weston *v.* Stammers, 1 Dall. (U. S.) 2; Cuttle *v.* Brockway, 24 Pa. St. 145; Hazzard *v.* Trego, 35 Pa. St. 9.

An order of the supervisors of a town, laying out or altering a highway, is competent evidence of the facts therein stated. Roehrborn *v.* Schmidt, 16 Wis. 519.

not such things as are incidentally noted therein.[1] But a r
is not evidence of any fact which can only be inferred from
argument.[2] But this rule does not prevent proper infer
from being drawn therefrom.[3]

(3) *Attestation and Identification.*—Public documents wil
be admitted in evidence, unless they are properly authentica

The record in the county clerk's office, of the appointment of a party as deputy sheriff, with parol evidence that he acted in such capacity, is admissible to prove his official character. Briggs *v.* Taylor, 35 Vt. 57.

To establish an allegation that at the time a certain quartz claim was located, it was a custom for persons desiring to appropriate mining claims in that district to measure off and designate the boundaries of such claims by stakes on the ground, enter upon them, and cause a record thereof to be made in the county recorder's office; and that the plaintiffs have made such entry of their claim, the contents of such book kept in such recorder's office, consisting of the records of the numbers of such locations, one of which is that of the plaintiffs, are admissible in evidence. Pralus *v.* Pacific G. & S. Min. Co., 35 Cal. 30.

Records of County Commissioners.—The records and files of the board of county commissioners purporting to establish a county road are evidence that such road has been legally established and has a legal existence. Willis *v.* Spoule, 13 Kan. 257; Anderson *v.* Hamilton Co., 12 Ohio St. 635; Beebe *v.* Scheidt, 13 Ohio St. 406.

Tax Collector's Return and Tax Books.—The tax collector's return is evidence of the assessment, levy, the amount of the tax, and that it is due and unpaid. Chinquy *v.* People, 78 Ill. 570; Pike *v.* People, 84 Ill. 80; Ohio etc. R. Co. *v.* People, 119 Ill. 207; Clapp *v.* Herdman, 25 Ill. App. 509; Roudendorff *v.* Taylor, 4 Pet. (U. S.) 349; and to show the payment of a tax. Hodgson *v.* Wight, 36 Me. 326.

But, in repelling a charge of fraud, resting, among other circumstances, on the allegation that the pretended price paid for land very much exceeded its value, it is competent to prove the fact by the tax lists that it was entered at a certain value on the tax lists. Cardwell *v.* Mebane, 68 N. Car. 485.

And the books of town tax assessors are admissible, even for collateral purposes, to show to whom property was assessed. Edson *v.* Munsell, 10 Allen (Mass.) 557; Elwell *v.* I
ley, 138 Mass. 225.

The tax books are admissible i
dence as tending to prove the so
of one not a party to the action,
that is in issue. Winter *v.* Banc
Ark. 362. See Cravens *v.* Dunc
Ind. 347; State *v.* Gorham, 65 M

In suit against alleged owner
steamboat for money and gooc
plied on the master's order, the
of the boat by the assessor for ta
is rightly given in evidence to
ownership. Holcroft *v.* Halbe
Ind. 256.

1. Instances When Not Admiss
Since public records are adm
to prove that only which they p
to record, it has been held that
ment-rolls or tax lists are not ev
of ownership, Shunway *v.* Leak
Cal. 458; Doe *v.* Arkwright, 5 C
575; 24 E. C. L. 462; 2 Ad. & E
note; 1 D. & M. 731; or of the loca
realty, Com. *v.* Heffron, 102
148; or of domicil of the pers
sessed, Sewall *v.* Sewall, 122
156; 23 Am. Rep. 299; or of the a
of property belonging to the pers
sessed, Lockhart *v.* Woods, 38 Al
Kennedy *v.* Holladay, 25 Mo.
503; or of the value of the pr
Flint *v.* Flint, 6 Allen (Mass
83 Am. Dec. 615; Kenerson *v.* I
101 Mass. 152; Com. *v.* Heffro
Mass. 148, and probably for no p
except the assessment and col
of taxes.

The records of a town which a
admissible to prove the existenc
legal townway, cannot be admit
show the limits or outside lines
road, although it may have been
that a road had been actually tr
somewhere within these limits fo
than twenty years. State *v.* Ber
Me. 169.

2. McCravey *v.* Remson, 1
430, 54 Am. Rep. 194.

3. For illustrations, see Fren
Olive, 67 Tex. 400; Barker *v.*
34 Me. 392; Marbourg *v.* McCo
23 Kan. 39.

4. Major *v.* Watson, 73 Mo

ol evidence may be given to show that a certain document is a public record.[1] And the general rule is, that to effect the nissibility of such an instrument in evidence, it must be veri- l by the attestation or official signature of the person who de it, or who is, by statute, required to attest it.[2] Such a sig- ure may be made by a deputy.[3] But the signature of such cer, even when provided for by statute, is not, as a general e, a requisite;[4] the record may be otherwise identified.[5] It y be identified by parol evidence.[6]

xander *v.* Campbell, 74 Mo. 142; te *v.* Smith, 30 N. J. L. 449; Bella New York etc. R. Co., 24 N. Y. St. 921; Mott *v.* Ramsay, 92 N. Car. Stroud *v.* Springfield, 28 Tex. 649; yler *v.* Schafer, 69 Wis. 23.

Dyer *v.* Brogan, 70 Cal. 136.

See People *v.* Eureka Lake etc. nal Co., 48 Cal. 143.

'he chairman of selectmen, not be- a recording officer, his attestation ot the proper verification of a rec- of their proceedings. Foxcroft *v.* oker, 40 Me. 308.

'he courts are bound to know who the legal custodians of public rec- s in the State, and therefore such an cer need not certify that he is the per. A simple attestation of a copy such officer is sufficient. Barret *v.* lshaw, 12 Bush (Ky.) 592.

Byington *v.* Allen, 11 Iowa 3; res *v.* Grimes, 3 Har. & J. (Md.) 95.

In a passing discussion in People Eureka Lake etc. Canal Co., 48 Cal. the court by McKinstry, J., said: e general rule is well settled that ry public document which is re- ed by law to be executed by a pub- officer, must be verified by the offi- signature of the person who made The rule applies to the execution ll public authorities, where the exer- of the power affects the property of citizen. The power is reposed in officer, not in the man; and but for protection of the law, he would be a passer. When he attempts to ex- se the power, he must recognize the ce from whence he derives it, and orm all acts in the character alone ch the law recognizes. (Blackw. Titles, 345-6). But the reason of rule does not extend to the proof of records of a corporate board which cises powers municipal and *quasi* lative. The action recorded is not action of the chairman or clerk; sign the minutes, not as certifying eir own official action, but as wit- nesses that the record is the record made by the clerk under the direction of the board. To give more effect to their signatures would be to decide that, in the absence of any provision of the statute requiring the chairman and clerk to sign the minutes, and by reason of a common-law principle, the minutes could not be introduced in evidence. But the records of the proceedings (when the law does not specially require them to be signed) have always been admitted in evidence, after certain preliminary proof."

5. People *v.* Eureka Lake etc. Canal Co., 48 Cal. 143; Pacheco *v.* Beck, 52 Cal. 24.

6. A book is sufficiently authenticated, *prima facie*, which purports to be a record of the school district; which is shown by the testimony of the present clerk to come from his custody; and which is identified by a former clerk of the district, as the book of records kept by him as clerk. Sanborn *v.* School District No. 10, 12 Minn. 17.

Books which purport to contain the charter and ordinances of a town and are shown to be in the custody of the town clerk, will be received in evidence without further attestation. Tipton *v.* Norman, 72 Mo. 381.

An ordinance book of the city of Ottumwa was identified as such by the testimony of a policeman familiar with the book. Ottumwa *v.* Schaub, 52 Iowa 515. In this case the testimony of the witness was to the effect that it was the ordinance book, and that the signature to the ordinance in question was that of the mayor. But there is a *dictum* which states that the additional fact of their contemporaneous character must also be testified to. See People *v.* Eureka Lake etc. Canal Co., 48 Cal. 143.

The testimony of the recorder's clerk, that a town plan, offered in evidence as proof of title, had been a deposit in the office more than six years,

c. EFFECT—(1) *Whether Primary Evidence.*—When the requires a certain document or record to be kept by a publi cer, as a memorial of a fact, the record is the best evider such fact; and such fact can be primarily proved only by record.[1] But a statute requiring a public record to be ma merely directory, and, if the record is not kept, the fact is required to be recorded may be otherwise proved.[2]

(2) *Weight or Force as Evidence.*—As to the weight or fo public records in evidence the authorities are not all agree has been stated that they are equal to the ordinary testi given under the obligation of an oath.[3] But the tru

is not sufficient evidence of its authenticity without other proof of it, such as its being recorded, or marked filed, and time of its receipt being duly noted. Franey *v.* Miller, 11 Pa. St. 434.

The witness must, of course, be sufficiently familiar with the book to testify from personal knowledge. State *v.* Cook, 30 Kan. 82. Thus, evidence that a former clerk of a proprietary once showed a book to the witness as the proprietors' record, and that the witness took minutes from it, to aid him in making surveys, is not sufficient to identify the book as such records. Bean *v.* Smith, 20 N. H. 461.

1. Peterson *v.* Taylor, 15 Ga. 483; 60 Am. Dec. 705; Ralston *v.* Plowman, 1 Idaho, N. S. 595; Phares *v.* State, 3 W. Va. 567; 100 Am. Dec. 777; Battin *v.* Woods, 27 W. Va. 58; Steele *v.* Schricker, 55 Wis. 134.

The only legal evidence of the selection of lands given to the State by the act of Congress, of March 2, 1827, is a certified copy thereof from the office of the Secretary of the Treasury at Washington, unless it be made to appear that the original is no longer to be found there. Stauffer *v.* Stephenson, 1 Ind. 115.

The best evidence of the redemption of land from a tax sale, in *Illinois*, by minor heirs, is the record in the auditor's office. Lane *v.* Sharpe, 4 Ill. 566.

But see Board of Education *v.* Taft, 7 Ill. App. 571.

As to the proof of the official character of persons which are claimed to be public officers, it has been held that a certified copy of the record of commissions from the executive office is the highest and best evidence of the fact that one who has acted as a justice of the peace was not a justice of the peace at the time; and where an attestation of a person to a deed, as justice, is shown, the testimony of persons resident in the county, to the eff there was no person of the name as justice in the county at that inadmissible. Fain *v.* Garthr Ga. 6. On the other hand, it ha held that commissions of public are not the best evidence of th pointment; but it may be sho parol. Scott *v.* Detroit Young Soc., 1 Dougl. (Mich.) 119.

2. Kellar *v.* Savage, 17 Me. 4

3. Barker *v.* Fogg, 34 Me. 39 McAnninch *v.* Freeman, 69 Te

In remarking as to the force fect which are to be given transcripts from the books Treasury Department at Wash in U. S. *v.* Ralston, 17 Fed. R the court by Hughes, J., said: are to be presumed to present the absence of contrary evider are not to be accepted as outw evidence given under the tw tions which constitute true le dence, viz.: those of an oath under opportunity of cross-e tion. The language of the Congress which makes them tent evidence in courts of justic 886, Rev. St.): 'Transcripts fro of the Treasury Department admitted as evidence, and th trying the cause shall be autho grant judgment and award ex accordingly.' The effect of t vision is to require that thes cripts shall be admitted as co evidence in a trial, to be allow weight as the court and jury each cause deem to be due to t

But it has also been held transcript of the books and p ings of the Treasury Departm vided for in U. S. Rev. Stat., § lating to the accounts of per countable for public money, is *facie* evidence of the fact state in, so far as the same are aut

loubtedly is, that these records are *prima facie* evidence.[1] It been expressly and affirmatively decided that they are not clusive or records importing absolute verity.[2] The legislature the power to declare the effect as evidence of instruments de by public officers.[3]

3) *Parol Evidence to Vary or Contradict.*—Parol evidence, red for the purpose of showing that a certain instrument is not cord is properly admissible.[4] The fact that there is a statute uiring a record of a fact to be made does not prevent such from being otherwise proved when there is no such record de.[5] When records are destroyed secondary evidence of their tents may be given.[6] The oral evidence of the person who

aw. U. S. *v.* Eggleston, 4 Sawy. S.) 199.

Stanley *v.* State, 88 Ala. 154; ple *v.* Bircham, 12 Cal. 50; Ohio R. Co. *v.* People, 119 Ill. 207; es *v.* People, 34 Ill. 297; Pike *v.* er, 84 Ill. 80; Clapp *v.* Herdman, l. App. 509; Merchants' Naviga- Co. *v.* Amsden, 25 Ill. App. 307; River Draining Assoc. *v.* Topp, nd. 242; Rizer *v.* Callen, 27 Kan. Locke *v.* Bennett, 7 Cush. (Mass.) Blake *v.* Sturtevant, 12 N. H. 567; ey *v.* Seavey, 37 N. H. 125; Pitts- *v.* Barnstead, 38 N. H. 115; Union ermes, 44 N. J. L. 269; 43 Am. 369; Phelps *v.* Schroder, 26 Ohio 49; Thompson *v.* Chase, 2 Grant's (Pa.) 367; Roehrborn *v.* Schmidt, Vis. 519; Blackman *v.* Dunkirk, 19 183; U. S. *v.* Eggleston, 4 Sawy. S.) 199; Fife *v.* Bohlen, 22 Fed. 878.

Wakefield *v.* Alton, 3 N. H. 378; sman *v.* Northrop, 8 Cow. (N. Y.)

pies of entries on the books of the Department, certified by the Sec- y of War, as to the mustering in cruits, are in no proper sense rec- importing absolute verity. Chap- *v.* Herrold Township, 58 Pa. St. 106. Lowe *v.* Aroma, 21 Ill. App. 599; plaine *v.* Cook, 7 Wis. 44; Lums- *v.* Cross, 10 Wis. 282; Steele *v.* icker, 55 Wis. 134.

the fourteenth and sixteenth ons of the act creating the Inter- Commerce Commission, it is pro- that the report or findings made e Commission "should thereafter, judicial proceedings, be deemed *n facie* evidence as to each and fact found." Kentucky etc. ge Co. *v.* Louisville etc. R. Co., d. Rep. 567.

Certified transcripts of the accounts kept at the Treasury Department, are made evidence of the facts entered and the balance due, in actions between the government and its officers and their sureties. Operation and effect of these acts—explained. Walton *v.* U. S., 9 Wheat. (U. S.) 651; Bruce *v.* U. S., 17 How. (U. S.) 437; U. S. *v.* Patterson, Gilp. (U. S.) 44; Postmaster Gen'l *v.* Rice, Gilp. (U.S.) 554.

The acts of Congress, making transcripts from the departments at Washington evidence against public debtors, though in derogation of the common law, are valid, and the transcripts *prima facie* proofs. U. S. *v.* Harrill, 1 McAll. (U. S.) 243; Gilman *v.* Riopelle, 18 Mich. 145; Crowell *v.* Hopkinton, 45 N. H. 9.

4. Dyer *v.* Brogan, 70 Cal. 136.

5. Kellar *v.* Savage, 17 Me. 444. See Day *v.* Peasley, 54 Vt. 310.

The reason for this rule is that such statutory provisions are merely directory.

But a county treasurer, who was by law required to keep certain books, was not allowed to introduce, in proceedings against him and his bondsmen to collect the amount of a default, evidence of a lower character as a substitute for the record, which he had negligently failed to keep. Price *v.* Douglas Co., 77 Ga. 163. See also Phares *v.* State, 3 W. Va. 567; 100 Am. Dec. 777.

Municipal and Quasi Municipal Records.—But, as to this, in regard to records of municipal corporations, see *supra*, this title, *Parol Evidence to Contradict or Aid Record.*

6. See LOST PAPERS, vol. 13, p. 1090, note.

kept or made a record is incompetent to contradict it.[1] But
evidence has been admitted to explain a record.[2]

d. HOW RECORD IS PROVED.[3]—The record itself may be
duced in evidence.[4] The contents of a public record may a
proved by a properly certified[5] copy[6] of the record.[7] W
copy of a book or record is, by statute, made admissible i
dence, the record itself will be admissible, although not exp
made so by statute.[8] It is to be observed that the ru
quiring the contents of a record to be proved by the
itself, or a certified copy, does not prevent certain fact

1. May *v.* Hammond, 146 Mass. 439; Brown *v.* BonHomme Co. (S. Dak. 1890), 46 N. W. Rep. 173.

In such case the proper way would be to amend the record. See *infra*, this title, *Amendment of a Record—of Public Record.*

2. Thus, parol evidence was held admissible to explain the meaning of certain coloring on an official map. Board of Education *v.* Donahue, 53 Cal. 190; Board of Education *v.* Keenan, 55 Cal. 642.

3. See *supra*, this title, *The Judicial Record in Evidence—How Proved;* JUDICIAL NOTICE, vol. 12, p. 160, note.

Proof by the Certificate of the Custodian of the Record.—Unless authorized by statute, the certificate of the custodian of a record stating, generally, its contents, is not evidence thereof. People *v.* Lee, 112 Ill. 113; Keller *v.* Killion, 9 Iowa 329; McGuire *v.* Sayward, 22 Me. 230; Jay *v.* East Livermore, 56 Me. 107; Oakes *v.* Hill, 14 Pick. (Mass.) 442; Green *v.* Durfee, 6 Cush. (Mass.) 362; Carr *v.* Youse, 39 Mo. 346; 90 Am. Dec. 470.

Proof by Parol Evidence.—The contents of a record cannot be proved by parol evidence. Elsner *v.* State, 22 Tex. App. 687.

4. Ronkendorf *v.* Taylor, 4 Pet. (U. S.) 349; Macy *v.* Goodwin, 6 Cal. 579; Thorn *v.* Case, 21 Me. 393; State *v.* Voight, 90 N. Car. 741; Herndon *v.* Casiano, 7 Tex. 322.

5. See AUTHENTICATION, vol. 1, pp. 1020–1024; EXEMPLIFICATION, vol. 7, pp. 479–482; EVIDENCE, vol. 7, p. 87.

The copy must be certified. People *v.* Turner, 18 N. Y. St. Rep. 26; Bella *v.* New York etc. R. Co., 24 N. Y. St. Rep. 921.

6. As to what is a copy, see COPY, vol. 4, p. 146.

A translation is not admissible in evidence as a copy. Bixbee *v.* I
Cal. 590.

7. 1 Greenl. Ev. § 484, note 2:
win *v.* McCabe, 75 Cal. 584; Si
v. Spratt, 20 Fla. 495; Bell *v.* Ke
25 Fla. 778; Columbus R. Co. *v*
more, 69 Ill. 566; St. Louis *v.* Fr
Ill. App. 339; Smith *v.* Mc
Blackf. (Ind.) 51; Monk *v.* Co
Iowa 503; Downing *v.* Haxton,
178; Darcy *v.* McCarthy, 35 Ka
Sneed *v.* Ward, 5 Dana (Ky
Sampson *v.* Noble; 14 La. An
Classen *v.* Classen, 57 Md. 510
v. Freeland, 32 Miss. 645; Oakes
14 Pick. (Mass.) 442; Pierce *v.* I
35 Mich. 53; Childress *v.* Cutter
24; Society for Propagating G
Young, 2 N. H. 310; Bowman
born, 25 N. H. 87; Whitehe
Bickford, 29 N. H. 471; Co
Blackwell, 19 N. J. Eq. 193; Jac
King, 5 Cow. (N. Y.) 237; 15 A
468; Clarke *v.* Diggs, 6 Ired. (N
159; 44 Am. Dec. 73; Paschal *v*
7 Tex. 348.

Duly authenticated copies fr
State land office, are admissible
dence. Franklin *v.* Woodland
Ann. 184; Finley *v.* Woodruff,
328; Sessions *v.* Reynolds, 7 S
M. (Miss.) 130; Wray *v.* Doe, 1
& M. (Miss.) 452; Harper *v.* I
etc. Bank, 7 W. & S. (Pa.) 204; C
v. Ferren, 1 Watts (Pa.) 57; C
Levan, 4 Pa. St. 393; Houston
ry, 3 Tex. 390; Mason *v.* McL
16 Tex. 24. S. P. Dikes *v.* M
Tex. Sup. 281; 78 Am. Dec. 5
lard *v.* Lively, 4 Gratt. (V
Ward *v.* Moorey, 1 Wash. Ter

8. Goodwyn *v.* Goodwyn, 25
James *v.* Greensboro etc. T
Co., 47 Ind. 379; Oram *v.* Yo
N. J. L. 54; King *v.* Kenny, 4
Sheehan *v.* Davis, 17 Ohio
Miller *v.* Hale, 26 Pa. St. 432
brod *v.* Chicago etc. R. Co., 21

contained in a particular record, from being shown by parol evidence.[1]

6. Sufficiency of Public Records.—In determining the sufficiency of public records as a memorial of certain transactions, technical precision or any particular form should not be required.[2]

VI. Quasi-Public Records.—There are also other records which partake both of a public and private character, and are treated as the one or the other, sometimes according to the nature of their subject-matter, but, generally, according to the relation in which one stands to them.

1. Parish or Church Registers.—In *England*, where there is a state church, which has authority to legislate with respect to parish registers, such records are by law invested with the characteristics of public records.[3] But in the *United States*, where there is no religion established by law, church registers, in the absence of

1. Marbourg *v.* McCormick, 23 Kan. 38; Strong *v.* State, 18 Tex. App. 19.

2. Lewis *v.* Laylin, 46 Ohio St. 663; Piatt *v.* People, 29 Ill. 54.

In the absence of other suspicious circumstances, it is not a sufficient ground for the exclusion of a public record, when offered in evidence, that some of its leaves are missing. People *v.* Board of Supervisors, 21 Ill. App. 371.

A semi-annual official statement of moneys in the county treasury, although the dollar mark is omitted and the amount of money therein expressed is only indicated by figures, without other index of denomination than the separating of the two right-hand figures in a column from the others by a perpendicular line, is competent evidence of the amount of money in his hands. State *v.* Ring, 29 Minn. 88.

In Lewis *v.* Laylin, 46 Ohio St. 663, the court by Blackburn, J., said: "They (records of inferior tribunals and public boards) are not usually drawn by persons possessed of professional knowledge or skill in such matters. The law does not contemplate that such tribunals or board should be constantly attended by persons having such knowledge or skill; but, rather, that their duties will be performed, at least generally, without such assistance. To subject them to the test of technical precision would, in most instances at least, defeat the object sought to be obtained by the legislature in creating inferior tribunals and public boards; and therefore, however informal their records may be, if enough appears to show with reasonable certainty that the requirements of the law have been substantially complied with, their proceedings should, upon grounds of public policy, if for no other reason, be sustained. Harding *v.* New Haven, 3 Ohio 227; Humiston *v.* Anderson, 15 Ohio 557; Barto *v.* Abbe, 16 Ohio 408; McClelland *v.* Miller, 28 Ohio St. 488; Lima *v.* McBride, 34 Ohio St. 338. Nor should their proceedings be attacked in detail, and an entry or an order separated from the balance of the record, and if found incomplete when considered alone, the proceedings declared erroneous. Instead, the whole is to be construed together, and if, from the entire record, it appears that all the statutory steps have been substantially taken, the proceedings should be upheld. These principles we adopt and apply in construing the record of the county commissioners in the case now under consideration."

3. Stainer *v.* Burgesses of Droitwich, 1 Salk. 281; 12 Mod. 86; Skin. 623; Holt 290; Doe *v.* Barnes, 1 M. & Rol. 386; Stark. Ev. (4th Eng. ed.) 299, and note b. But registers kept by dissenters were not invested with such dignity. Wheat. on Ev., § 653. This rule has, however, been abrogated by statute in *England*, so as to include many other records which all churches keep.

See also MARRIAGE, vol. 14, p. 523–525.

A copy from a register of births and deaths of Quakers in *England* was held evidence, in *Pennsylvania*, to prove the death of a person. Hyam *v.* Edwards, 1 Dall. (U. S.) 2.

statutory provisions, are not regarded as public records.[1] B
statutes have been enacted in several States, which give to su
records, in a measure, their former common-law importanc
These registers, when admissible, are not, in general, evidence
any fact not required to be recorded in them.[3]

2. Books of Private Corporations.[4]—The books of private corpo
tions are in the nature of public records as between its member
or if the matter which is the subject of record is obviously o
public character.[6] But it seems that these books do not pro
themselves.[7] And the record is the best evidence of the fa

1. Kennedy *v.* Doyle, 10 Allen (Mass.) 161; Childress *v.* Cutler, 16 Mo. 24; Morrissey *v.* Wiggins Ferry Co., 47 Mo. 521. See Gaines *v.* Relf, 12 How. (U. S.) 471.

But in a recent case the rule has been stated as conforming with the English law, and the case of Lewis *v.* Marshall, 5 Pet. (U. S.) 475, which is cited in the next note, claimed as authority for the decision which admitted the sworn and examined copy of the parish record of baptismal kept by the Catholic Church at Amherstburg, in Ontario, to prove the plaintiff's age. Hunt *v.* Order of Chosen Friends, 64 Mich. 671.

These entries, while denied the characteristics of public records, have sometimes been admitted in evidence as being an entry made by a third person in the discharge of an official duty. Kennedy *v.* Doyle, 10 Allen (Mass.) 161; Whitcher *v.* McLaughlin, 115 Mass. 167; Weaver *v.* Leiman, 52 Md. 708; Blackburn *v.* Crawford, 3 Wall. (U. S.) 175.

2. In *Massachusetts*, by an ordinance of 1638, it was enacted "that there be records kept, by the churches," "of the days of every marriage, birth and death of every person within this jurisdiction;" and similar statutes have been ever since in force in that State. *Massachusetts* Gen. Sts., ch. 21; ch. 106, §§ 16, 17. Similar provisions are found in the statutes of other States. Thus where an entry of a burial made in the register book of burials of Christ Church, in Philadelphia, was admitted in evidence by the Supreme Court of the United States in Lewis *v.* Marshall, 5 Pet. (U. S.) 475, it seemed that the record was kept according to the act of the provincial assembly of *Pennsylvania* of 1705, *cited* in Stoever *v.* Whitman, 6 Binn. (Pa.) 416. See Lavin *v.* Mutual Aid Soc., 74 Wis. 349; Meconce *v.* Mower, 37 Kan. 298; Succession of Hebert, 33 La. Ann. 1099; Morrissey *v.* Wiggins Ferry Co., 47 Mo. 521; Shut bury *v.* Hadley, 133 Mass. 242; in of which cases the decision is foun upon such a statute.

3. Meconce *v.* Mower, 37 Kan. 2 Morrissey *v.* Wiggins Ferry Co., Mo. 521; Wedgwood's Case, 8 Me. Durfee *v.* Abbott, 61 Mich. 4 Kabok *v.* Phœnix Mut. L. Ins. Co. Hun (N. Y.) 639; Blackburn Crawford, 3 Wall. (U. S.) 175. also MARRIAGE, vol. 14, p. 524, n 3 & 4; p. 525, note 1.

That, by the application of this r identity must be proved by evide *aliunde*, is a doctrine enunciated several of these cases. But see ID TITY, vol. 9, p. 868.

4. See also BOOKS AS EVIDEN vol. 2, pp. 467*o*–467*p*.

5. 1 Greenl. Ev., §§ 474, 493; Wh Ev., § 661; Ang. & Am. Corp., § 6 Howard *v.* Glenn, 85 Ga. 238; Co *v.* Sanford, 14 Iowa 235; Hamric Bence, 29 Ind. 500; Penobscot R. Co Dummer, 40 Me. 172; Frank *v.* Mo son, 58 Md. 423; White Mts. R. Co Eastman, 34 N. H. 124; Wetherbe Baker, 35 N. J. Eq. 501; Com. Woelper, 3 S. & R. (Pa.) 29; 8 A Dec. 628; Fraser *v.* Charleston, 8 Car. 628; Pittsburgh etc. R. Co. Applegate, 21 W. Va. 172.

Thus, all the members of a comp are chargeable with knowledge of entries made on their books, by agent of the company, in the course of business, and with the t meaning of the entries as underst by the agent. Allen *v.* Coit, 6 H (N. Y.) 318.

6. Ang. & Am. Corp., § 679, not Tayl. Ev., § 1781; Rex *v.* Mothers 1 Str. 93; Owings *v.* Speed, 5 Wh (U. S.) 420.

7. The court cannot determine character of the transfer books o corporation, simply by inspection the book. Corporation books do

corded.[1] The records of a private corporation are only *prima acie* evidence.[2] They may be rebutted by parol testimony.[3]

3. Ship's Log Book.—A ship's log book is at common law in o sense a public register,[4] but it has been made so, for some urposes, by statute.[5]

4. Miscellaneous Records.—There are many other records of this nd, but they are of little importance.[6]

VII. Foreign Records.[7]

VIII. Inspection of Records.[8]—At common law the rule was

ove themselves. Pittsburg Coal Co. Foster, 59 Pa. St. 365; Corse *v.* Sanrd, 14 Iowa 235. It has been held at corporation books will not be conlered as proving themselves, but that must appear that they are the corration books, and that they have en kept as such, and the entries ade by the proper officer, or some her person in his necessary absence. ghland Turnpike Co. *v.* McKean, Johns. (N. Y.) 154. See Union old Min. Co. *v.* Rocky Mt. Nat. nk, 2 Colo. 565.

1. Union Gold Min. Co. *v.* Rocky t. Nat. Bank, 2 Colo. 565; Smith *v.* chards, 29 Conn. 232; Evans *v.* uthern Turnpike Co., 18 Ind. 101; kes *v.* Hill, 14 Pick. (Mass.) 442. When a corporation is by statute reired to keep a record of all business nsactions, and the record is, by tute, made competent evidence in y action or proceeding to which ch corporation may be a party, the st evidence of an assessment made the board of directors is the record the order of the board.

3. Rockville etc. Turnpike Co. *v.* n Ness, 2 Cranch (C.C.) 449.

4. St. Louis etc. R. Co. *v.* Tiernan, Kan. 606; Knights of Honor *v.* ickser (Tex. 1888), 12 S. W. Rep. ; Goodwin *v.* U. S. Ins. Co., 24 nn. 591.

5. Greenl. Ev., § 495; U. S. *v.* Gilrt, 2 Sumn. (U. S.) 19.

6. 17 & 18 V., ch. 104, §§ 280, 287. n the *United States*, by act of Conss, Stat. 1790, ch. 29, § 5, 1 U. S. Stat. L. (L. & B.'s ed.) 133, it is provided t if any seaman, etc., shall absent nself from the ship or vessel in ich he shall have shipped, an entry that fact shall be made in the book, and the seaman will be ble to be deemed guilty of desertion. outman *v.* Tunison, 1 Sumn. (U. S.) . But this entry is not conclusive dence of the desertion, and may be repelled by proof of the falsity of the entry, or its being made by mistake. Orne *v.* Townsend, 4 Mason (U. S.) 544.

6. Among this class of records may be mentioned the books of the East India Company, recording the transfer of stock, Geery *v.* Hopkins, 2 Ld. Raym. 851; 7 Mod. 129; 2 Dougl. 593, n. 3; and the books of the Bank of England, Mortimer *v.* McCallan, 6 M. & W. 58; the rolls of Courts Baron, B. N. P. 247; Doe *v.* Askew, 10 East 520; public lottery books, Schmotti *v.* Bumstead, 1 Tidd's Pr. 594; the books of a distiller required to be kept by the internal revenue laws, U. S. *v.* Myers, 1 Hughes (U. S.) 533.

Record of Proprietors of Common Lands.—Monumoi Great Beach *v.* Rogers, 1 Mass. 159; Tolman *v.* Emerson, 4 Pick. (Mass.) 160; Cobleigh *v.* Young, 15 N. H. 493; Whitehouse *v.* Bickford, 29 N. H. 471.

Ships Register.—The enrollment or registry of a ship is not a public or official register.

The act of Congress requiring the enrollment or registry of ships is required for purposes of public policy, but does not change the rule. Miller *v.* Hill, 10 Humph. (Tenn.) 470.

In an action to recover back a premium of insurance, on the ground that the plaintiff had no interest in the vessel at the time the insurance was made, the register, which was in the names of other persons, is not even *prima facie* evidence to show that the plaintiff was not the owner of the vessel. Sharp *v.* United Ins. Co., 14 Johns. (N. Y.) 201. See also Leonard *v.* Huntington, 15 Johns. (N. Y.) 302. But see Moore *v.* Anderson, 8 Ind. 18.

7. See Authentication, vol. 1, p. 1021; Foreign Laws, vol. 8, p. 435; Judgments, vol. 12, pp. 148*k*, 148*s*.

8. See Mandamus, vol. 14, pp. 171, 173; p. 208, note 3; Production of Documents.

that every person is entitled to the inspection, by himself o agent, of public records,[1] provided he has an interest ther It seems that the person seeking inspection of court records have such an interest in a specific controversy as will enable to maintain and defend an action, for which the documen furnish confident evidence or necessary information; it is

1. As far as the right to inspect records is concerned, it is unnecessary to make any distinction between the different records, as the legislative, judicial, executive, etc., but they may all be spoken of as public records. And this will be done under this division. When the circumstances, such as the relation of the person seeking inspection, are such that a *quasi* public record will be treated as a public record, the rules here stated are applicable; otherwise, they are not applicable. And the term public record, as used herein, unlike its use in all other parts of this record, also includes the public records of private writings, treated under the title RECORDING ACTS.

2. Rex *v.* Merchant Tailors' Co., 2 B. & Ad. 115; 22 E. C. L. 40; *In re* McLean, 2 Flip. (U. S.) 512; 9 Cent. L. J. 425; Brewer *v.* Watson, 71 Ala. 299; 46 Am. Rep. 318; Daly *v.* Dimoch, 55 Conn. 579; People *v.* Walker, 9 Mich. 328.

People *v.* Cornell, 47 Barb. (N. Y.) 329, which has been cited as denying that the person seeking inspection of a public record must have some interest therein, is overruled in People *v.* Cornell, 35 How. Pr. (N. Y.) 31.

English Limitation to the Rule.—In *England*, because of the frequency of actions for malicious prosecution, this right was restrained by an order of the judges made in the reign of Charles II, prohibiting the granting of any copy of an indictment for felony, without a special order, upon motion in open court at the general jail delivery. 1 Greenl. Ev., § 471.

Although the English rule has been followed in the *United States*, People *v.* Poyllon, 2 Cai. (N. Y.) 202, such limitations will probably be deemed repugnant to the genius of American institutions. 1 Greenl. Ev., § 471; Stone *v.* Crocker, 24 Pick. (Mass.) 81.

Inspection of Records by Abstract Companies.—By the application of the rule stated in the text it is held that, at common law, there is no right spect and make copies of public r for speculative purposes, as fo compilation of abstracts of title stract companies, with a view to sale or use thereof. Randolph *v* 82 Ala. 527; 60 Am. Rep. 761; E People, 7 Colo. 200; Scribner *v.* 27 Ill. App. 36; Cormack *v.* W 37 Kan. 391; Webber *v.* Townl Mich. 534; 38 Am. Rep. 213 Buck *v.* Collins, 51 Ga. 391; 2 Rep. 236.

But the principle upon which cases are decided is denied, and th of Webber *v.* Townley, 43 Mich 38 Am. Rep. 213, is expressly ruled in Burton *v.* Tuite, 78 Mic In the decision of this case the co Morse, J., said: "I do not thin any common law ever obtained free government that would deny people thereof the right of free to, and public inspection of, pub ords. They have an interest alw such records; and I know of n written or unwritten, that pr that, before an inspection or exa tion of a public record is mad citizen who wishes to make it show some special interest in suc ord. I have a right, if I see fit, amine the title of my neighbor's erty, whether or not I have any est in it, or intend ever to have. have the right to examine any tit I see fit, recorded in the public for the purposes of selling such mation, if I desire."

But abstract companies have permitted to inspect records principle of agency. The inspec records may be done by the ag the person having such right Randolph *v.* State, 82 Ala. 527; 6 Rep. 761. Thus, persons enga the business of furnishing abstr titles to real estate, when sp employed in a certain case by on ing such an interest in a rec would give him the right to ins have a right, as his agents, to t spection of the record. Boy

necessary that a cause be pending.[1] Nor is it essential that the interest be private, capable of sustaining a suit or defense on his own personal behalf; but it will be sufficient that he act in such suit as the representative of the common or public right.[2]

By statutes of the *United States* and many States, the necessity of interest has been done away with, and any person may examine public records,[3] and this includes the right to take memoranda therefrom.[4]

But the right to inspect public records may be subjected to proper regulations. Thus, there may be a regulation giving the clerk a right to charge a fee for making an examination of the records.[5] But if a person dispenses with the services of the custodian of the records, and makes the examination himself, no fee can be charged.[6] A person seeking inspection of records must conduct himself in a proper manner, or he may properly be denied access to the records.[7]

IX. Lost Record.[8]

X. Amendment of a Record—1. Of Judicial Record.—When, by reason of a merely clerical error resulting from some accident, mistake, or misprision of the clerk or other recording officer, the record of a court is found not in accordance with the facts it purports to record, it may be amended so as to conform to the actual facts and truth of the case,[9] and this may be done not only during

Warren, 39 Kan. 301. It seems that the decision in the case of Burton *v.* Tuite, 78 Mich. 363, cited *supra*, was influenced by this consideration.

1. Rex *v.* Lucas, 10 East 235; Rex *v.* Tower, 4 M. & S. 162; Rex *v.* Leicester, 4 B. & C. 891; 10 E. C. L. 466; Rogers *v.* Jones, 5 D. & R. 484.

2. Rex *v.* Shelly, 3 T. R. 141; Rex *v.* Babb, 3 T. R. 579; Ferry *v.* Williams, 41 N. J. L. 332.

3. See State *v.* Rachae, 37 Minn. 372; Nash *v.* Lathrop, 142 Mass. 29; Lum *v.* McCarty, 39 N. J. L. 287; Hanson *v.* Eichstaedt, 69 Wis. 538; *In re* Chambers, 44 Fed. Rep. 786.

4. Boylan *v.* Warren, 39 Kan. 301; Nash *v.* Lathrop, 142 Mass. 29; Newton *v.* Fisher, 98 N. Car. 20.

5. Buck *v.* Collins, 51 Ga. 391; 21 Am. Rep. 236; Belt *v.* Prince George's Co Abstract Co. (Md. 1890), 20 Atl. Rep 982; 34 Am. & Eng. Corp. Cas. 440.

6. Lum *v.* McCarty, 39 N. J. L. 287; *In re* Chambers, 44 Fed. Rep. 786.

But see Newton *v.* Fisher, 98 N. Car. 20; Belt *v.* Prince George's Co. Abstract Co. (Md. 1890), 20 Atl. Rep. 982; 34 Am. & Eng. Corp. Cas. 440.

7. Boyden *v.* Burke, 14 How. (U. S.) 575.

8. See generally, Lost Papers, vol. 13, p. 1059, where the law of lost records is fully treated.

9. 3 Bl. Comm. 24; 2 Steph. Comm. 583; Rex *v.* Grampound, 7 T. R. 699; Bank of Com. *v.* Wistar, 3 Pet. (U. S.) 431; The Palmyra, 12 Wheat. (U. S.) 1; Jenkins *v.* Eldredge, 1 Woodb. & M. (U. S.) 61; Union Mfg. Co. *v.* Pitkin, 14 Conn. 174; McCormick *v.* Wheeler, 36 Ill. 114; 85 Am. Dec. 388; Hannah *v.* Dorrell, 73 Ind 465; Patrick *v.* Newel, 1 Bibb (Ky.) 323; Boyle *v.* Connelly, 2 Bibb (Ky.) 7; Hall *v.* Williams, 10 Me. 278; Longley *v.* Vose, 27 Me. 179; State *v.* Maher, 35 Me. 225; *Ex parte* Weston, 11 Mass. 416; State *v.* Clark, 18 Mo. 432; West *v.* State, 22 N. J. L. 212; Williams *v* Wheeler, 1 Barb. (N. Y.) 48; Sluyter *v.* Smith, 2 Bosw. (N. Y.) 673; Newburgh Bank *v.* Seymour, 14 Johns. (N. Y.) 219; Marsh *v.* Berry, 7 Cow. (N. Y.) 344; State *v.* Littlefield, 3 R. I. 124; Hudson *v.* Fishel (R. I. 1890), 20 Atl. Rep. 100; Hanley *v.* Levin, 5 Ohio 228; Hollister *v.* Lucas Co., 8 Ohio St. 201; 70 Am. Dec. 100. See also Amendment, vol. 1, p. 553, n. 1; Indictment, vol. 10, p. 537, n. 2.

In Ives *v.* Hulce, 17 Ill. App. 30, the court by Wall, P. J., says: "It has

the term,[1] but after the term in which the transactions have curred *nunc pro tunc*.[2] And such amendment may be made e after the cause has been removed to the superior court by app or writ of error, and is there pending.[3] A clerical error in judgment entry has been corrected by such amendment, e after an appeal and affirmance of the judgment.[4]

been well said that there are many cases where it so clearly appears that the judgment as entered is not the sentence which the law ought to have pronounced upon the facts established by the record, that the court acts upon the presumption that the error is a clerical misprision rather than a judicial blunder, and sets the judgment, or rather the judgment entry, right by amendment *nunc pro tunc*. Freeman on Judgments, ch. 4; Rees *v.* Morgan, 5 T. R. 349; Lill *v.* Stookey, 72 Ill. 495; Church *v.* English, 81 Ill. 442; Becker *v.* Lauter, 89 Ill. 596; Tucker *v.* Hamilton, 108 Ill. 464."

See also Houston *v.* Williams, 13 Cal. 24; 73 Am Dec. 565; Harrison *v.* State, 10 Mo. 686; Butler *v.* Lewis, 10 Wend. (N. Y.) 541; Rockwell *v.* Carpenter, 25 Hun (N. Y.) 529; Bank of U. S. *v.* Moss, 6 How. (U. S.) 31.

1. Branger *v.* Chevalier, 9 Cal. 351; Maish *v.* Crangle, 80 Iowa 650; Com. *v.* Phillips, 11 Pick. (Mass.) 28; Mobley *v.* State, 46 Miss. 501; Hudson *v.* Fishel (R. I. 1890), 20 Atl. Rep. 100.

2. *In re* Wight, 134 U. S. 136; Nelson *v.* Barker, 3 McLean (U. S.) 379; Cromwell *v.* Bank of Pittsburg, 2 Wall. Jr. (C. C.) 569; Green *v.* State, 19 Ark. 178; Morrison *v.* Dapman, 3 Cal. 255; Swain *v.* Naglee, 19 Cal. 127; Dreyfuss *v.* Tompkins, 67 Cal. 339; Waldo *v.* Spencer, 4 Conn. 71; Holman *v.* State, 79 Ga. 155; Church *v.* English, 81 Ill. 442; Spellmyer *v.* Gaff, 112 Ill. 29; Gillett *v.* Booth, 95 Ill. 183; Gebbie *v.* Mooney, 22 Ill. App. 369; Gebbie *v.* Mooney, 121 Ill. 255; State *v.* Pearce, 14 Ind. 426; Makepeace *v.* Lukens, 27 Ind. 435; 52 Am. Rep. 295; Hartford *v.* Arbuckle, 123 Ind. 518; Kean *v.* Rankin, 2 Bibb (Ky.) 88; Bacon *v.* Lincoln, 2 Cush. (Mass.) 124; Tilden *v.* Johnson, 6 Cush. (Mass.) 354; Balch *v.* Shaw, 7 Cush. (Mass.) 282; Fay *v.* Wenzell, 8 Cush. (Mass.) 315; Bilausky *v.* State, 3 Minn. 427; Hanley *v.* Dewes, 1 Mo. 16; Hyde *v.* Curling, 10 Mo. 359; Day *v.* State, 13 Mo. 422; State *v.* Clark, 18 Mo. 432; Gibson *v.* Chouteau, 39 Mo. 282; Priest *v.* McMaster, 52 Mo. 60; Robertson *v.* Neal, 60 Mo. 579; State Primm, 61 Mo. 166; State *v.* Jef 64 Mo. 376; Frink *v.* Frink, 43 N 508; 80 Am. Dec. 189; Seama Drake, 1 Cai. (N. Y.) 9; Gallowa McKeithen, 5 Ired. (N. Car.) Wright *v.* Lathrop, 2 Ohio 33; 15 Dec. 529; Torbet *v.* Coffin, 6 Ohio Rhoads *v.* Com., 15 Pa. St. 272; sell *v.* Miller, 40 Tex. 494; H Hoover, 5 Wis. 386; 68 Am. Dec. Scheer *v.* McKeown, 34 Wis. 353.

3. Cowan *v.* Ross, 28 Tex. Chestnutt *v.* Pollard, 77 Tex. 86. see GARNISHMENT, vol. 8, p. notes 4 & 5. See also West *v.* S 22 N. J. L. 212.

The record of a judgment ha been amended during the penden a writ of error thereon, the ame record becomes the only subsisting ord for the consideration of the c Weed *v.* Weed, 25 Conn. 494.

But in Ramsey *v.* Cole, 84 Ga. the court by Simmons, J., said: was there error in refusing to the magistrate, who was in cour amend the original judgment transcribing this entry on the mons and entering it upon his do Irregular judgments can be ame by application to the proper cou term-time, but we know no law thorizing a magistrate, during progress of the case in the sup court, to come into that court amend the judgment entered up by in the justice's court. If parties to amend an irregular judgment must apply to the court that rend it, and at its term-time. They ca summon the judge of the inf court to the superior court to him perform a judicial act in th perior court, by amending an irre judgment rendered by his court."

4. Ronset *v.* Boyle, 45 Cal. 64; lon *v.* Brittan, 84 Cal. 511. But pare, *contra*, GARNISHMENT, vol. 1264, n. 3.

Amendment After Change of Ven The fact that the venue of a cause been changed, does not deprive court where the cause originate

It has been held that at common law, and under the statutes of jeofails and amendments, the record could not be amended, unless there existed some record evidence, or writing made in accordance with the practice of the court, from which the facts could be obtained.[1] This has been modified into the statement that, after the expiration of the term, the record cannot be amended except by record evidence, or facts appearing in the record itself;[2] yet, other authorities deny that the court is thus restricted as to the evidence.[3]

It seems that the amendment of a court record will not be allowed to operate to the prejudice or injury of the intervening rights acquired by third persons in reliance on the accuracy of the record.[4]

It is proper practice in correcting these mistakes to proceed by motion,[5] with due notice to the opposite party,[6] or by petition. Or the court may proceed to amend upon its own motion.[7] But it is incompetent for the clerk, at a subsequent term, and upon his own motion, to make any entry of what occurred at a preceding term.[8] It seems that, when the motion to amend is made in

jurisdiction to amend its record made in the cause previous to such change of venue. Church *v.* English, 81 Ill. 442.

1. Blackamore's Case. 4 Co. Rep. 156; Tidd's Prac. (4th Am. ed.) 713; Makepeace *v.* Lukens, 28 Ind. 435; 52 Am. Rep. 295; Miller *v.* Royce, 60 Ind. 189; Schoonover *v.* Reed, 65 Ind. 313. See Nelson *v.* Barker, 3 McLean (U. S.) 379.

2. Branger *v.* Chevalier, 9 Cal. 351; Swain *v.* Naglee, 19 Cal. 127; Waldo *v.* Spencer, 4 Conn. 71; *In re* Barnes 27 Ill. App. 151; Gillett *v.* Booth, 95 Ill. 183; Frew *v.* Danforth, 126 Ill. 242; Hyde *v.* Curling, 10 Mo. 359; Priest *v.* McMaster, 52 Mo. 60; Robertson *v.* Neal, 60 Mo. 579; State *v.* Primm, 61 Mo. 166; State *v.* Jeffors, 64 Mo. 376.

3. Clammer *v.* State, 9 Gill (Md.) 279; Mayo *v.* Whitson, 2 Jones (N. Car.) 231. It is said that courts of record are the exclusive judges upon the kind and sufficiency of the proofs upon which to proceed. Balch *v.* Shaw, 7 Cush. (Mass.) 282; Fay *v.* Wenzell, 8 Cush. (Mass.) 315.

And this is the opinion held by the Supreme Court of the United States, although it is perhaps partly founded on § 954 of the Revised Statutes, commonly called the Statute of Jeofails and amendments of the United States. *In re* Wight, 134 U. S. 136.

4. Newburgh Bank *v.* Seymour, 14 Johns. (N. Y.) 219. See McCormick *v.* Wheeler, 36 Ill. 114; 85 Am. Dec. 388; Church *v.* English, 81 Ill. 442.

But judgment had been entered upon a warrant of attorney, and the same was regularly signed and docketed; but by the negligence of the attorney, the plea of the defendant was not signed, nor was the name of the defendant's attorney inserted in the record. The plaintiff was allowed to amend the record *nunc pro tunc*, though a subsequent judgment had been entered up against the defendant, on which a preference was claimed. Close *v.* Gillespey, 3 Johns. (N. Y.) 526.

5. Hill *v.* Hoover, 5 Wis. 386; 68 Am. Dec. 70; Rogers *v.* Hoening, 46 Wis. 363. See MOTIONS, vol. 15, p. 888, n. 5.

6. Hill *v.* Hoover, 5 Wis. 386; 68 Am. Dec. 70.

Amendment may be made without notice. Balch *v.* Shaw, 7 Cush. (Mass.) 282.

Where an indictment was returned into court by the grand jury, but the record fails to show the fact, the record may be amended by a *nunc pro tunc* entry; but in such case the accused must be present in court when the amendment is made. Green *v.* State, 19 Ark. 178.

7. Balch *v.* Shaw, 7 Cush. (Mass.) 282. See JUDGE, vol. 12, p. 16, note, *Minutes of Court in Louisiana;* p. 38, note 5.

8. McQuillen *v.* State, 8 Smed. & M.

a collateral proceeding in which the record is introduced in evidence, the amendment may properly be made at any time before the record goes to the jury, to be received and acted upon, as the basis of their verdict.[1]

When an order directing the record to be amended has been made, it has been held that the clerk should actually alter the record,[2] but it should not be done by means of erasures or interlineations.[3] The amendment may be made at any time after the order.[4]

2. Of Public Record.[5]—A public record may be amended to conform to the true facts.[6] This may be done by the order of the court on the trial of a suit in which the record is introduced in evidence.[7] While the amendment is not conclusive as against persons not parties to the suit in which it was made, the amended record must stand as the sole record until again amended.[8] The truth of a proposed amendment may be established by parol evidence.[9]

(Miss.) 587; Graham *v.* People, 6 Lans. (N. Y.) 149.

1. Com. *v.* Phillips, 11 Pick. (Mass.) 28.

2. Jones *v.* Lewis, 8 Ired. (N. Car.) 70; 47 Am. Dec. 338.

3. Farrelly *v.* Cross, 10 Ark. 197; Sluyter *v.* Smith, 2 Bosw. (N. Y.) 674. See Jennings *v.* State, 1 Oregon 290.

It is not meant that if this is done it will always be a ground for vacating the judgment or even causing very serious inconvenience. But it is not good practice. Sluyter *v.* Smith, 2 Bosw. (N. Y.) 674.

Approved Method of Making the Amendment.—Mr. Bishop, in regard to the manner in which the amendment is to be made, says: "The better way is believed to be to make, in the record of the term at which the amendment is offered, an entry to the effect that, whereas on inspection of the record of the preceding term an error therein appears, etc., it is considered that the same be corrected and amended, etc., setting out the amendment. Then let the clerk enter the amendment also in full, if there is space, in the margin of the preceding record, adding a reference to the record requiring it. The books will thus show the amendment; yet, when the clerk is called on for a transcript of the record, he will make it as though it originally stood as amended." 1 Crim. Proc. § 1345.

In the case of Sluyter *v.* Smith, 2 Bosw. (N. Y.) 674, the court by Hoffman, J., said: "It (the amendment) should be by appending the order of amendment to the roll, as well as by entering it in the proper book, and by referring in the margin of the entry of the judgment to an amendment as made by an order of such a date. The portions changed or omitted could be designated by brackets, underscoring or otherwise. Or the judgment may be entered anew as amended." See, Scott *v.* People, 63 Ill. 508; Sumner *v.* Cook, 12 Kan. 162.

4. 1 Bish. Crim. Proc., § 1345, n. 7, *citing* Marshall *v.* Fisher, 1 Jones (N. Car.) 111.

5. See MANDAMUS, vol. 14, p. 173, note 2; p. 208; MUNICIPAL CORPORATIONS, vol. 15, pp. 1077–1079; COUNTY COMMISSIONERS, vol. 4, p. 384, note 2.

6. See May *v.* Hammond, 146 Mass. 439.

A town clerk entered into his book of records that the defendant was elected and sworn as treasurer. Afterwards, on leave to amend his record, he struck out the word "treasurer," and inserted the words "collector of taxes, according to my best knowledge and belief;" and he testified to the grounds of his belief. *Held*, that the alteration was not a record, but that it was competent to go to the jury, together with the parol evidence, on the question whether the defendant had been sworn as collector. Sprague *v.* Bailey, 19 Pick. (Mass.) 436.

7. Roberts *v.* Holmes, 54 N. H. 560; Taft *v.* Barrett, 58 N. H. 449.

8. French *v.* Spalding, 61 N. H. 395.

9. Davis *v.* Sawyer (N. H. 1890) 20 Atl. Rep. 100.

RECORDARI.—See JUSTICE OF THE PEACE, vol 12, p. 489.

RECORDING ACTS.—(See also ACKNOWLEDGMENT, vol. 1, p. 3; ATTESTATION, vol. 1, p. 938; BONA, vol. 2, p. 444; CHATL MORTGAGES, vol. 3, p. 175; CONDITIONAL SALES, vol. 3, p. 4; CONVEYANCE, vol. 4, p. 132; DEEDS, vol. 5, p. 423; FILE, l. 7, p. 960; FRAUDULENT SALES, vol. 8, p. 786; HOMESTEAD, l. 9, p. 423; INCUMBRANCES, vol. 10, p. 361; LEASE, vol. 12, 974; LICENSE, vol. 13, p. 514; LICENSE (PATENT LAW), vol. , p. 557; LIS PENDENS, vol. 13, p. 868; NOTICE, vol. 16, p. 7; PATENTS, vol. 18, p. 20; PURCHASE MONEY MORTGAGES, l. 19, p. 574.)

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I. **History and Construction.**—The practice of placing titles to land upon public record did not exist at common law.[1] In the earlier periods of the law livery of seisin for estates of freehold, and entry for estates for years was the only notoriety needed or demanded by law in transactions passing the title to land.[2] But later, the general demands of a higher civilization, and especially after the enactment of the Statute of Uses,[3] by which estates in lands, even estates of inheritance, might be created and transferred by deed merely, without actual livery of seisin, the necessity of something to take the place of livery of seisin induced the enactment of the Statute of Enrollments,[4] providing for the enrollment of bargains and sales.[5] But this statute was soon nullified by the ingenious adaptation of the lease and release to the purpose of conveying the title to land.[6] Aside from the Statute of Enrollments, one of the earliest of the enactments, which may be properly called recording acts, is a statute limited in its operation to the County of Middlesex.[7] This was followed by other statutes of similar import.[8] But these early attempts were regarded with little favor,[9] and the practice of recording deeds has not become general in *England;* it is a local and very limited requirement.[10]

1. See Clarke *v.* White, 12 Pet. (U. S.) 178; Shirk *v.* Thomas, 121 Ind. 147; Aubuchan *v.* Bender, 44 Mo. 564; Den *v.* Richman, 13 N. J. L. 43; Fort *v.* Burch, 6 Barb. (N. Y.) 60.

2. 2 Min. Inst. 947.

3. 27 Hen. VII, ch. 10.

4. 27 Hen. VIII, ch. 16.

5. But while the Statute of Enrollment was designed to give to purchasers the notoriety formerly attained by livery of seisin, it differed from the usual recording acts now adopted, in that enrollment was made a part of the execution of the conveyance by bargain and sale. See Mart. on Conv., § 269; Le Neve *v.* Le Neve, Amb. 436; 1 Ves. 64; 3 Atk. 646; 2 Lead. Cas. Eq. 29; Pyle *v.* Maudling, 7 J. J. Marsh. (Ky.) 204; *infra*, this title, note 3, p. 571.

This statute seems never to have been part of the law of the *United States.* Chandler *v.* Chandler, 55 Cal. 267; Givan *v.* Doe, 7 Blackf. (Ind.) 210; Welsh *v.* Foster, 12 Mass. 96; Report of Penn. Judges on British Statutes, 3 Binn. (Pa.) 595.

6. 2 Min. Inst. 948; Jackson *v.* Wood, 12 Johns. (N. Y.) 74.

7. Statute 7 Anne, ch. 20. The more important provisions of which act are as follows: "That a memorial of all deeds and conveyances which, after the 27th of September, 1709, shall be made and executed, and of all wills and devises in writing, whereby any honors, manors, lands, etc., in the county of Middlesex, may be any way affected in law or equity, may be registered in such manner as is after directed; and that every such deed or conveyance that shall, at any time after, etc., be made and executed, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such memorial be registered as by this act is directed, before the registering of the memorial of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim," etc. Although this statute is not the original model whence our present registry laws were taken, yet its analogies have been allowed, unfortunately, too much to influence its construction. 2 Min. Inst. 848.

8. The other *English* Registry acts are: For West Riding of Yorkshire, 5 Anne, ch. 18; East Riding of Yorkshire and Kingston on Hull, 6 Anne ch. 35; North Riding of Yorkshire, 8 Geo. II, 6; Irish Act, 6 Anne, ch. 2.

And we may, perhaps, also enumerate the statute of 15 Car. II, ch. 17, providing that "no lease, etc., should be of force but from the time it should be registered."

9. 2 Bl. Com. 343.

10. See 4 Kent's Comm. 459.

But in the *United States*, by a gradual and continuous growth om a very early period,[1] these acts have attained great impor- nce. By this public exhibition of titles, transfers of land are eatly facilitated, especially where, as is often the case in this untry, the abodes of the parties thereto are widely separated. nd, because of the greater security against previous alienations hich these acts furnish purchasers of land, its transfer is much couraged. These considerations of convenience and safety ve so operated that, in the *United States*, the system of regis- ation flourishes in its fullest vigor. It may, indeed, be said that our whole system of land titles and conveyances has now for any years rested upon the plan and policy of registration."[2] nd the principles of the law of registration have not been con- ed to land titles; statutes have been enacted extending their ope and operation so as to embrace nearly every species of operty.

Although the provisions of the recording acts have by some urts been declared to be in derogation of the common law, or isting rights, and therefore should be construed strictly,[3] the ore common view is that these statutes are remedial and should liberally construed to attain the object intended.[4]

A statute requiring recordation does not ordinarily have etrospective effect, so as to apply to instruments executed ior to their enactment.[5] But, if the true construction of such islative act demands that it be given a retroactive effect, statute is not open to the objection that it impairs any con- tutional right.[6]

II. **Instruments Required to be Recorded.**—The recordation stem has undergone a gradual process of extension, and, in its esent development, often gives its protection to conveyances of l and personal property and equitable interests therein. ere are, however, some distinctions in the law which necessi- e a separate treatment of the different instruments required to recorded by the recording acts.

The history of recording in the *ited States* antedates even the stat- of 7th Anne. See Webb Rec. Tit.,

Webb Rec. Tit., § 4; 2 Min. Inst. Womble *v.* Battle, 1 Ired. Eq. Car.) 186.

See Hoyt *v.* Hoyt, 8 Bosw. (N. 524.

See Kelly *v.* Calhoun, 95 U. S. ; National Bank *v.* Conway, 1 hes (U. S.) 37; 14 Nat. Bank. Reg. Tarpley *v.* Hamer, 9 Smed. & M. ss.) 310; Parkist *v.* Alexander, 1 ns. Ch. (N. Y.) 393; Jackson *v.* n, 4 Cow. (N. Y.) 599; 15 Am. 405; Fort *v.* Burch, 6 Barb. (N. 60; Peck *v.* Mallams, 10 N. Y. 542; Moore *v.* Thomas, 1 Oregon 201; Kenyon *v.* Stewart, 44 Pa. St. 179; Fallass *v.* Pierce, 30 Wis 480.

5. Webb on Rec. Tit., § 190; Guard *v.* Rowan, 3 Ill. 499; Mosley *v.* Shattuck, 43 Iowa 540; Dunwell *v.* Bidwell, 8 Minn. 34; Foster *v.* Berkey, 8 Minn. 351; Harrell *v.* Goodwin, 102 N. Car. 330; Perry *v.* Young, 105 N. Car. 463; Beal *v.* Miller, 3 Thomp. & C. (N. Y.) 570.

6. Call *v.* Hastings, 3 Cal. 179; Stafford *v.* Lick, 7 Cal. 479; Boston *v.* Cummins, 16 Ga. 102; 60 Am. Rep. 717; Connecticut Mut. L. Ins. Co. *v.* Talbot, 113 Ind. 373; Hopping *v.* Burnam, 2 Greene (Iowa) 39; Fitzpatrick *v.* Boylan, 57 N. Y. 443.

1. **Conveyances of Legal Title**—*a.* PATENTS.—Patents of land from the United States do not come within the purview of the recording laws of the different States, where the terms employed do not specially include them.[1]

The original record in the General Land Office from which patents are issued has been held to give notice to the world of their existence.[2]

b. DEEDS.[3]

c. LEASES.[4]—Since leases for a term of years are within the mischief which the recording acts are designed to remedy, they have been held to come within the operation of these statutes, although not specifically named therein.[5] Accordingly, mortgages of such leasehold estates are also within the application of the recording acts.[6]

1. Rhinehart *v.* Schuyler, 7 Ill. 473; Curtis *v.* Hunting, 6 Iowa 536; David *v.* Rickabaugh, 32 Iowa 540; Moran *v.* Palmer, 13 Mich. 367; Sands *v.* Davis, 40 Mich. 14; Evitts *v.* Roth, 61 Tex. 81. But see Coles *v.* Berryhill, 37 Minn. 56.

2. Evitts *v.* Roth, 61 Tex. 81; Stevens *v.* Geiser, 71 Tex. 140.

But where a statute declared an unrecorded conveyance void as against a judgment, only when the judgment is "against the person in whose name the title to such land appears of record prior to the recording of such conveyance," it was held that the recording of a patent in the General Land Office of the United States, was not a recording within the meaning of this statute. Coles *v.* Berryhill, 37 Minn. 56.

3. See DEEDS, vol. 5, pp. 451–453.

4. See LEASE, vol. 12, p. 989.

5. Thus, a statute requiring the recordation of "every deed or conveyance of or for any lands, tenements, or hereditaments" has been construed to include leases for years. Spielman *v.* Kliest, 36 N. J. Eq. 199. The artificial distinction, springing from ideas of property prevalent in the feudal age, which because of its determinate duration, denies this estate any greater importance than that attached to mere chattels, was refused recognition to operate on these statutes, which were designed for the convenience of society as it now exists. The court by Van Fleet, V. C., said: "It would seem that there should be no doubt that a lease for a term of ten years is a conveyance of lands within the meaning of the statute under consideration, and, as such, entitled to be recorded. But it may be said the books say that a lease for years confers no estate in the lands demised by it, for though the term granted by it may exceed the duration of many lives, yet it simply confers a term or a mere chattel interest. This, it cannot be denied, was the ancient view, and it is likewise undeniable that the ancient doctrine was founded on principles which have no application to modern times, or to society as it exists under a republican form of government. I think it is safe to say that in this commercial age, which reverences fact more than fiction, and pays no special homage to any class of citizens, and bestows no extraordinary privileges on military men, a grant which gives to the grantee a right to the possession of lands for a term of three or five hundred years, would be esteemed everywhere a great deal more valuable, and entitled to much more consideration, than the grant of a term to run during the successive lives of any three mortals. And it would be so in fact. A different estimate of the dignity or value of the two grants rests on fancy and not on fact." But see next note.

6. Decker *v.* Clarke, 26 N. J. Eq. 163; Berry *v.* Mutual Ins. Co., 2 Johns. Ch. (N. Y.) 603; Johnson *v.* Stagg, 2 Johns. (N. Y.) 510; Paine *v.* Mason, 7 Ohio St. 198. *Compare* Williams *v.* Downing, 18 Pa. St 60.

But in a later *New Jersey* case it was decided that a mortgage on a leasehold interest need not be recorded under the statute requiring the recordation of real estate mortgages. Hutchinson *v.* Bramhall, 42 N. J. Eq. 372, the court by Van Syckel, J., saying in regard to the classification of such an

ıt the said statutes now usually include leases by express rms.[1]

d. POWERS OF ATTORNEY.—It seems that the recording acts e not applicable to powers of attorney to execute a conveyance, revocations thereof, in the absence of provisions specifically umerating and making them subject to those acts.[2] But the ıtutes have now commonly been extended to these instruents.[3] When the statute requires that the power as well as the ed executed thereunder be recorded, the record of the deed thout the power has no legal effect.[4]

e. MORTGAGES,[5] DEFEASANCE,[6] ASSIGNMENT,[7] AND RELEASE.[8] The law of registration applies to mortgages of an interest in alty, as it does to deeds, except where the statutes make a fference, or the nature of the matter necessarily demands it.[9] ıt, aside from these general principles of registration, priority ay be determined by contract or understanding of the parties, d a variety of equitable considerations.[10]

ate as a chattel (see note next ove): "We cannot disregard the eslished technical meaning at comn law of words woven into our tem of conveyancing, and have bene part of it, without introducing ıfusion and uncertainty in respect land titles." And this reason was en effect to exclude leases for a m of years from the operation of tutes relating to the title to realty. .. Stim. Am. Stat. L., § 1624.

Under a statute which requires a rtgage of a leasehold estate to be orded it was held that all such rtgages must be recorded together h the lease; that is, the two deeds wing the actual extent and nature the mortgagee's interest, must be ced of record. Sturtevant's Appeal, Pa. St. 149.

. Valentine *v.* Pipe, 22 Pick. ass.) 85; 33 Am. Dec. 715. Thus, record of a power of attorney, when law does not require it to be reded, does not give constructive noe. Williams *v.* Birbeck, Hoffm. Ch. . Y.) 359.

But it has been held that a power of orney is a "contract relating to d," and may be recorded under Stat. 1822. Hughes *v.* Wilkinson, 37 ss. 482.

A power of attorney to execute a d is a monument of title and may though it need not be, recorded h the deed. Anderson *v.* Dugas, Ga. 440.

. Stim. Am. Stat. L., §§ 1624 (10), 1670, 1673. See Hager *v.* Spect, 52 Cal. 579; Hughes *v.* Wilkinson, 37 Miss. 482; Herndon *v.* Bascom, 8 Dana (Ky.) 113.

4. Carnall *v.* Duval, 22 Ark. 136; Graves *v.* Ward, 2 Duv. (Ky.) 301; Lowry *v.* Harris, 12 Minn. 255.

But the power need not be recorded *eo instanti* with the deed; it may be recorded before the recording of the deed. Rosenthall *v.* Ruffin, 60 Md. 324.

Where a deed, reciting the power of attorney by virtue of which it was executed, was duly deposited for record under the *New York* act of 1794, it was held sufficient notice of the power to a subsequent purchaser, who was equally affected by it as if the power itself had been deposited. Jackson *v.* Neely, 10 Johns. (N. Y.) 374.

5. See MORTGAGES, vol. 15, p. 761, n. 1; p. 819, n. 1; PURCHASE MONEY MORTGAGES, vol. 19, p. 574.

6. See MORTGAGES, vol. 15, pp. 793–795.

7. See MORTGAGES, vol. 15, p. 844, n. 2 and 3.

8. See MORTGAGES, vol. 15, pp. 878–879.

9. Webb Rec. Tit.; 1 Hilliard on Mortg. 711.

10. Webb Rec. Tit., § 31; Howard *v.* Chase, 104 Mass. 249; Pomeroy *v.* Latting, 15 Gray (Mass.) 435; Van Aken *v.* Gleason, 34 Mich. 477; Rhodes *v.* Canfield, 8 Paige (N. Y.) 545; Jones *v.* Phelps, 2 Barb. Ch. (N. Y.) 440; Hendrickson's Appeal, 24 Pa. St. 363; Clason *v.* Shepherd, 6 Wis. 369.

Assignments of mortgages are not within the operation of the recording acts unless there are express provisions to that effect, and an assignee need not record the assignment in order to protect himself against a subsequent assignment.[1] But this is now generally regulated by statute.[2] Even though assignments are required to be recorded, if the mortgage is recorded, and has not been released,[3] or become merged,[4] an assignment of a mortgage

1. Oregon Trust Co. *v.* Shaw, 5 Sawy. (U. S.) 336; Hasselman *v.* McKernan, 50 Ind. 441; Dixon *v.* Hunter, 57 Ind. 278; Reeves *v.* Hayes, 95 Ind. 521; James *v.* Morey, 2 Cow. (N. Y.) 246; 14 Am. Dec. 475; Watson *v.* Dundee Mortgage etc. Ins. Co., 12 Oregon 474; Gordon *v.* Rixey, 76 Va. 694.

2. For provisions requiring assignments of mortgages to be recorded, see the following statutes: *California* Stats., § 7934; *Indiana* Rev. Stats., 1881, § 1093; *Minnesota* Stats.; *New Jersey* Stats. 1877, *Mortgages*, § 32. In *Pennsylvania* by act of 6th April, 1876, assignments of mortgages are to be noted on the margin of the record.

Where the term "conveyance" is defined as embracing "instruments by which the title to land may be affected in law or in equity" (Stim. Am. St. L., § 1551), it has been held that assignments of mortgages of interests in real estate come within the term "conveyances" as used in the recording acts. Vanderkemp *v.* Shelton, 11 Paige (N. Y.) 28; Fort *v.* Burch, 5 Den. (N. Y.) 187; Belden *v.* Meeker, 2 Lans. (N. Y.) 470; Kellogg *v.* Smith, 26 N. Y. 18; Purdy *v.* Huntington, 46 Barb. (N. Y.) 389; 42 N. Y. 334; 1 Am. Rep. 532; St. John *v.* Spalding, 1 N. Y. Sup. Ct. 483; Greene *v.* Warnick, 64 N. Y. 220; Van Keuren *v.* Corkins, 66 N. Y. 77; Bank *v.* Frank, 45 N. Y. Super. Ct. 411; Westbrook *v.* Gleason, 79 N. Y. 23; Decker *v.* Boice, 83 N. Y. 215; Bacon *v.* Van Schoonhoven, 87 N. Y. 446. See also Roberts *v.* Jackson, 1 Wend. (N. Y.) 485; Gillig *v.* Maas, 28 N. Y. 212; McCabe *v.* Grey, 20 Cal. 509. But *compare* Hoyt *v.* Hoyt, 8 Bosw. (N. Y.) 511.

In *Pennsylvania* it has been held that an assignment of a mortgage is not a conveyance of and concerning land, whereby the same may be in any way affected in law or equity (which were the words of the recording act), and therefore were not governed by those acts. Craft *v.* Webster, 4 Rawle (Pa.) 254; Mott *v.* Clark, 9 Pa. St. 399; 49 Am. Dec. 566; Goff *v.* Denny, 2 Phila. (Pa.) 275. But, under the act of 28th May, 1715, expressly declaring that "all bargains and sales, deeds and conveyances of lands, tenements, and hereditaments, may be recorded," it was held that the mortgagee was justified in placing his assignment upon record, and that the certified copy of such a record was evidence. Philips *v.* Bank of Lewiston, 18 Pa. St. 394. Under the Act of 9th April, 1849, Purd. Dig. 471., pl. 66, declaring that assignments of mortgages "may be recorded," it is held that, when an assignment is actually recorded, such record will have the force of constructive notice. Pepper's Appeal, 9 Phila. (Pa.) 86; 77 Pa. St. 273.

3. Connecticut Mut. L. Ins. Co. *v.* Talbot, 113 Ind. 373; 3 Am. St. Rep. 655; State Bank *v.* Anderson, 14 Iowa 544; Bowling *v.* Cook, 39 Iowa 200; Daws *v.* Craig, 62 Iowa 515; Ely *v.* Schofield, 35 Barb. (N. Y.) 330; Bacon *v.* Schoonhoven, 87 N. Y. 446; Swartz *v.* Leist, 13 Ohio St. 419; Ladd *v.* Campbell, 56 Vt. 529; Girardin *v.* Lampe, 58 Wis. 267. To illustrate:

A mortgaged land to B, who assigned the mortgage to C. The assignment is not recorded. B, without authority from C, discharged and satisfied the mortgage upon the record. D, without notice of the assignment to C, purchased the mortgaged premises of A. *Held*, that the rights of D, thus acquired, were superior to those of C. C, by his failure to place the assignment on record, placed power in the hands of the original mortgagee to commit fraud upon innocent parties, and his rights must be postponed to those subsequently acquired by innocent purchasers in good faith and without notice of the assignee's antecedent rights in the premises. Ladd *v.* Campbell, 56 Vt. 529.

4. If there can, under these circumstances, be a merger, this might have a like effect as the discharge or release of the mortgage. See Purdy *v.* Huntington, 42 N. Y. 334; 1 Am. Rep. 532;

eed not be recorded as against one who purchases the mortaged property from the mortgagor,[1] but recording is necessary its validity as against rights founded on a subsequent transfer discharge of the mortgage by the mortgagee.[2] And, when e assignment is recorded, the assignee will not only be proected against a subsequent assignment,[3] but, also against an unthorized discharge of the mortgage.[4] But, unless the mortage is recorded, the registration of the assignment will not be a rotection against subsequent purchasers and incumbrancers of e land from the mortgagor.[5] It seems that the record of the ssignment is not notice to the mortgagor, and will not protect e assignee against payments on the mortgage debt by the ortgagor to the mortgagee.[6]

A release of a mortgage, being an "instrument by which an state or interest in land may be affected in law or equity," under ose statutes so defining the term "conveyance of real estate" hich is required to be recorded, must be recorded in order to rotect the releasee against a subsequent purchaser.[7] But the

mes *v.* Morey, 2 Cow. (N. Y.) 246; Am. Dec. 475.

1. Enos *v.* Cook, 65 Cal. 175; ridges *v.* Bidwell, 20 Neb. 185; Campll *v.* Vedder, 3 Keyes (N. Y.) 174; illig *v.* Maass, 28 N. Y. 191; Purdy Huntington, 42 N. Y. 334; 1 Am. ep. 532; Sprague *v.* Rockwell, 51 L. 401; Oregon Trust Co. *v.* Shaw, 5 wy. (U. S.) 333; King *v.* McVickar, Sandf. Ch. (N. Y.) 192.

Under these circumstances the asgnee will be protected equally with s assignor, and the failure to record e assignment cannot weaken the proction. See cases in this note, and 1 nes on Mort., § 474.

2. McCormick *v.* Bauer, 122 Ill. 573; onnecticut Mut. L. Ins. Co. *v.* Talbot, 3 Ind. 373; 3 Am. St. Rep. 655; State nk *v.* Anderson, 14 Iowa 544; Bowlg *v.* Cook, 39 Iowa 200; Daws *v.* aig, 62 Iowa 515; James *v.* Johnson, Johns. Ch. (N. Y.) 417; Bacon *v.* hoonhoven, 38 N. Y. 446; Swartz *v.* ist, 13 Ohio St. 419. See MORTGAGES, l. 15, p. 844, n. 3.

3. See Greene *v.* Warnick, 64 N. Y. ; Yates Co. Bank *v.* Baldwin, 43 n (N.Y.) 136; Pepper's Appeal, 9 ila. (Pa.) 56; 77 Pa. St. 373.

4. Belden *v.* Meeker, 47 N. Y. 308; nderkemp *v.* Shelton, 11 Paige (N.) 29; Viele *v.* Judson, 82 N. Y. 29; eilbrun *v.* Hammond, 13 Hun (N. Y.) .

5. Yerger *v.* Barz, 56 Iowa 77. See ORTGAGES, vol. 15, p. 844, n. 2.

6. Hubbard *v.* Turner, 2 McLean (U. S.) 533. See MORTGAGES, vol. 15, p. 844, notes 2 and 3.

It is provided by statute in several States that the recording of an assignment of a mortgage shall not in itself be deemed notice of such assignment to the mortgagor, his heirs or personal representatives, so as to invalidate any payment made by them to the mortgagee. *California*, Codes & Stat. 1876, § 7935; *Dakota*, Civ. Codes, § 1735; *Idaho*, Rev. Stat., § 3359; *Kansas*, Dassler's Stats. 1876, ch. 68, § 3; *Michigan*, Comp. Laws 1878, p. 1347; Howell's Stat., § 5687; *Minnesota*, Comp. Stats., p. 400, § 28; Gen. Stat. 1878, ch. 40, § 24; *Nebraska*, Comp. Stats. 1881, p. 392; *New York*, 1 Rev. Stat., p. 763, § 42; 7 Rev. Stat., p. 763, § 41; *Oregon*, Gen. Laws 1872, p. 519; Annotated Laws 1887, § 3030; *Wisconsin*, Rev. Stat. 1878, p. 641, § 2244; *Wyoming Territory*, Rev. Stat. 1887, § 22. These statutes controlled in the following cases: Reed *v.* Marble, 10 Paige (N. Y.) 409; Van Kerren *v.* Corkins, 6 N. Y. Sup. Ct. 355; Johnson *v.* Carpenter, 7 Minn. 176; Blumenthal *v.* Jassoy, 29 Minn. 177.

But in a few States the contrary rule is declared, and, if the assignment is recorded, such payment will be invalid. *Indiana*, Rev. Stats. 1881, § 1094; *New Jersey*, Rev. Stat. 1877, *Mortgages*, § 34.

7. St. John *v.* Spalding, 1 Thomp. & C. (N. Y.) 483; Mut. L. Ins. Co. *v.*

method of release or discharge of mortgages now mostly in vogue is the statutory discharge by entry of satisfaction on the record.[1]

f. TRUST DEEDS.—Trust deeds, although not specifically mentioned in the recording acts, come within the purview of those provisions of the statute which require the recording of mortgages, and also those provisions which extend to powers of sale contained in mortgages.[2] It has been said that the record of a trust deed is not only notice of its existence, but points out the source of information in regard to proceedings in pursuance of the deed, and subsequent purchasers, or claimants of the equity of redemption, are bound to take notice of such proceedings thereunder.[3]

2. Conveyances of Equitable Title.—It seems that during the earlier stages of the recording acts, they were treated as extend-

Wilcox, 55 How. Pr. (N. Y.) 43; Bacon *v.* Schoonhoven, 87 N. Y. 446; Palmer *v.* Bates, 22 Minn. 532; Merchant *v.* Woods, 27 Minn. 396.

In *North Carolina*, although the regular method would be to place the discharge on record, yet it is held that even though this is not done, the discharge of the mortgage debt is a complete discharge of the mortgage in equity. Walker *v.* Mebane, 90 N. Car. 259.

1. See MORTGAGES, vol. 15, pp. 878–879.

By the *California* Civ. Code, § 2938, it is provided that satisfaction of the mortgage may be acknowledged on the record. A mortgage was given to secure several notes. The first note was paid at its maturity, whereupon the mortgagee caused a satisfaction of the mortgage to be entered in the margin of the record thereof in the following words: "Full payment and satisfaction of the within note and mortgage hereby acknowledged." It was contended that this was not a full discharge of the mortgage, so as to destroy its effect as notice of an existing mortgage, because the marginal entry informed subsequent purchasers that only one note had been paid. But it was held that the matter in the entry with respect to the payment of "the note" was not properly of record as a part of the marginal entry under the statute; therefore, no constructive notice. Beal *v.* Stevens, 72 Cal. 451.

2. 2 Pom. Eq. Jur., § 995; Wood *v.* Lake, 62 Ala. 489; Farrar *v.* Payne, 73 Ill. 82; Schultze *v.* Houfes, 96 Ill. 335; Munson *v.* Ensor, 94 Mo. 504; Woodruff *v.* Robb, 19 Ohio 212; Lyon *v.* Field, 17 B. Mon. (Ky.) 543; Crosby *v.* Huston, 1 Tex. 203. See Magee *v.* Carpenter, 4 Ala. 469. *Contra*, Stanhope *v.* Dodge, 52 Md. 483.

A deed of trust, assigning a legacy, does not come within the operation of the registration laws. Wallston *v.* Braswell, 1 Jones Eq. (N. Car.) 137.

In *Louisiana* deeds of trust not being recognized, this is not so. And the record of a deed of trust in the book of mortgages has been held to give no priority over a subsequently recorded mortgage. Thibodeaux v. Anderson, 34 La. Ann. 797.

Under statutes avoiding unrecorded deeds of trust as to subsequent judgment creditors, a trust deed will be void as to such creditors, notwithstanding the trust had been executed by a sale and conveyance of the property; for in this respect the statutes of registration make no distinction between executed and unexecuted trusts, but are designed to give notice of the state of the title as affected by successive alienations, as well as by incumbrances. Campbell *v.* Nonpareil Fire Brick etc. Co., 75 Va. 291.

3. Thus, it was held that the record of the trust deed is notice to subsequent purchasers of the fact that a sale had been made under the power, although the deed given to the purchaser at the sale was unrecorded. Snapp *v.* Peirce, 24 Ill. 156; Farrar *v.* Payne, 73 Ill. 82; Heaton *v.* Prather, 84 Ill. 330; Mansfield *v.* Excelsior Refinery Co., 135 U. S. 326.

ing their provisions to conveyances of the legal title only.[1] But this doctrine has undergone a change along with the general alteration in the relation between law and equity; so that, at the present time the registry laws are usually applicable to conveyances affecting real estate, whether of legal or equitable interests.[2] As

1. Webb on Rec. Tit., § 36, and cases cited in note 1; Morecock *v.* Dickens, Ambl. 678; Combs *v.* Nelson, 91 Ind. 123; Morton *v.* Robards, 4 Dana (Ky.) 258; Corn *v.* Sims, 3 Metc. (Ky.) 391; Halstead *v.* Bank of Ky., 4 J. J. Marsh. (Ky.) 554; Swigert *v.* Bank of Ky., 17 B. Mon. (Ky.) 268; Walker *v.* Gilbert, 1 Freem. Ch. (Miss.) 85; Kelley *v.* Mills, 41 Miss. 267; Grimstone *v.* Carter, 3 Paige (N. Y.) 421; 24 Am. Dec. 230; Ellison *v.* Pecare, 29 Barb. (N. Y.) 333; Laverty *v.* Moore, 32 Barb. (N. Y.) 347; 33 N. Y. 658; Jaques *v.* Weeks, 7 Watts (Pa.) 261; Trotter *v.* Nelson, 1 Swan (Tenn.) 7; Doswell *v.* Buchanan, 3 Leigh (Va.) 365; 23 Am. Dec. 280; Withers *v.* Carter, 4 Gratt. (Va.) 407; 50 Am. Dec. 78; Briscoe *v.* Ashby, 24 Gratt. (Va.) 454. See also Neligh *v.* Michenor, 11 N. J. Eq. 539; argument of counsel in the case of Doe *v.* Lacoste, 1 Smed. & M. (Miss.) 673.

2. This has been brought about by force of statute and decision together. Webb on Rec. Tit., § 36 and cases cited; Fish *v.* Benson, 71 Cal. 428; Bailey *v.* Myrick, 50 Me. 171; Putnam *v.* White, 76 Me. 551; U. S. Ins. Co. *v.* Shriver, 3 Md. Ch. 381; Alderson *v.* Ames, 6 Md. 52; General Ins. Co. *v.* U. S. Ins. Co., 10 Md. 517; Edwards *v.* McKernan, 55 Mich. 520; Wilder *v.* Brooks, 10 Minn. 50; 88 Am. Dec. 44; Parkist *v.* Alexander, 1 Johns. Ch. (N. Y.) 394; Johnson *v.* Stagg, 2 Johns. (N. Y.) 510; Hunt *v.* Johnson, 19 N. Y. 279; Tarbell *v.* West, 86 N. Y. 280; Smith *v.* Neilson, 13 Lea (Tenn.) 461; Herrington *v.* Williams, 31 Tex. 448; Jarvis *v.* Dutcher, 16 Wis. 307.

Executory Contracts.—The recording acts of the States vary greatly in their provisions relating to the registration of executory contracts for the sale or purchase of land.

Unless executory contracts are brought within the operation of the recording acts by express provisions, or by the use of such terms as necessarily include such instruments, it will be useless to record them. Mesick *v.* Sunderland, 6 Cal. 297; Miller *v.* Alexander, 8 Tex. 45.

In several States, no executory contracts for the sale of land need be recorded. Stim. Stat. L., §§ 1551, 1624. See statutes of *Arizona*, *Dakota*, *Idaho*, *Indiana*, *Minnesota*, *Montana*, *Nebraska*, *New York*, *Michigan*, *Wisconsin* and *Wyoming*.

Such instruments are, however, mentioned in the statutes of a number of States, and must be recorded. See the following statutes: *Connecticut*, Stat. 1875, tit. 18, ch. 6, art 1, § 14; Stat. of *District of Columbia*, § 449; *Indiana*, Stat. 1881, § 2957; *Maryland*, Rev. Co. 1878, art. 44, § 27; *Michigan*, Stat. (How. Stat. 1882), §§ 5690, 5712; *Mississippi*, Co. 1880, 1214; *Nebraska* Stat. 1881, part 1, ch. 73, § 47; *New Jersey*, Stat. 1877, *Conveyances*, § 23; 2 *New York* Stat., 7th ed., ch. 3, § 39; *Nevada*, Stat. 1873, § 252; *North Carolina*, Stat.; *Oregon* Stat. 1872, ch. 6, § 34; *Tennessee* Stat.; *Texas* Co.; *Virginia* Stat.; *West Virginia* Stat.; *Wisconsin*, Stat. 1878, § 2238; *Utah*, Stat. 1876, § 618. But in some of these statutes the word "may," as used would seem to indicate an option; the effect of the record is, however, as in other cases. Stim. Am. Stat. Law, § 1624.

The statutes of other States bring executory contracts of this kind within their operation by the use of such terms as necessarily include them. Thus the statutes of several States provide for the registration of "any instrument affecting the title to, or possession of, real property." *California* Stat., § 6158; *Colorado* Gen. Stat. 1883, § 215; *Dakota* Civ. Co., § 647; *Illinois*; *Kansas* Stat., ch. 25, § 9. It seems that these provisions may be so construed. Allen *v.* Woodruff, 96 Ill. 11. See *Indiana*, Rev. Stat. 1881, § 2957; Case *v.* Bumstead, 24 Ind. 429.

A written agreement to convey land to be sold on payment of a debt has been held to be comprehended by the statutory provision requiring the recordation of "instruments in the nature of a mortgage of real property." O'Neal *v.* Seixas, 85 Ala. 80.

The *Texas* statute providing for the registry of "all instruments relating to any lands is held to include executory

a result a recorded equitable claim will prevail even against the legal title of a subsequent purchaser from the same grantor.[1]

3. Conveyances of Personal Property—*a.* IN GENERAL.—Generally the provisions for the recording of deeds will not be so construed that they will apply to personalty or choses in action.[2] But the recording acts now sometimes contain provisions which require the recording of conveyances of personal property,[3]

contracts." Ranney *v.* Hogan, 1 Tex. U. Cas. 283; Miller *v.* Alexander, 8 Tex. 45; 1 Webb on Rec. Tit., § 37. See *Indiana* Rev. Stats. (1881), § 2957; Case *v.* Bumstead, 24 Ind. 429.

In *Minnesota*, an executory contract may be recorded, and will be notice to subsequent purchasers of the same lands; but the prior record of such contract does not entitle the holder thereof to a preference over the grantee in a deed given before the execution of such contract. Thorsen *v.* Perkins, 39 Minn. 420.

Bonds for Title.—The statutes providing for the registration of contracts for the purchase and sale of land usually, by express terms, include bonds for title. Stim. Am. Stat. L., § 1624. See the following decisions: D'Wolf *v.* Pratt, 42 Ill. 198; McFarran *v.* Knox, 5 Colo. 217; Morgan *v.* Snell, 3 Baxt. (Tenn.) 382; Scarborough *v.* Arrant, 25 Tex. 129; Catlin *v.* Bennatt, 47 Tex. 165; Schuster *v.* La Londe, 57 Tex. 28; Hunt *v.* Johnson, 19 N. Y. 279. See also Den. *v.* Dellinger, 75 N. Car. 300.

This will of course necessitate the recording of assignments of such a bond. Bailey *v.* Myrick, 50 Me. 171; McFarran *v.* Knox, 5 Colo. 217.

In *Kentucky*, where the registry acts are treated as relating to conveyances of legal title only, it is held that bonds for the purchase or sale of land, or other instruments dealing with merely equitable interests do not come within their provisions. Corn *v.* Sims, 3 Metc. (Ky.) 401; Morton *v.* Robards, 4 Dana (Ky.) 260; Nelson *v.* Boyce, 7 J. J. Marsh. (Ky.) 401; 23 Am. Dec. 411.

Mortgages of Equitable Interests.—It is now generally established by statute, either expressly or by implication, that the record of a mortgage of an equitable estate or interest is necessary to protect the mortgagee against a subsequent purchaser of the same interest. See Pierce *v.* Jackson, 56 Ala. 599; O'Neal *v.* Seixas, 85 Ala. 80; Putnam *v.* White, 76 Me. 551; Alderson *v.* Ames, 6 Md. 52; Edwards *v.* McKernan, 55 Mich. 520; Clamorgan *v.* Lane, 9 Mo. 446; Todd *v.* Outlaw, 79 N. Car. 236; Crane *v.* Turner, 7 Hun (N.Y.) 357; Tefft *v.* Munson, 63 Barb. (N. Y.) 31; 57 N. Y. 97; Tarbell *v.* West, 86 N. Y. 280; Butler *v.* Maury, 10 Humph. (Tenn.) 420; Jarvis *v.* Dutcher, 16 Wis. 307.

1. U. S. Ins. Co. *v.* Shriver, 3 Md. Ch. 381; Edwards *v.* McKernan, 55 Mich. 520; Johnson *v.* Prairie, 91 N. Car. 159; Herrington *v.* Williams, 31 Tex. 448.

2. Stim. Am. Stat. L., § 4035. See Tift *v.* Dunn, 80 Ga. 14; Thomas *v.* Grand Gulf Bank, 9 Smed. & M. (Miss.) 201; Merrill *v.* Dawson, 1 Hempst. (U. S.) 563.

3. The sale of personalty, if not accompanied by delivery, is invalid, except as between the parties (in *Iowa* and *Washington*, not valid as against creditors and innocent purchasers) unless recorded in the same way as chattel mortgages. Stim. Am. Stat. L., § 4580; *Iowa*, Rev. Co. 1880, § 1923; *Maryland*, Rev. Co. 1878, art. 44, §§ 45, 49; *Washington*, Co. 1881, § 2327.

In *Georgia* and *Texas* all deeds, bills of sale, or instruments affecting personal property may be recorded, as above, but such record is not generally obligatory. Stim. Am. Stat. L., § 4580; *Georgia*, Co. 1882, § 2710; *Texas*, Rev. Stats. 1879, § 4341. But in *Georgia* such record will not give notice to anyone. Stim. Am. Stat. L., § 4580.

All deeds of gift or deeds of trust of personalty are void as against creditors and subsequent purchasers for value until duly recorded. *Alabama*, Co. 1876, § 2170; *Mississippi*, Co. 1880, § 1293; *Missouri*, Rev. Stats. 1879, § 2501; *Virginia*, Co. 1873, ch. 114, § 5. See *North Carolina* Co., § 1254; Chemical Co. *v.* Johnson, 98 N. Car. 123.

Bills of Sale.—A bill of sale, absolute on its face, but intended as a mortgage, must be recorded under the provisions

conditional sales of personal property,[1] and also of chattel mortgages.[2]

These provisions are intended to subserve the same purpose as those relating to conveyances of real property, and the same general principles are alike applicable in each case.[3] The purpose of these acts being to prevent the possession of property from being used in fraud of persons relying on facts showing such possession as sufficient *indicia* of ownership, a sale or mortgage of property, without giving actual possession thereof to the vendee or mortgagee, will be void as to subsequent purchasers or incumbrancers unless the instrument evidencing the sale or mortgage is recorded.[4] But actual and continued change of possession of the property is usually considered a substitute for recordation, and, where this has taken place, no record need be made.[5]

Since it cannot be said of these provisions, as of those relating to the conveyance of real property,[6] that the general rule obtains that the law contemplates the registry of all instruments affecting the title to personal property, it would seem that the rule of construction which is applicable to the provisions relating to the conveyance of personalty, in determining what instruments are to be recorded under them, will not extend them by implication to the same extent as does the rule applied in the construction of the provisions relating to the conveyance of real property.[7]

b. CONDITIONAL SALES.—It is held that conditional sales do not come within the general provisions of the recording acts;[8]

requiring the recordation of chattel mortgages. Dukes *v.* Jones, 6 Jones (N. Car.) 14; Preston *v.* Southwick, 42 Hun (N. Y.) 291; Siedenbach *v.* Riley, 111 N. Y. 560; Nicklin *v.* Betts Spring Co., 11 Oregon 406; 50 Am. Rep. 477. See BILLS OF SALE, vol. 2, p. 276, n. 4; CHATTEL MORTGAGES, vol. 3, p. 191, n. 1.

1. See *infra*, this title, *Conditional Sales.*

2. See *infra*, this title, *Chattel Mortgages.*

3. See Griffith *v.* Douglass, 73 Me. 532; 40 Am. Rep. 395; Wade on Notice, §§ 67, 68.

4. Stewart *v.* Platt, 101 U. S. 731; Bank of Farmington *v.* Ellis, 30 Minn. 270; Hughes *v.* Menefee, 29 Mo. App. 192; Camp *v.* Camp, 2 Hill (N. Y.) 628; Yenni *v.* McNamee, 45 N. Y. 614; Porter *v.* Parmley, 52 N. Y. 185; Steele *v.* Benham, 84 N. Y. 634; Smith *v.* Clarendon, 53 Hun (N. Y.) 636; Corbett *v.* Cushing, 15 Daly (N. Y.) 170; Siedenbach *v.* Riley, 111 N. Y. 560; Thorn *v.* First Nat. Bank, 37 Ohio St. 254.

5. Wilson *v.* Pearson, 20 Ill. 81; Dayton *v.* Peoples' Sav. Bank, 23 Kan. 421; Waters *v.* Dashiell, 1 Md. 455; Parks *v.* Willard, 1 Tex. 350; see CHATTEL MORTGAGE, vol. 3, p. 192, n. 1. This principle proceeds from the rule that actual possession gives notice of title. See NOTICE, vol. 16, p. 800, *et seq.; infra*, this title, *What Persons Protected Without Actual Notice of Prior Conveyance.* Mr. Webb says: "The rule that actual possession gives notice of title, applies with greater force to personal than to real property, for the reason that in the former class of cases the possession is in its nature and character usually more complete and exclusive, and therefore more significant." Webb on Rec., p. 397, note 1, *citing* Crocker *v.* Crocker, 31 N. Y. 507; 88 Am. Dec. 291; Gass *v.* Hampton, 16 Nev. 189; Wade on Notice, §§ 67, 68.

6. See *infra*, this title, *Miscellaneous Instruments.*

7. Webb on Rec. Tit., §§ 40, 245.

8. Webb Rec. Tit., § 249, n. 2; Campbell Printing Press, etc., Co. *v.*

yet, in certain cases where it is not clear whether the instrument evidences a conditional sale or a chattel mortgage, the preference will be given to the latter construction, and thus bring it within the provisions governing the recordation of chattel mortgages.[1]

In many States, statutes now require conditional sales,[2] or agreements by which the vendor retains the title to chattels sold and delivered to the vendee, until the price is paid,[3] or any other condition is satisfied,[4] to be recorded in order to be valid against subsequent creditors and purchasers.[5] As has been said, the general principles of the law of recordation are applicable to these instruments; but the question as to the instruments required to be recorded under these provisions is sometimes more difficult.[6]

Walker, 22 Fla. 412; Blackwell *v.* Walker, 5 Fed. Rep. 419; Rogers' Locomotive Works *v.* Lewis, 4 Dill. (U. S.) 158.

1. Webb on Rec. Tit., p. 405, n. 1; Harris *v.* Chaffee (R. I., 1890), 21 Atl. Rep. 104; Herring *v.* Cannon, 21 S. Car. 212; 53 Am. Rep. 661; Knittel *v.* Cushing, 57 Tex. 354; 44 Am. Rep. 598; Key *v.* Brown, 67 Tex. 300. See Stim. Am. Stat. L., § 4553, together with note *a* thereto. See also CONDITIONAL SALES, vol. 3, p. 437, n. 1.

2. *Colorado*, Gen. Stats. 1883, § 169; *Iowa*, Rev. Co. 1880, § 1922; Moline Plow Co. *v* Braden, 71 Iowa 141; *Missouri*, Rev. Stats. 1879, § 2505; *North Carolina* Co., § 1275; Chemical Co. *v.* Johnson, 98 N. Car. 123; *South Carolina*, Gen. Stats. 1882, § 2022.

3. *Georgia*, Co. 1882, § 1955*a;* Morton *v.* Frick Co. (Ga. 1891), 13 S. E. Rep. 463; *Maine*, Rev. Stats. 1883, ch. 111, § 5, if the note given is for more than thirty dollars, Rawson *v.* Tuel, 47 Me. 506; Winchester *v.* Ball, 54 Me. 558; Drew *v.* Smith, 59 Me. 393; Nichols *v.* Ruggles, 76 Me. 25; Hill *v.* Nutter, 82 Me. 199; *Missouri*, Rev. Stats. 1879, § 2507; *Ohio*, Ann. Laws 1885, p. 238; *Texas*, Rev. Stats. (Sayles), § 3190*a; Virginia*, Co. 1887, § 2462, amended by act of Feb. 28, 1890 (Pub. Acts 1889-90, ch. 135, p. 108); *West Virginia*, Rev. Stats. (Kelly), ch. 96, § 3; *Wisconsin*, Rev. Stats. 1878, § 2317; Rawson Mfg. Co. *v.* Richards, 69 Wis. 643; Thomas *v.* Richards, 69 Wis. 671. See *South Carolina* Act of Dec. 21, 1882 (18 St. 35); Ludden, etc., Music House *v.* Dusenbury, 27 S. Car. 464.

4. By statutes of *Iowa*, *Missouri* and *West Virginia*.

5. Stim. Am. Stat. L., § 4553; Webb on Rec. Tit., § 251. See *New York* Laws of 1884, ch. 315, § 1; Campbell, etc., Printing Co. *v.* Oltrogge, 13 Daly (N. Y.) 247; Moyer *v.* McIntyre, 43 Hun (N. Y.) 58.

Minnesota, Gen. Stats. 1878, ch. 39, § 15; Laws of 1883, ch. 38, § 2; Laws of 1885, ch. 76; Morse *v.* Chicago, etc., R. Co., 73 Iowa 226.

In *Vermont*, besides the usual statute requiring record as against creditors and purchasers, it is also provided that a creditor of the conditional vendee may, by attachment, take his place in relation to the property, and extinguish the right of the vendor to it by making payment of the amount remaining due. Webb. on Rec. Tit., § 251; *Vermont*, Rev. Stats., §§ 1186, 1992; Bugbee *v.* Stevens, 53 Vt. 389.

6. As to the transactions which are conditional sales, see CONDITIONAL SALES, vol. 3, p. 424, *et seq.*

An exchange of horses, in which one of the parties reserved the right to return the one delivered to him and retake his own, if the one delivered to him should prove to have a certain disease was held to come within the statute requiring the conditional contract of sale, of personalty, or a memorandum thereof, to be recorded. Kinney *v.* Cay, 39 Minn. 210.

Under the *West Virginia* Co. 1887, it was held that where a piano was delivered under an agreement in writing, purporting to rent the same at ten dollars per month, the owner agreeing that when $300, or the value of the piano was paid, in such monthly payments or otherwise, the title to the piano should vest in the rental, must be recorded.

Under the *Maine* Rev. Stats., ch. 111, par. 5, the following instruments were required to be recorded:

"Milford, April 8, 1887. Cunningham & Madden: Let W. Marshall

c. CHATTEL MORTGAGES.[1]—Statutes in nearly all the States require chattel mortgages to be recorded.[2] These statutes relate to such goods and chattels as can be removed from place to place, and which are capable of delivery.[3] They do not embrace chattels real, such as leases for years of real estate, or assignments thereof by way of mortgage.[4] Nor need defeasible or conditional assignments of a chose in action be recorded under these acts.[5] And, the capital stock of a corporation, not being capable of delivery, a mortgage thereof is not comprehended by these provisions.[6]

d. CHOSES IN ACTION.—The recording acts relating to personal property are generally inapplicable to choses in action.[7]

have one bay horse, eight years old, known as the Cunningham horse, for one hundred and fifty dollars; fifty dollars by the 15th of April, 1887, and one hundred dollars by the first of August; that said Cunningham & Madden should hold the horse until paid for. Wm. H. Marshal." Cunningham *v.* Trevitt, 82 Me. 145.

"Newfield, August 30, 1886. I agree to let Joseph W. Nutter have two tons of English hay at $14 per ton delivered, and two tons of run hay at $7 per ton delivered, and pay him $10 per month for three months to come, September, October, and November, and $5 per month until I pay him $125 and interest, for a black mare that he lets me have, and said mare is to remain said Nutter's until she is paid for. George Smith." Hill *v.* Nutter, 82 Me. 199.

Consignment of Goods to Factor or Commission Merchant.—A consignment of merchandise by a manufacturer to a merchant to be sold on commission is not within the statute providing that conditional sales of personal property must be recorded. Peet *v.* Spencer, 90 Mo. 384. See Smith *v.* Clews, 105 N. Y. 283; 59 Am. Rep. 502.

1. See CHATTEL MORTGAGES, vol. 3, pp. 191–194.

2. CHATTEL MORTGAGES, vol. 3, p. 191, n. 1.

3. Harrison *v.* Burlingame, 48 Hun (N. Y.) 212. It was in this case held that an assignment of a real estate mortgage as collateral security was not within the statute relating to the filing of chattel mortgages.

4. Webb on Rec. Tit., § 252, n. 3; Potts *v.* New Jersey Arms & Ord. Co., 17 N. J. Eq. 395; Decker *v.* Clarke, 26 N. J. Eq. 163; Deane *v.* Hutchinson, 40 N. J. Eq. 83; Hutchison *v.* Bramhall, 42 N. J. Eq. 372; Booth *v.* Kehoe, 71 N. Y. 341; Breese *v.* Bange, 2 E. D. Smith (N. Y.) 474.

But it seems that the recording of a chattel mortgage will be a protection against subsequent purchasers or incumbrancers, although the property may afterwards be so annexed or attached to real estate as to constitute it a chattel real. Sword *v.* Low, 122 Ill. 487; Webb on Rec. Tit., § 252. See Sowden *v.* Craig, 26 Iowa 156; 96 Am. Dec. 125.

A clause in a lease of real estate, reserving to the lessor a lien for the rent on the goods and chattels of the lessee placed on the demised premises, to be enforced on non-payment of the rent, as in case of a chattel mortgage, by taking possession and sale of the property, is in its nature and effect a chattel mortgage, at least in equity, and the lease comes under the provisions of the statute requiring chattel mortgages to be filed. Merrill *v.* Ressler, 37 Minn. 82.

Mortgages of Rolling Stock of Railroads.—See RAILROADS, vol. 19, p. 775; RAILROAD SECURITIES, vol. 19, p. 694; Pingrey on Chat. Mortg., §§ 428, 429.

5. Winsor *v.* McLelland, 2 Story (U. S.) 492; Monroe *v.* Hamilton, 60 Ala. 226; Newby *v.* Hill, 2 Metc. (Ky.) 530; Bank of U. S. *v.* Huth, 4 B. Mon. (Ky.) 448; Putnam *v.* White, 76 Me. 551; Marsh *v.* Woodbury, 1 Met. (Mass.) 436; Bacon *v.* Bonham, 27 N. J. Eq. 209. See Vanmeter *v.* Faddin, 8 B. Mon. (Ky.) 435. See also RAILROAD SECURITIES, vol. 19, p. 694.

6. Rowland *v.* Plummer, 50 Ala. 182; Williamson *v.* New Jersey Southern R. Co., 26 N. J. Eq. 398.

7. Allen *v.* Bain, 2 Head (Tenn.) 100; Kelley *v.* Thompson, 2 Heisk.

4. Miscellaneous Instruments—*a.* IN GENERAL.—Since it is the policy of the law to make every man's title to real estate, as far as possible, appear of record,[1] many instruments not referred to in the recording acts by express terms have, in the construction of these statutes by the courts, been declared to come within their provisions.[2] Thus a deed granting a permanent right of

(Tenn.) 278; Tingle *v.* Fisher, 20 W. Va. 497; Kirkland *v.* Brune, 31 Gratt. (Va.) 126; Gordon *v.* Rixey, 76 Va. 694; Daily *v.* Warren, 80 Va. 512.

1. See Bush *v.* Golden, 17 Conn. 594; Henderson *v.* Pilgrim, 22 Tex. 464; Shaw *v.* Wilshire, 65 Me. 485.

2. Thus a writing made by an adult in ratification of a conveyance of realty made by him during his minority is within the policy of the registry laws providing for the recordation of deeds. Black *v.* Hills, 36 Ill. 376; 87 Am. Dec. 224; Ewell's Lead. Cas. 183.

A certificate of sale issued to the purchaser at an execution or foreclosure sale has been held within the recording acts. Raymond *v.* Pauli, 21 Wis. 531. See also Gardner *v.* Eberhart, 82 Ill. 316; Evans *v.* Ashley, 8 Mo. 177.

The registry laws apply to mortgages of school certificates, and a record of them in the proper county affects with notice subsequent purchasers of the certificate. Dodge *v.* Silverthorn, 12 Wis. 644.

A written acknowledgment by the grantee of a land certificate already located, that he had previously sold and conveyed it is, in legal effect, a written contract in relation to land, and may be recorded within the provision of the statute (*Texas* Pasc. Dig. 4989) permitting written contracts in relation to land to be recorded in the county in which the land was situated. Peterson *v.* Lowry, 48 Tex. 408. And so as to purchase money notes, given by the purchaser of certain land who received a conveyance absolute upon its face, which notes recited that they were given for the land, and on their face expressly retained a lien on the land described therein for their payment. Saunders *v.* Hartwell, 61 Tex. 679. In both these cases, the instruments having been recorded, subsequent purchasers were charged with notice of their existence and effect.

The vendor's lien being an interest in land, an instrument, acknowledging the non-payment of purchase money, and giving the vendor the right of possession until it is paid, was held to be comprehended by the statute (1 *Indiana* Rev. Stat., § 34) providing for the recordation of instruments concerning any interest in land. Melross *v.* Scott, 18 Ind. 250.

Under a statute providing for the recording of "deeds, mortgages, powers of attorney, and other instruments of writing relating to, or affecting the title to real estate," where a deed of trust executed by a married woman was void as a conveyance, inasmuch as her husband did not join in the execution thereof, yet it was held under the statute, that this was an instrument in writing relating to real estate, and when recorded gave constructive notice. Morrison *v.* Brown, 83 Ill. 562.

A writing which recites that "there is due B from me an interest in" certain lands, has been held entitled to record under the *Texas* statutes. Chamberlain *v.* Boon, 74 Tex. 659.

A written agreement under seal between a first and a second mortgagee by which the former waives his prior lien in favor of the subsequent incumbrancer is an instrument concerning an interest in land and may be recorded under *Wisconsin* Rev. Stats., ch. 60, § 1; Clason *v.* Shepherd, 6 Wis. 369.

An instrument by which one partner certifies that he gives up to the other partner all claims to land which belongs to both has been held recordable as an instrument relating to land. Pegram *v.* Owens, 64 Tex. 475. But a parol partition is not affected by the registry laws. Aycock *v.* Kimbrough, 71 Tex. 330.

Pending a partition by commissioners appointed by deed, some of the parties agreed that a certain portion should be set off to G, a purchaser since the deed, and it was so set off. *Held*, that the agreement with G was at least such an executory agreement in respect to land as could be recorded under the statute, and, therefore, that the record thereof was notice to purchasers from the parties thereto. Tewksbury *v.* Provizzo, 12 Cal. 20.

Rules agreed upon by two congregations, Lutheran and Reformed, re-

way has been held to come within the recording laws.[1] And a statute requiring the registry of deeds and applying in terms to natural persons only is to be construed as applicable to deeds of a corporation.[2]

b. PLATS.—The statutes of many of the States provide for the recording of town plats.[3]

citing that they had taken up land and built a church, and regulating their respective titles to rights in the same, and also the modes of conducting worship, of electing trustees and ministers, and rights in the burial ground, are within the recording act of *Pennsylvania* of 1775. Shortz *v.* Unangst, 3 W. & S. (Pa.) 45.

Instrument in Which the State Is Guarantee.—A mortgage given to the State is within the statutes regulating the registration of mortgages of real estate. Clement *v.* Bartlett, 33 N. J. Eq. 43. The court by Runyon, Ch., said: "By the common law, the king himself was bound by an act of Parliament intended to give a remedy against a wrong or prevent fraud, even though he was not named in the act. The act under consideration makes no reservation or exception in favor of the State. Its terms are general and sweeping. It existed, and, indeed, had been long in force, when the respective mortgages of the trustees and the complainants were taken. The former was taken subject to its provisions, and the latter under its protection. The State itself, by the statute, in effect declared to Clement when he took his mortgage, that if any unregistered or unrecorded mortgage of which he had no actual notice, existed on the property, it would be void and of no effect against that which he proposed to take thereon."

Instruments Not Entitled or Required to be Recorded.—An assignment of a land certificate, under the statute of *Alabama*, is not within the registration acts, and does not become inoperative against the sheriff's vendee for the omission to register it. Falkner *v.* Jones, 12 Ala. 165.

An agreement, not under seal, by which a railroad company pledges its real and personal property to secure agents employed by it to purchase iron, is not within the act of 1828 (Clay's Dig. 255, § 5) requiring registration of all conveyances in trust to secure debts. Fash *v.* Ravesies, 32 Ala. 451.

The *Maine* statute of 1821, ch. 36, § 3, requiring a "bond, deed, or other instrument of defeasance," to be recorded in order to be effectual, contemplates one which acts directly upon the title, requiring upon certain terms a conveyance of it. Therefore, a bond for the support of the mortgagee, to secure which the mortgage is given, is not within the statute. Noyes *v.* Sturdivant, 18 Me. 104.

A covenant to hold land for the benefit of an alien, and to convey as he shall direct, is not a conveyance within the recording acts; and the record of it is not constructive notice of its existence, and will not affect a title acquired by subsequent purchasers. Ludlow *v.* Van Ness, 8 Bosw. (N. Y.) 178.

A deed delivered as an escrow in the proceedings of a court of equity, administering trust funds, is not within the intendment of the statute requiring the registry of titles. Trout *v.* Warwick, 77 Va. 731.

1. Prescott *v.* Beyer, 34 Minn. 493; Worley *v.* State, 7 Lea (Tenn.) 382.

By an oral agreement between A and B, B granted to A a right of way over certain property. B subsequently mortgaged the premises to C and D, who had no notice of the existence of the right of way. *Held*, that A, having no record title to the way in question, his claim could not prevail over that of C and D. Bush *v.* Golden, 17 Conn. 594.

But the failure to record a sealed instrument releasing an easement is of no importance, even as against subsequent purchasers, where the execution of such instrument is followed by acts denoting an unequivocal intention to abandon the easement, as the instrument is of importance only as showing, with the other facts, an intention to abandon the easement. Ray Neg. of Imp. Duties, p. 573, n. 1; Snell *v.* Levitt, 110 N. Y. 595.

2. Sheehan *v.* Davis, 17 Ohio St. 571. See PERSON, vol. 18, p. 403.

3. See Webb on Rec. Tit., § 49; *Illinois*, Rev. Stats. 1874, p. 771; *Iowa*,

c. WILLS.—In some States wills devising realty, duly proved, must, like deeds or conveyances, be recorded in the county or counties where the land affected lies,[1] but in a few States wills are expressly excluded from the operation of the recording acts,[2] and yet in other States the statutes contain no reference to wills.[3]

The purpose of these statutes requiring the registration of wills seem to be the same as those relating to deeds and conveyances.[4]

Rev. Code, 1873, § 559; *Wisconsin*, Rev. Stats., p. 645; Satchell *v.* Doran, 4 Ohio St. 542; Kensington *v.* Wood, 10 Pa. St. 93; 49 Am. Dec. 582.

In *Texas* there is no statutory provision as to recording plats, but if duly acknowledged, it is believed that they are admissible to record under article 4331 of the Rev. Stats. 1879, as "instruments of writing concerning lands and tenements." Webb on Rec. Tit., p. 94, n. 4.

The effect of recording a plat is, from the nature of the instrument, in many respects different from the record of a deed or other conveyance, and will therefore be treated under the title SURVEYS. See also RECORD.

1. Stim. Am. Stat. L., § 1624; *Arizona*, Stats.; *California* Stats.; *Colorado* Stats., § 230; *Idaho*, Rev. Stats. 1887, § 5314 provides for recording the will and certificate of proof thereof in the office of clerk of probate court where proved; *Illinois* Stats. 1883, ch. 30, § 33; *Maine*, Rev. Stat. 1883, ch. 7, § 16; *Minnesota*, Gen. Stats. 1878, ch. 47, § 35; *Missouri*, Rev. Stats 1879, § 3991; Rodney *v.* Landau, 104 Mo. 251; *Nebraska*, Comp. Stats. 1881, part 1, ch. 73, § 22; *New York*. See *Vermont* Stat.; Lovejoy *v.* Raymond, 58 Vt. 509. And the provision is expressly extended to wills executed in other States devising land in the State by the following statutes: *Idaho*, Rev. Stats. 1887, § 5315; *Illinois* Stats.; *Tennessee* Stats. See *Missouri*, Rev. Stat., 1879, §§ 3992, 3993.

The statutes of a State providing that any person owning real property in that State shall record any will devising such land in the same manner as wills executed and proved according to the laws of such State apply not only to wills executed in a sister State, Keith *v.* Keith, 97 Mo. 223; Graves *v.* Ewart, 99 Mo. 13, but also to those executed and probated in a foreign country, Gaven *v.* Allen, 100 Mo. 293.

In *Alabama*, wills creating estates in remainder or reversion, are void as against creditors of the tenants for life, in possession unless recorded within five years. *Alabama*, Stats. 1876, § 2169.

2. In *Missouri* and *Wisconsin* no wills need be recorded. Stim. Am. Stat. L., § 1624; *Missouri*, Rev. Stats. 1879, § 701; *Wisconsin*, Rev. Stats. 1878. But as to *Missouri* see *supra* this title, note 1.

It is to be observed that wills are expressly excepted from the definition of a deed or conveyance adopted in many States, which includes "every instrument by which any estate or interest in real property is created, aliened, mortgaged, or assigned, or by which the title to any real estate may be affected in law or equity," in the following States and Territories: *Arizona*, *Arkansas*, *California*, *Colorado*, *Dakota*, *Florida*, *Idaho*, *Indiana*, *Michigan*, *Minnesota*, *Missouri*, *Montana*, *Nebraska*, *Nevada*, *New York*, *Oregon*, *Utah*, *West Virginia*, *Wisconsin*, *Wyoming*. Stim. Am. Stat. L., § 1551.

The constitution of *Vermont* of 1777, required that all conveyances of land should be recorded in the town clerk's office, and an act of the legislature of 1779, required such conveyances to be acknowledged and recorded in such office. *Held*, that the provisions referred exclusively to conveyances *inter vivos*, and not to mere devises of land; and that in an action for covenant broken, a will in force at the time was admissible, as tending to prove that the land was by elder and better title than that of the covenantor, though the will had not been recorded in the town clerk's office. Smith *v.* Perry, 26 Vt. 279.

3. Stim. Am. Stat. L., § 1624.

4. By referring to *supra*, this title, note 7, p. 528, it will be seen that wills are included in the early 7 Anne., ch. 20.

d. MECHANICS' LIENS.[1]

5. Statutory Instruments Relating to Judicial Proceedings.—Since it is important that information as to the effect of judicial proceeding on the title to property should be easily obtainable by every one, certain instruments are, by the statutes of many of the States, required to be recorded in order to give this information.

Thus, judgments must generally be docketed to be a lien against subsequent purchasers, etc.,[2] and, in some States indexing is a requisite to such lien.[3] And, by some statutes, abstracts of judgments are to be furnished to the county recorder of deeds, before the judgment can be considered as a lien against the property of the judgment debtor as to subsequent purchasers thereof.[4]

The common-law doctrine of *lis pendens*, at least so far as it imputes notice of the pendency of suits, has been modified by statutes requiring a memorandum, called a notice of *lis pendens*, containing certain matters specified in the statutes, to be filed in order to be notice of the suit to a stranger.[5]

Some of the statutes provide for registry of the levy of executions and other writs creating a lien on real estate.[6] Such levy must accordingly be recorded in order to be valid against a sub-

An heir-at-law took possession of his ancestor's land and mortgaged it, and the mortgage was duly registered in the East Riding of Yorkshire. Subsequently, and more than six months after the ancestor's death, a will was discovered devising the mortgaged property to a stranger. *Held*, that under the East Riding registry act, the devisee would take subject to the mortgage, no memorial of the will or of the impediment preventing its registration having been registered within six months after the testator's death. Chadwick *v.* Turner, L. R., 1 Ch. 310; 11 Jur. N. S. 333; 34 Beav. 634.

1. The application of the general principles of the registration law to mechanics' liens is fully discussed under the title, MECHANICS' LIENS, vol. 15, p. 1, *et seq.*

2. See JUDGMENTS, vol. 12, p. 105; RECORD; Hunt *v.* Grant, 19 Wend. (N. Y.) 90.

3. See JUDGMENTS, vol. 12, p. 105, n. 6. In *Texas*, under the former statutes, indexing was not essential. Schleicher *v.* Markword, 61 Tex. 99; but it is now; *Texas* Rev. Stat., § 3159; Belbaze *v.* Ratto, 69 Tex. 636; Webb on Rec. Tit., § 42, n. 5.

4. *California*, Co. Civ. Pro., § 897–900; *Louisiana*, Civ. Co., §§ 3322–3, 3329; *Texas*, Rev. Stat., § 3156. See Shaw *v.* Neale, 6 H. L. Cas. 581.

A judgment of the circuit court of the *United States* is a lien from the time of rendition, on the lands of the defendant therein, lying within the district over which the court has jurisdiction; and a statute of the State of *Florida* providing that a judgment rendered in one of the counties of a judicial district shall not be a lien upon lands situated in another county of said district, unless the same is regarded in the latter county, is not applicable to judgments of the *United States* court. Doyle *v.* Wade, 23 Fla. 90.

5. These statutes are fully treated under the title LIS PENDENS, vol. 13, pp. 894–897.

6. Webb on Rec. Tit., § 44, *citing* the following statutes: *Connecticut*, Rev. Stats. 1875, tit. 3, ch. 3, art. 3, § 7; *Georgia*, Code, § 2709; *Maine* Stats.; *Maryland* Stats.; *Massachusetts*, Pub. Stats. 1882, ch. 172, § 3; *Michigan* Stats.; *New Hampshire* Gen. Laws 1878, ch. 27, § 7; *Texas* Laws 1889, p. 80; *Vermont* Stats.

Mr. Webb in his treatise on Record of Title says: "In those States where there are no statutory provisions for giving notice of *lis pendens*, some provisions as to giving notice of the liens created by the levy of such writs would seem to be imperatively required, since otherwise, in cases where the writs are sent from another county, there would

sequent purchaser.[1] And such record will give constructive notice to subsequent purchasers.[2] The provisions in a statute requiring the attachment levy to be filed with the recorder of deeds, when complied with, give the attaching creditor a lien on the lands attached; but as the object of a statute of this kind is only to secure the property attached to satisfy any judgment afterwards obtained, it does not give to such creditor priority over pre-existing rights, or prior unrecorded conveyances, when attaching creditors are not considered purchasers within the recording acts.[3]

III. **The Record.**—The manner in which recordation is to be made is prescribed by the statutes, and unless these statutes are complied with in every substantial particular, the instrument will not be considered as recorded.[4] Whether an instrument has been recorded is a question for the court.[5]

1. **Time of Record.**—When the statutes merely state that the instruments must be recorded, without specifying any time within which the record may be made, it seems to have been held that it is necessary to record an instrument, before a subsequent conveyance is made, or the rights of the subsequent purchaser will prevail.[6] On the other hand, it has been held, and with better reason, that the grantee is entitled to a reasonable time within which to record the instrument under which he claims.[7] But the statutes enacted in many States which provide that the instrument under which the subsequent purchaser or incumbrancer

be nothing whatever of record in the county where the land lay to give notice of the lien." Webb. on Rec. Tit., § 44.

1. Stearn Stone-Cutter Co. *v.* Sears, 23 Fed. Rep. 313.

2. Benjamin *v.* Davis, 73 Iowa 715; Rathbone *v.* Riley, 3 Day (Conn.) 503.

In *Indiana*, under § 517 of the Civil Code of 1852 (§ 677, *Indiana* Rev. Stat. 1881), the clerk of the circuit court is required to keep an execution docket and to enter therein at length the sheriff's return of the sale of real estate on execution, and it is declared that such docket entries shall be taken and deemed to be a record. All persons interested in the real estate sold are bound to take notice of such record, and are thereby put upon inquiry as to whether the real estate has been redeemed or not from the sheriff's sale thereof. Maddux *v.* Watkins, 88 Ind. 74.

3. First Nat. Bank *v.* Hayzlett, 40 Iowa 659; Columbia Bank *v.* Jacobs, 10 Mich. 349; 81 Am. Dec 792.

4. 1 Dev. on Deeds, § 645, n. 2; Galpin *v.* Abbott, 6 Mich. 17; Tillman *v.* Cowand, 12 Smed. & M. (Miss.) 262; Caldwell *v.* Head, 17 Mo. 561; Hendrickson's Appeal, 24 Pa. St. 363; Peebles *v.* Reading, 8 S. & R. (Pa.) 496; Friedly *v.* Hamilton, 17 S. & R. (Pa.) 70; 17 Am. Dec. 638; Jaques *v.* Weeks, 7 Watts (Pa.) 261; Manufacturers' Bank *v.* Bank of Pa., 7 W. & S. (Pa.) 335; 42 Am. Dec. 240; Ziegler *v.* Shomo, 78 Pa. St. 357; Dey *v.* Dunham, 2 Johns. Ch. (N. Y.) 182; Woolfolk *v.* Graniteville Mfg. Co., 22 S. Car. 332; Johnson *v.* Slater, 11 Gratt. (Va.) 321; Cox *v.* Wayt, 26 W. Va. 807; Pringle *v.* Dunn, 37 Wis. 449; 19 Am. Rep. 772; Wade on Notice, § 124.

5. Bailey *v.* Godfrey, 54 Ill. 507; 5 Am. Rep. 157.

6. Webb on Rec. Tit., § 131; Stafford *v.* Lick, 7 Cal. 479; Self *v.* Sanford, 4 Ill. App. 328; Sigourney *v.* Larned, 10 Pick. (Mass.) 72. See Drew *v.* Streeter, 137 Mass. 460.

7. 4 Kent's Com. 458; Goodsell *v.* Sullivan, 40 Conn. 83. See *dictum* to this effect in Bryson *v.* Penix, 18 Mo. 13; Bissell *v.* Nooney, 33 Conn. 411.

For instances where record was not made within a reasonable time, see

claims, must be first duly recorded in order to give him priority,[1] has served to lessen the importance of this question by turning the decisions which would otherwise come thereunder on another and simpler consideration—namely, the question of priority of record.[2]

Many statutes prescribe a certain period within which an instrument must be recorded.[3] If a writing is recorded before the expiration of the period specified, it will relate back to the date of its execution and take precedence of subsequent instruments, although they may be first recorded.[4] But an instrument recorded after the time limited will not have such retrospective effect, and a subsequent instrument which is executed before such record is made, will take precedence.[5] By the statutes of some

Wilson *v.* Nulligan, 75 Mo. 41; Givanovitch *v.* Hebrew Congregation, 36 La. Ann. 272.

1. Stim. Am. Stat. L., § 1611.

2. See Den *v.* Richman, 13 N. J. L. 43; Fleschner *v.* Sumpter, 12 Oregon 161; Webb on Rec. Tit., § 133.

3. Stim. Am. Stat. L., § 1615.

4. Clarke *v.* White, 12 Pet. (U. S.) 178; Betz *v.* Mullin, 62 Ala. 365; Nichols *v.* Hampton, 46 Ga. 253; Melross *v.* Scott, 18 Ind. 250; Eaton *v.* McKahan, 91 Ind. 109; Dale *v.* Arnold, 2 Bibb (Ky.) 605; McConnell *v.* Brown, Litt. Sel. Cas. (Ky.) 462; Breckenridge *v.* Todd, 3 T. B. Mon. (Ky.) 54; 16 Am. Dec. 83; Hill *v.* Jackson, 9 Ired. (N. Car.) 333; Phelps *v.* Barnhart, 88 N. Car. 333; Slansell *v.* Roberts, 13 Ohio 148; Parke *v.* Neeley, 90 Pa. St. 52; Bismarck Bldg. etc. Assoc. *v.* Bolster, 92 Pa. St. 123; Steele *v.* Mansell, 6 Rich. (S. Car.) 443; King *v.* Frazer, 23 S. Car. 543; Martin *v.* Sale, Bailey Eq. (S. Car.) 6.

In *Mississippi*, the express provisions of the statute seem to be to this effect. Claiborne *v.* Holmes, 51 Miss. 146.

When it is remembered that at common law a conveyance was valid even as to third persons without registration, and a provision for the registration of a conveyance within a certain time is simply a statutory imposition of an additional requirement in conveyancing, it will be seen that this is the only reasonable rule. See Clarke *v.* White, 12 Pet. (U. S.) 178.

Chattel Mortgages.—The rule stated in the text has been held to not apply to chattel mortgages, although the provision as to time is the same. Drew *v.* Streeter, 137 Mass. 460.

5. Wallis *v.* Rhea, 12 Ala. 646; Pollard *v.* Cocke, 19 Ala. 188; Harding *v.* Allen, 70 Md. 395; Sanborn *v.* Adair, 29 N. J. Eq. 338; Northrup *v.* Brehmer, 8 Ohio 392.

It has been considered that this is true only when the subsequent instrument has been executed after the expiration of the period given for the recordation of the prior one, as well as before it is recorded. Martin *v.* Williams, 27 Ga. 406. This decision is put on the ground that the grantee in the junior deed had no equity because he happened to have bought during the time allowed for the recording of the prior deed, the court saying that had he bought after that time without notice, his equities would have been entirely different. This reasoning is criticised by Mr. Webb, who says: "Such a ground is, however, entirely untenable, since a subsequent purchaser must in all cases have no knowledge whatever of the prior conveyance; and in later cases, by the same court, the preference given to the deed oldest in date, where both are recorded after the time, is placed upon a construction of the terms in the statute." Webb on Rec. Tit., par. 133, *citing* the following cases to the last clause: Roe *v.* Maund, 48 Ga. 461; Webb *v.* Wilcher, 33 Ga. 565; and see Hockenhull *v.* Inman, 80 Ga. 89. Likewise, in Schaeffer *v.* Fithim, 17 Ind. 463, a case where deeds were given to A and B, and were afterwards canceled, and new deeds were made to their wives, who had no notice of the prior deeds to their husbands, the court by Worden, J., said: "It would seem to be wholly immaterial whether the subsequent conveyance was made before, or after, the expiration of the ninety days limited for the recording of the first."

States, it must also be first recorded,[1] but in the absence of such statute, the omission to record the subsequent instrument within its statutory time cannot affect its relation to the prior one.[2] The recording of a writing after the specific time will, however, be treated as notice from the time the record is effected, and be a protection against conveyances or incumbrances made subsequently thereto. If not declared by statute, this rule can be deduced from the spirit and purpose of these statutes,[3] although most of the decisions to this effect are probably made pursuant to the terms of the statutes which seem to give this effect to such tardy recordation.[4] The only difference, therefore, between recording

1. Fleschner *v.* Sumpter, 12 Oregon 161; Sonder *v.* Morrow, 33 Pa. St. 83.

By the *Georgia* Code. § 2663, a subsequent mortgage, in order to take precedence of a prior one, must be duly recorded, that is, recorded within its time. Martin *v.* Williams, 27 Ga. 406; Myers *v.* Picquet, 61 Ga. 260. As against a lien of judgment a mortgage must be recorded before the rendition of the judgment. Webb on Rec. Tit., p. 214, note; Richards *v.* Myers, 63 Ga. 762; Janes *v.* Penney, 76 Ga. 796.

2. McGuire *v.* Barker, 61 Ga. 339; Schaeffer *v.* Fithian, 17 Ind. 463; Northrup *v.* Brehmer, 8 Ohio 392. But see McNamee *v.* Huckabee, 20 S. Car. 190; Leger *v.* Doyle, 11 Rich. (S. Car.) 109; 70 Am. Dec. 240.

3. 1 Dev. on Deeds, § 625; Meni *v.* Rathbone, 21 Ind. 454; Runyan *v.* McClelland, 24 Ind. 165; Trisler *v.* Trisler, 38 Ind. 282; Gilchrist *v.* Gough, 63 Ind. 576; 30 Am. Rep. 250; Plume *v.* Bone, 13 N. J. L. 63; Fleschner *v.* Sumpter, 12 Oregon 161. See Graham *v.* State, 25 Pa. St. 323.

In Meni *v.* Rathbone, 21 Ind. 454, where it was claimed that a record made after the expiration of the specified time would be of no effect for any purpose, the court by Hanna, J., said: "If the construction insisted upon by the appellants is correct, then a deed, etc., should not go upon the records, unless placed there within the time designated by the statute. For it could be no notice to one who should purchase, even after it was so recorded. This construction, we cannot adopt; we think that a man could not be considered as standing in the position of a purchaser in good faith, who should buy and take title in view of a recorded deed of an already outstanding title; but that he would be buying with notice. That is, that the record would be notice to subsequent purchasers. In Trisler *v.* Trisler, 38 Ind. 282, the court by Buskirk, J., said of this construction: "It is so reasonable, and the consequences would be so disastrous of giving this statute a literal construction, that we are inclined to adhere to such construction. Besides, it can hardly be said that a person is a purchaser in good faith, who is chargeable with, and is bound to take notice of the fact that there is a deed spread upon the records to another person for the lands that he is purchasing."

In Steele *v.* Mansel, 6 Rich. (S. Car.) 454, it is said: "By delaying beyond the prescribed time, the grantee in a deed has lost the right to insist that the tardy registration shall have relation to the date of the deed so as to prevail against intervening claims, but why should he lose the benefit of registration from the date it was made? As regards notice to be obtained by search of a registry, the same search which would disclose a deed registered within the prescribed time, would disclose one registered after the expiration of the time; and the same fraud or disappointment of past expectation, which would arise from the first deed being registered between the search and the execution of a second one, might ensue, whether the registration of the first one was or was not within the prescribed time from its date."

4. DeLane *v.* Moore, 14 How. (U. S.) 253; Mallory *v.* Stodder, 6 Ala. 801; Hand *v.* McKinney, 25 Ga. 648; Lee *v.* Cato, 27 Ga. 637; 73 Am. Dec. 746; Allen *v.* Holding, 29 Ga. 485; Williams *v.* Logan, 32 Ga. 165; Williams *v.* Adams, 43 Ga. 407; Adair *v.* Davis, 71 Ga. 769; Hockenhull *v.* Inman, 80 Ga. 89; McRaven *v.* McGuire, 9 Smed. &

within the time specified and afterwards is, that in the first case, the record is notice from the time of execution; in the latter from the time of record.[1]

An instrument may ordinarily be registered at any time after its execution.[2] And, since the recording of an instrument is no part of its execution, the period of recordation is not restricted by the terms or policy of the statutes to the lifetime of the grantor in a deed or mortgage, but recordation may take place after his death.[3] But in the neglect to record a deed for an unusually great length of time, may be a significant circumstance when it is attacked as fraudulent and forged,[4] and it has even been held that where a deed had not been recorded until so great a length of time, after it purported to have been executed, as precluded the party to be affected by it from every reasonable opportunity of detecting any fraud, imposition, or forgery, that may have been practiced in the case, it could not be considered as a regularly recorded deed so as to authorize the reading of the copy of it in evidence.[5]

When an instrument belongs to one of two classes of instruments having a different allowance of time for their record, the

M. (Miss.) 34; Irvin *v.* Smith, 17 Ohio 226; Leger *v.* Doyle, 11 Rich. (S. Car.) 109; 70 Am. Dec. 240; Belk *v.* Massey, 11 Rich. (S. Car.) 614; King *v.* Fraser, 23 S. Car. 543; South Carolina S. & T. Co. *v.* McPherson, 26 S. Car. 431; Mowry *v.* Crocker (S. Car. 1890), 12 S. E. Rep. 3.

1. See Anderson *v.* Dagas, 29 Ga. 440.

2. Stewart *v.* Mathews, 19 Fla. 752; Reese *v.* Taylor, 25 Fla. 283; Finley *v.* Spratt, 14 Bush (Ky.) 225; Citizens' Bank *v.* Ferry, 32 La. Ann. 310; Sellers *v.* Sellers, 98 N. Car. 13; Steele *v.* Mansell, 6 Rich. (S. Car.) 437; Leger *v.* Doyle, 11 Rich. (S. Car.) 109; 70 Am. Dec. 240.

Recorded "Forthwith." — A chattel mortgage may be recorded at any time after its execution and be valid as against an attachment made after the record, although the statute provides that the mortgage must "be forthwith deposited, etc.," for record. Gibson *v.* Warden, 14 Wall. (U. S.) 244. So held where a mortgage executed August 17, 1880, the mortgage debt coming due August 27, 1880, was filed for record September 4, 1880, two days before an attachment was levied upon the mortgaged property. McVay *v.* English, 30 Kan. 368. Under a statute using the same expression, a chattel mortgage dated March 12, 1851, and recorded March 20, 1851, was protected against a levy on the property made subsequently to the recording. Wilson *v.* Leslie, 20 Ohio 161. But it seems that if a lien is acquired by levy of execution before the recording of the mortgage, it can be of no importance that a reasonable time for the recording of the mortgage has not elapsed; by the employment of the word "forthwith" in the statute it was not intended to leave the question of priority open to controversy upon the facts of each case. Cass *v.* Rothman, 42 Ohio St. 382. See FORTHWITH, vol. 8, p. 571.

3. 1 Jones on Mortg., § 545; 2 Min. Inst., § 857; Terry *v.* Briggs, 12 Met. (Mass.) 17.

A deed or mortgage, though recorded after the grantor's death, is not for that reason inoperative as against the grantor's general creditors having no specific lien on the property. Haskell *v.* Bissell, 11 Conn. 174; Gill *v.* Pinney, 12 Ohio St. 38; McCandlish *v.* Keen, 13 Gratt. (Va.) 615.

4. See Sibley *v.* Haslam, 75 Ga. 490; Ross *v.* Prentice, 4 McLean (U. S.) 106.

5. Longworth *v.* Close, 1 McLean (U. S.) 282. See also Reese *v.* Taylor, 25 Fla. 283.

But by the statutes of some States an instrument cannot be recorded at all unless it is recorded within a certain date. Stim. Am. Stat. L., § 1616.

time in which such instrument is to be recorded ought to be governed by the same considerations that control in determining the book in which it is to be recorded.[1]

2. Place of Record—*a.* IN THE CASE OF REAL PROPERTY.—The various statutes require that a deed or other instrument affecting land shall be recorded in the county where the land conveyed or affected by it is situated.[2] It is necessary to the validity of an instrument that it be recorded in the place designated by law; if registered elsewhere it would not suffice to protect the grantee against a subsequent conveyance or incumbrance.[3] So when a deed or mortgage conveys separate and distinct parcels of land lying in different counties, it must be recorded in each of those counties; recording the instrument in only one of the counties will only be notice to subsequent purchasers of the part of the land situated in that county.[4] Where distinct but adjacent tracts of land lying in different counties, are conveyed by one deed, the recording of the deed in only one of the counties, is not effectual in regard to the land lying in the other county.[5] And the cases go further: an instrument conveying or affecting a single tract of land which extends into several counties must be recorded in each of those counties; the grantee thereunder will not be protected against subsequent purchasers of that part of the land lying in the county or counties where the instrument is not recorded.[6]

If an instrument has been recorded in the proper county, but, by a subsequent change of the county boundaries, the land falls within the boundaries of another county, such change will not

1. See *infra*, this title, *Record Book*. An instrument which was an absolute deed upon its face, but in fact a mortgage, was held properly recorded at any time before the expiration of the six months allowed for the recording of deeds. Kemper *v.* Campbell, 44 Ohio St. 210.

2. Stim. Am. Stat. L., § 1614.

3. Lewis *v.* Baird, 3 McLean (U. S.) 56; Beaver *v.* Frick Co., 53 Ark. 18; St. John *v.* Conger, 40 Ill. 535; Cohen *v.* Barton (Md.), 21 Atl. Rep. 63; Moore *v.* Davey, 1 N. Mex. 303; King *v.* Portis, 77 N. Car. 25; Secrest *v.* Jones, 21 Tex. 121; Hawley *v.* Bullock, 29 Tex. 216; Stewart *v.* McSweeney, 14 Wis. 468; Brown *v.* Edson, 23 Vt. 435. See Harrison *v.* Strother, 1 Bay (S. Car.) 332; Kerns *v.* Swope, 2 Watts (Pa.) 75.

And it is, of course, immaterial that the instrument is recorded in the wrong county under a mistake as to the true locality of the land. Adams *v.* Hayden, 60 Tex. 223.

4. Perrin *v.* Reed, 35 Vt. 2.

5. Horsley *v.* Garth, 2 Gratt. (Va.) 471; 44 Am. Dec. 393. In this case it was determined that, although land may have been held by the proprietor, and by him offered for sale as one tract, yet, where a navigable stream is the dividing line between the two counties, and so separates the land as to throw part on one side of the stream, and part on the other, the parts so separated must be regarded as distinct tracts, and registry in one of the counties would not suffice under the statute requirement that registration should take place in "the county, city, or corporation in which the land or part thereof lieth." 2 Min. Inst. 852.

6. Ludlow *v.* Clinton Line R. Co., 1 Flip. (U. S.) 25; Harper *v.* Tapley, 35 Miss. 506; Oberholtzer's Appeal, 124 Pa. St. 583. See also Van Meter *v.* Knight, 32 Minn. 205. But *compare* Simm *v.* Read, Cooke (Tenn.) 346.

The decisions supporting the text were made under a general statutory provision requiring deeds, etc., to be recorded in the county where the land

affect the validity of the recordation, and necessitate a re-record of the instrument in the new county.[1] But, where the change in the county boundaries is made after the execution of an instrument, but before its record, it must be recorded in that county in which the land lies at the time of its recordation.[2]

b. IN THE CASE OF PERSONAL PROPERTY.—The statutes of the different States show a considerable lack of uniformity in the provisions which establish the place for recording title to personal property. It is obvious that whatever idea of place may be attached for any purpose to most chattels is purely conventional, the things having in themselves no natural locality. And the place where the property is has not always been selected to determine the place of recording title to it; the more usual provisions make the county or town where the mortgagor resides, or if he be out of the State, the county or town where the property is, the proper place of record.[3] Yet in some States, the record must also, in all cases, be made in the county where the property is.[4] The statutes must be strictly followed with respect to the place of record; a record in the wrong county cannot charge with notice.[5]

When the statute requires an instrument to be recorded where the grantor therein resides, it must be followed irrespective of the *situs* of the property[6] or the place where the mortgagor

lies. Under statutes requiring a deed to be recorded in the county where the land, or any part thereof lies, it need not be recorded in each county into which the land extends. Record in any one of such counties is sufficient. Conn *v.* Menifee, 2 A. K. Marsh. (Ky.) 396; 12 Am. Dec. 417.

1. Stebbins *v.* Duncan, 108 U. S. 32; Hayden *v.* Nutt, 4 La. Ann. 65; Ellison *v.* Iler, 22 La. Ann. 470; Parish *v.* Edrington, 40 La. Ann. 633; Koerper *v.* St. Paul, etc., R. Co., 40 Minn. 132; Hill *v.* Wilson, 4 Rich. (S. Car.) 521; 55 Am. Dec. 696; McKissick *v.* Colquhoun, 18 Tex. 148; Howard *v.* Colquhoun, 28 Tex. 134; Melton *v.* Turner, 38 Tex. 81; Jones *v.* Powers, 65 Tex. 207.

Registration made in a county in which land is shown to be by legal establishment of the county lines, will be held valid registry, even if the county commissioner's court has power to, and subsequently actually does, cause other lines to be established, which exclude from the country in which registration has been made, land conveyed by a deed formerly registered. Jones *v.* Powers, 65 Tex. 207. In this case the court by Stayton, J., said: "It rests with the legislature to define the boundaries of counties and provide means whereby their true localities on the ground may be determined, and when these methods have been pursued and the line or lines ascertained as by law required to be, the line or lines so established should be considered the true ones whether mathematically so or not."

2. Astor *v.* Wells, 4 Wheat. (U. S.) 466; Garrison *v.* Haydon, 1 J. J. Marsh. (Ky.) 222; 19 Am. Dec. 70; Stewart *v.* McSweeny, 14 Wis. 468. See also Bell *v.* Fry, 5 Dana (Ky.) 344.

3. Stim. Am. Stat. L., § 4532.

4. Stim. Am. Stat. L., § 4532 (2).

5. Bither *v.* Buswell, 51 Me. 601; Cohen *v.* Barton (Md. 1891), 21 Atl. Rep. 63; London *v.* Youmans, 31 S. Car. 147; Davis *v.* Loftin, 6 Tex. 489.

6. Vaughn *v.* Bell, 9 B Mon. (Ky.) 477; Singleton *v.* Young, 3 Dana (Ky.) 559; Reynolds *v.* Case, 60 Mich. 76; Powers *v.* Freeman, 2 Lans. (N. Y.) 127.

Residence of Corporation.—Within these statutes, the place of residence of a corporation is where it has its principal place of business. Wright *v.* Bundy, 11 Ind. 398; Nelson *v.* Neil, 15 Hun (N. Y.) 383. But a corporation must dwell in the place of its creation, and

conducts his business.[1] The instrument must be recorded in the county which is his permanent residence[2] at the time of the execution of the instrument.[3] An instrument executed by two or more persons residing in different counties or towns in the same State, must be recorded in each place in which such persons reside.[4] If some of the grantors in an instrument reside in the State, and others of them without the State, the instrument must be recorded in the counties in which such residents live.[5]

The statutes of one State requiring mortgages or other instruments dealing with personal property to be recorded in the town or county where the mortgagors reside, do not apply to mortgages made by its citizens in another State.[6] It is a case where the *lex loci contractus* must govern. Although the requirement that an instrument conveying or affecting movable chattels shall be recorded in the place where the property is situate may

cannot migrate to another sovereignty. Wherefore, the mere fact that a corporation has a place of business in a certain State does not make it a resident of that State, and there can be no valid registry of a mortgage of personal property in such State, under a statute of that State, which requires a chattel mortgage to be recorded "in the county in which the mortgagor resides," if it is executed by a foreign corporation. Watson *v.* Thompson Lumb. Co., 49 Ark. 83; Cook *v.* Hager, 3 Colo. 386.

1. Weaver *v.* Chunn, 99 N. Car. 431.

2. Boyd *v.* Beck, 29 Ala. 703; Vaughn *v.* Bell, 9 B. Mon. (Ky.) 447; Briggs *v.* Leitelt, 41 Mich. 79.

3. Reynolds *v.* Case, 60 Mich. 76; Powers *v.* Freeman, 2 Lans. (N. Y.) 127; Hicks *v.* Williams, 17 Barb. (N. Y.) 523.

But a mortgage executed by a person living in one county upon a crop to be planted on land bought by him in another, to which he contemplated removing and to which he afterwards did remove, was held properly registered in such latter county. Harris *v.* Jones, 83 N. Car. 317.

4. Rich *v.* Roberts, 48 Me. 548; Morrill *v.* Sanford, 49 Me. 566; Rich *v.* Roberts, 50 Me. 395; Altman *v.* Guy, 41 Ohio St. 598.

Joint owners come within the application of this rule. See CHATTEL MORTGAGES, vol. 3, p. 193, note.

Residence of Partnership.—Giving a partnership, as such, a place of residence would seemingly not be in accord with the common-law conception of partnership that it is not a thing in any way distinct or separate from the members composing it. See PARTNERSHIP, vol. 17, p. 918. It has been said that a firm can have no place of residence. Granger *v.* Adams, 90 Ind. 87. And it is undoubtedly established by the weight of authority that, under the statutes requiring chattel mortgages to be recorded in the place where the mortgagor resides, a chattel mortgage, executed by a firm upon firm property, must be recorded in the county or town where the individual members of the firm severally reside. Stewart *v.* Platt, 101 U. S. 731; 9 Myers Fed. Dec., § 1773–1781; Granger *v.* Adams, 90 Ind. 87; Briggs *v.* Seitelt, 41 Mich. 79; Westlake *v.* Westlake, 47 Ohio St. 315; Kane *v.* Rice, 10 Nat. Bankr. Reg. 469. See also PARTNERSHIP, vol. 17, p. 918, n. 6. But see, CHATTEL MORTGAGES, vol. 3, p. 193; Hubbardson Lumber Co. *v.* Covert, 35 Mich. 254.

Corporations.—A chattel mortgage in which a corporation is the grantor, need only be recorded in the place where it has its principal business office. Wright *v.* Bundy, 11 Ind. 398; Nelson *v.* Neil, 15 Hun (N. Y.) 383.

5. Pingrey on Chat. Mortg., § 364; DeCaurcey *v.* Collins, 21 N. J. Eq. 357. As has been said, the statutes in most States provide that, when the mortgagor resides out of the State, the mortgage must be recorded in the place where the chattels are.

6. Longworthy *v.* Little, 12 Cush. (Mass.) 109. See Mershon *v.* Wheeler, 76 Wis. 502.

not be in strict harmony with the common-law doctrine that the disposition of movables is to be governed by the law of the domicile of the owner, it is certainly competent for a State to adopt a modification of this kind to the disposition of any property within its territorial limits.[1]

Where the statutes require a chattel mortgage to be in all cases filed at the place where the property is situate, and also where the mortgagor resides, filing in one of such places is not sufficient.[2] A subsequent purchaser is not bound to search the records in both places. No reason is perceived why the rules, long established in *England*, in connection with the probate of wills and grant of administration, which assigns a locality to every subject of personal property, may not be invoked to determine the place of record under the provisions of the recording acts which require registration in the place wherein the chattels may be.[3]

It is sometimes provided that when the mortgagor removes, or the property is removed to another county, the mortgage must, within a certain time, be filed in the county to which the removal is made.[4] But this is only necessary under express provisions to this effect. Statutes requiring recordation ordinarily refer only to the time of the execution of the instrument, and if a record has been duly made, a subsequent removal of the property or change of habitancy will not necessitate another record in such new *situs* or abode.[5]

3. Prerequisites to Recordation—*a.* OF THE INSTRUMENT.—In order that the effects of registration may attach to an instrument it

1. Golden *v.* Cockril, 1 Kan. 259; Denny *v.* Faulkner, 22 Kan. 89; Montgomery *v.* Wight, 8 Mich. 143; Boydson *v.* Goodrich, 49 Mich. 65; Lathe *v.* Schoff, 60 N. H. 34; Crosby *v.* Huston, 1 Tex. 203. See CONFLICT OF LAWS, vol. 3, p. 570, n. 3.

2. Lundberger *v.* Northwestern Elevator Co., 42 Minn. 37.

3. 2 Min. Inst. 853. For a compilation of those rules, see SITUS.

4. Wilkinson *v.* King, 81 Ala. 156; Reed *v.* Spikes (Tex. 1890), 15 S. W. Rep. 122.

If a mortgagee is not properly recorded at the time of its execution, subsequent recordation in the county to which the property has been removed was held ineffectual. Pollak *v.* Davidson, 87 Ala. 551.

5. Beall *v.* Willamson, 14 Ala. 55; Twelves *v.* Nevill, 39 Ala. 175; Yarbrough *v.* Arnold, 20 Ark. 592; Pease *v.* Odenkirchen, 42 Conn. 415; Smith *v.* McLean, 24 Iowa 322; Barrows *v.* Turner, 50 Me. 127; Brigham *v.* Weaver, 6 Cush. (Mass.) 298; Elson *v.* Barrier, 56 Miss. 394; Bevans *v.* Bolton, 31 Mo. 437; Feurt *v.* Rowell, 62 Mo. 524; Coal *v.* Roche, 20 Neb. 550; Grand Island Banking Co. *v.* Frey, 22 Neb. 66; Hicks *v.* Williams, 17 Barb. (N. Y.) 523; Nichols *v.* Mase, 25 Hun (N. Y.) 640; Harris *v.* Allen, 104 N. Car. 86; Parks *v.* Hillard, 1 Tex. 350. See also CHATTEL MORTGAGES, vol. 3, p. 192, n. 4.

But the Supreme Courts of *Vermont* and *Michigan* have decided that a chattel mortgage, executed and recorded according to the laws of another State, where there is no change of possession, will not be valid as against the claims of attaching creditors, if the property is removed into those States. Farnsward *v.* Shepard, 6 Vt. 521; Woodward *v.* Gates, 9 Vt. 361; Gates *v.* Gaines, 10 Vt. 249; Lynde *v.* Melvin, 11 Vt. 686; 34 Am. Dec. 717; Kendall *v.* Samson, 12 Vt. 515; Rockwood *v.* Collamer, 14 Vt. 141; Skiff *v.* Solace, 23 Vt. 279; Montgomery *v.* Wight, 8 Mich. 143.

must be a valid instrument; the record of a void instrument is of no effect.[1]

(1) *Signing, Sealing, and Delivery.*—Therefore, when signing and sealing are necessary to the validity of a deed, mortgage, or other instrument, it must appear upon the record that it was properly signed[2] and sealed.[3] But seal need not appear except when it is necessary to the validity of the conveyance. Thus, where equitable interests are recognized as the proper subjects of registration, and a record has been made of an unsealed instrument which, although void as a conveyance of the legal title, conveys the equitable title, the record will be sustained.[4]

When delivery of a deed or other instrument is necessary to its validity, it is a prerequisite to valid registration.[5] And, as there can be no delivery without an acceptance, a record of an instrument made without the knowledge or consent of the purchaser is of no effect until it has been accepted.[6] The acceptance by the purchaser under such instrument will validate the record as to third persons from the time of the acceptance.[7] The record of an instrument is only *prima facie* evidence of its delivery;[8] if made without the knowledge and

1. Loomis *v.* Brush, 36 Mich. 40; Wright *v.* Lancaster, 48 Tex. 250; Isham *v.* Bennington Iron Co., 19 Vt. 230. See *infra*, this title, note 2, p. 561.

Forged Deed.—The recording statutes, requiring all instruments affecting the title to land to be recorded, have no application to forged deeds and other instruments, as they cannot affect the title to land, and are therefore not entitled to record. And innocent purchasers, without notice of the forgery, claiming under a forged deed which has been placed upon the records, will not have a good title as against the true owner. Pry *v.* Pry, 109 Ill. 466.

2. Shepherd *v.* Burkhalter, 13 Ga. 443; 58 Am. Dec. 523.

3. Racouillat *v.* Sansevain, 32 Cal. 376; Racouillat *v.* Rene, 32 Cal. 450; Switzer *v.* Knapps, 10 Iowa 72; 74 Am. Dec. 375. See Van Riswick *v.* Goodhue, 50 Md. 57.

4. McClurg *v.* Phillips, 57 Mo. 214; Harrington *v.* Fortner, 58 Mo. 468; Brydon *v.* Campbell, 40 Md. 331; Wade on Notice, § 140; Webb on Rec. Tit., § 146.

5. Wade on Notice, § 141; Fitzgerald *v.* Goff, 99 Ind. 28; Edwards *v.* Thom, 25 Fla. 222.

6. Herbert *v.* Herbert, 1 Ill. 354; 12 Am. Dec. 192; Union Mut. L. Ins. Co. *v.* Campbell, 95 Ill. 267; 35 Am. Rep. 166; Weber *v.* Christen, 121 Ill. 91; 2 Am. St. Rep. 68; Woodbury *v.* Fisher, 20 Ind. 387; 83 Am. Dec. 325; Oxnard *v.* Blake, 45 Me. 602; Samson *v.* Thornton, 3 Met. (Mass.) 275; 37 Am. Dec. 135; Parker *v.* Hill, 8 Met. (Mass.) 447; Jackson *v.* Phipps, 12 Johns. (N. Y.) 418; Foster *v.* Beardsley, 47 Barb. (N. Y.) 505; Welch *v.* Sackett, 12 Wis. 243; Miller *v.* Blinebury, 21 Wis. 676; McCutchin *v.* Platt, 22 Wis. 561; Parmelee *v.* Simpson, 5 Wall. (U. S.) 81.

But *compare* Carnall *v.* Duval, 22 Ark. 136.

7. Oxnard *v.* Blake, 45 Me. 602; Hedge *v.* Drew, 12 Pick. (Mass.) 141; 22 Am. Dec. 416; Parker *v.* Hill, 8 Met. (Mass.) 447; Mutual Ben. L. Ins. Co. *v.* Rowand, 26 N. J. Eq. 389; Farmers', etc., Bank *v.* Drury, etc., Bank, 38 Vt. 426; Gould *v.* Day, 94 U. S. 405.

8. Warren *v.* Jacksonville, 15 Ill. 236; Union Mut. L. Ins. Co. *v.* Campbell, 95 Ill. 267; 35 Am. Rep. 166; 58 Am. Dec. 610; Deere *v.* Nelson, 73 Iowa 186; Hutchins *v.* Dixon, 11 Md. 29; Patrick *v.* Howard, 47 Mich. 40; Stevens *v.* Castel, 63 Mich. 111; Conlan *v.* Grace, 36 Minn. 276; Bullitt *v.* Taylor, 34 Miss. 708; 69 Am. Dec. 412; Claiborne *v.* Holmes, 51 Miss. 153; Tobin *v.* Bass, 85 Mo. 654; 55 Am. Dec. 392; Standiford *v.* Standiford, 97 Mo. 231;

consent of the purchaser thereunder, it is not equivalent to delivery.[1]

(2) *Acknowledgment and Proof of Execution.*—Acknowledgment or proof of the execution of an instrument entitled to be recorded has usually been made a prerequisite to valid recordation,[2] in order to insure the authenticity of the instrument[3] and to prevent one person from personating another.[4] There can be no valid registration without a compliance, at least in substance with this requirement.[5] But under a few early statutes the record of an unacknowledged or defectively acknowledged deed

Jackson *v.* Perkins, 2 Wend. (N. Y.) 308; Gilbert *v.* North American F. Ins. Co., 23 Wend. (N. Y.) 43; 35 Am. Dec. 541.

1. Wellborn *v.* Weaver, 17 Ga. 267; 63 Am. Dec. 235; Herbert *v.* Herbert, 1 Ill. 354; 12 Am. Dec. 192; Weber *v.* Christern, 121 Ill. 91; 2 Am. St. Rep. 68; Day *v.* Griffith, 15 Iowa 104; National State Bank *v.* Morse, 73 Iowa 174; 5 Am. St. Rep. 670; Woodbury *v.* Fisher, 20 Ind. 387; 83 Am. Dec. 325; Patterson *v.* Snell, 67 Me. 559; Hawkes *v.* Pike, 105 Mass. 560; Parmelee *v.* Simpson, 5 Wall. (U. S.) 81.

2. Stim. Am. Stat. L., § 1570.

3. The acknowledgment will estop the grantor from saying his signature was forged. Chivington *v.* Colorado Springs Co., 9 Colo. 597; Webb on Rec. Tit., § 52, n. 2.

4. McConnell *v.* Reed, 3 Ill. 371; Livingstone *v.* Kettelle, 6 Ill. 116; 41 Am. Dec. 166.

5. Lord Dunsany *v.* Latouche, 1 Sch. & Lef. 137; Hodgson *v.* Butts, 3 Cranch (U. S.) 155; Strong *v.* Smith, 3 McLean (U. S.) 362; Schults *v.* Moore, 1 McLean (U. S.) 520; Hitz *v.* Jenks, 123 U. S. 298; Jacoway *v.* Gault, 20 Ark. 190; 73 Am. Dec. 494; Conner *v.* Abbott, 35 Ark. 365; Ford *v.* Burks, 37 Ark. 91; Hastings *v.* Vaughan, 5 Cal. 315; Mesick *v.* Southerland, 6 Cal. 297; Carter *v.* Champion, 8 Conn. 549; 21 Am. Dec. 695; Sumner *v.* Rhodes, 14 Conn. 135; Edwards *v.* Thom, 25 Fla. 222; Herndon *v.* Kimball, 7 Ga. 432; 50 Am. Dec. 406; Shepard *v.* Burkhalter, 13 Ga. 443; 58 Am. Dec. 523; Gardner *v.* Grannis, 57 Ga. 557; Chouteau *v.* Jones, 11 Ill. 300; 50 Am. Dec. 460; Porter *v.* Dement, 35 Ill. 539; Gould *v.* Woodward, 4 Greene (Iowa) 82; Dussaume *v.* Burnett, 5 Iowa 95; Suiter *v.* Turner, 10 Iowa 517; Brinton *v.* Seevers, 12 Iowa 389; Reynolds *v.* Kingsbury, 15 Iowa 238; Wilson *v.* Traer, 20 Iowa 231; Willard *v.* Cramer, 36 Iowa 22; Greenwood *v.* Jenswold, 69 Iowa 53; Wickersham *v.* Chicago Zinc Co., 18 Kan. 481; 26 Am. Rep. 784; Meskimen *v.* Day, 35 Kan. 46; Fisher *v.* Cowles, 41 Kan. 418; Edwards *v.* Bunker, 9 Dana (Ky.) 69; Blight *v.* Banks, 6 T. B. Mon. (Ky.) 192; 17 Am. Dec. 136; DeWitt *v.* Moulton, 17 Me. 418; Brown *v.* Lunt, 37 Me. 423; Jones *v.* Roberts, 65 Me. 273; Johns *v.* Reardon, 3 Md. Ch. 57; Johns *v.* Scott, 5 Md. 81; Cockey *v.* Milne, 16 Md. 200; Sigourney *v.* Larned, 10 Pick. (Mass.) 72; Blood *v.* Blood, 23 Pick. (Mass.) 80; Graves *v.* Graves, 6 Gray (Mass.) 391; Galpin *v.* Abbott, 6 Mich. 17; Minor *v.* Willoughby, 3 Minn. 225; Parret *v.* Shaubhut, 5 Minn. 323; Tillman *v.* Cowand, 12 Smed. & M. (Miss.) 262; Work *v.* Harper, 24 Miss. 517; Bass *v.* Estill, 50 Miss. 300; Lougbridge *v.* Bowland, 52 Miss. 546; Allen *v.* Moss, 27 Mo. 354; Lemay *v.* Poupenez, 35 Mo. 71; Bishop *v.* Schneider, 46 Mo. 472; 2 Am. Rep. 533; Stephens *v.* Hampton, 46 Mo. 404; Irwin *v.* Welch, 10 Neb. 479; Hill *v.* Gilman, 39 N. H. 88; Stevens *v.* Morse, 47 N. H. 532; Lovell *v.* Osgood, 60 N. H. 71; Williams *v.* Birbeck, Hoffm. Ch. (N. Y.) 369; Wetmore *v.* Roberts, 10 How. Pr. (N. Y.) 54; Card *v.* Bird, 10 Paige (N. Y.) 435; Stoddard *v.* Rotton, 5 Bosw. (N. Y.) 383; James *v.* Morey, 2 Cow. (N. Y.) 246; 14 Am. Dec. 475; Wolcott *v.* Sullivan, 1 Edw. Ch. (N. Y.) 408; Peck *v.* Mallams, 10 N. Y. 509; Washburn *v.* Burnham, 63 N. Y. 132; Todd *v.* Outlaw, 79 N. Car. 235; White *v.* Denman, 1 Ohio St. 110; Barney *v.* Sutton, 2 Watts (Pa.) 31; Heister *v.* Fortner, 2 Binn. (Pa.) 40; 4 Am. Dec. 417; McKean *v.* Mitchell, 35 Pa. St. 269; 78 Am. Dec. 335; Zeigler *v.* Shomo, 78 Pa. St. 357; Villard *v.* Robert, 1 Strobh. Eq. (S. Car.) 393; Woolfolk *v.* Graniteville Mfg. Co., 22 S. Car.

operated as constructive notice.[1] And, in late legislation, there seems to be a tendency to do away with much of the strictness of this requirement.[2] In some States acknowledgment is entirely dispensed with as a prerequisite to valid registration, or to the effect of the record as imparting notice.[3]

The recordation system is entirely a creature of statute law; and it would seem that, apart from enactment of the statutes, there can be no method of proving a deed for the purpose of registration;[4] but it has been held that the common-law proof of instruments by subscribing witnesses may be resorted to.[5] Stat-

332; Wood *v.* Reeves, 23 S. Car. 382; Craddock *v.* Merrill, 2 Tex. 494; Holliday *v.* Cromwell, 26 Tex. 188; Peters *v.* Clements, 46 Tex. 115; Taylor *v.* Harrison, 47 Tex. 454; 26 Am. Rep. 304; Hayden *v.* Moffatt, 74 Tex. 647; Hoisington *v.* Hoisington, 2 Aik. (Vt.) 235; Stevens *v.* Brown, 3 Vt. 420; 23 Am. Dec. 215; Sawyer *v.* Adams, 8 Vt. 172; 30 Am. Dec. 459; Pope *v.* Henry, 24 Vt. 560; Fleming *v.* Ervin, 6 W. Va. 215; Cox *v.* Wayt, 26 W. Va. 807; Parkersburg Nat. Bank *v.* Neal, 28 W. Va. 744; Ely *v.* Wilcox, 20 Wis. 523; 91 Am. Dec. 436; Pringle *v.* Dunn, 37 Wis. 449; 19 Am. Rep. 772.

Thus, in an action by the mortgagee for the conversion of the property, an allegation in the complaint that the mortgage was recorded in the proper office is sufficient without alleging that the mortgage was properly acknowledged before it was recorded, as such averment implies that it had been duly prepared for record. Syfers *v.* Bradley, 115 Ind. 345.

Sufficiency of Acknowledgment.—As to what constitutes sufficient acknowledgment, see ACKNOWLEDGMENT, vol. 1, p. 143, *et seq.* The above cases are illustrative of insufficient acknowledgment.

What Law Governs.—The sufficiency of the record must be determined by the law of the place where the instrument is to be recorded. Jones *v.* Berkshire, 15 Iowa 248; 83 Am. Dec. 412; Galpin *v.* Abbott, 6 Mich. 17; Irwin *v.* Welsh, 10 Neb. 479; Woolfolk *v.* Graniteville Mfg. Co., 22 S. Car. 332.

1. *Illinois*, Stat. of July 21, 1827; Gillespie *v.* Reed, 3 McLean (U. S.) 377; Reed *v.* Kemp, 16 Ill. 445. *Kansas*, Comp. Laws, p. 355; Simpson *v.* Mundee, 3 Kan. 172; Brown *v.* Simpson, 4 Kan. 76; Stebbins *v.* Duncan, 108 U. S. 32.

2. It is sometimes provided that a certificate of acknowledgment is sufficient if it states that the grantor in the instrument appeared before the proper officer and "acknowledged the same." *West Virginia*, Rev. Stats. 1878 (Kelley's), ch. 65, § 3, except as to married women; *Wisconsin*, Rev. Stats. 1878, § 2217. See *Kansas* Comp. Laws (Dassler's), § 1034.

That construction of the statutes requiring aknowledgment which compels compliance with the requirements of the statute in every substantial particular, or the record of the instrument will be inoperative as constructive notice, has been considered as strictly defensible, and the provision itself dictated by the highest considerations of security to owners of real estate (Wade on Notice, § 125). While a late writer maintains, with good reason, that an undue importance and consequence has been attached to this matter of acknowledgment, and welcomes a change of this kind as doing away with cumbersome requirements which, while serving no substantial purpose, occasion, in a large proportion of cases, an entire failure to accomplish the object for which the recording laws are designed. Webb on Rec. Tit., §§ 8, 52, 53.

3. Webb. on Rec. Tit., §§ 8, 53; *Alabama*, Code 1876, § 2153; Tranum *v.* Wilkinson, 81 Ala. 408; Bickley *v.* Keenan, 60 Ala. 293; *Colorado*, Gen. Stats. 1883, § 217; *Connecticut*, Rev. Stats. 1875, tit. 18, ch. 6, art. 1, § 3; *Illinois*, Rev. Stats. (Hurd's, 1883), ch. 30, § 31; Morrison *v.* Brown, 83 Ill. 562; Stebbins *v.* Duncan, 108 U. S. 32.

In *South Carolina* the statutes provide only for proof by subscribing witnesses. *South Carolina*, Gen. Stats. 1882, §§ 1775–1777.

4. McIntyre *v.* Kamm, 12 Oregon 253; Webb on Rec. Tit., § 122.

5. Carrier *v.* Hampton, 1 Ired. (N. Car.) 307. In *New York* the practice

utes, in most of the States, provide that a deed or other instrument may be proved for record by subscribing witnesses as well as by acknowledgment.[1] This is only required in the absence of acknowledgment.[2]

In some States, however, the execution must be attested by either one or two subscribing witnesses in addition to the formal acknowledgment before an officer.[3] Under these statutes, instruments copied upon the records without being so attested do not impart constructive notice by virtue of their registry,[4] even though the defect be not apparent on the face of the instrument.[5]

Usually the statutes require that when an acknowledgment is taken in another county or State it shall be accompanied by a certificate of some other officer to the effect that the person taking the acknowledgment was authorized to do so, that his signature is genuine, and his certificate in proper form.[6] And where this double certificate is required, it is a prerequisite to a valid recordation.[7]

of proving a deed by subscribing witnesses for the purpose of having it recorded, grew up in colonial times as a part of the common law of that State. Van Cortlandt *v.* Tozer, 17 Wend. (N. Y.) 338; 20 Wend. (N. Y.) 423.

1. See ACKNOWLEDGMENT, vol. 1, p. 163; ATTESTATION, vol. 1, p. 939; Webb on Rec. Tit., § 123.

In *South Carolina*, this is the only mode of authenticating an instrument, except as to releases by married women. *South Carolina* Gen. Stats., 1882, § 768, 1777.

In *Connecticut*, *New Mexico*, and *Wyoming*, such statutes have not been enacted. Webb on Rec. Tit., § 123, n. 2.

In *Delaware*, *Maine*, *Michigan*, *Minnesota*, *Rhode Island*, *Vermont*, and *Wisconsin*, this mode of proof seems to be authorized only where the proof is to be made within the home State. Webb on Rec. Tit., § 123, n. 5.

In *Kansas* it is confined to cases where the grantor is dead or absent from the State. *Kansas* Comp. Laws, 1879, ch. 22, § 12.

See ATTESTATION, vol. 1, p. 939, note 1.

2. See ATTESTATION, vol. 1, p. 938, n. 3; p. 939, n. 1.

3. *Connecticut*, *Delaware*, *Florida*, *Georgia*, *Louisiana*, *Maryland*, *Michigan*, *Minnesota*, *New Hampshire*, *Ohio*, *South Carolina*, *Texas*, *Vermont*, and *Wisconsin*.

4. Carter *v.* Champion, 8 Conn. 549; 21 Am. Dec. 695; Gardner *v.* Moore, 51 Ga. 268; Frostburg Mut. Bldg. Assoc. *v.* Brace, 51 Md. 508; Galpin *v.* Abbott, 6 Mich. 17; Parret *v.* Shaubhut, 5 Minn. 323; 80 Am. Dec. 424; Thompson *v.* Morgan, 6 Minn. 292; Ross *v.* Worthington, 11 Minn. 438; 88 Am. Dec. 95; Hastings *v.* Cutler, 24 N. H. 481; White *v.* Denman, 16 Ohio 59; 1 Ohio St. 110; Harper *v.* Barsh, 10 Rich. Eq. (S. Car.) 149; Pringle *v.* Dunn, 37 Wis. 449; 19 Am. Rep. 772.

5. Webb on Rec. Tit., p. 230, n. 5. So held when one of the two witnesses was disqualified because she was the wife of the grantor. Carter *v.* Champion, 8 Conn. 549; 21 Am. Dec. 695.

6. Stim. Am. Stat. L., § 1583.

7. Webb on Rec. Tit., p. 131, n. 1; Morton *v.* Smith, 2 Dill. (U. S.) 316; Strong *v.* Smith, 3 McLean (U. S.) 362; Milligan *v.* Mayne, 2 Cranch (C. C.) 210; Reasoner *v.* Edmundson, 5 Ind. 393; Jones *v.* Berkshire, 15 Iowa 248; 83 Am. Dec. 412; Dyson *v.* Simmons, 48 Md. 207; Sitler *v.* McComas, 66 Md. 135; Irwin *v.* Welch, 10 Neb. 479; O'Brien *v.* Gaslin, 20 Neb. 347; DeSegond *v.* Culver, 10 Ohio 188; Musgrove *v.* Bonser, 5 Oregon 313; 20 Am. Rep. 737; Fleschner *v.* Sumpter 12 Oregon 161; Texas Land Co. *v.* Williams, 51 Tex. 51; Ely *v.* Wilcox, 20 Wis. 523; 91 Am. Dec. 436.

A registry copy of a deed, recorded more than one hundred years before, being produced in evidence, it appeared that the deed purported to

b. OTHER PREREQUISITES—(1) *Payment of Recording Fee.*—Under statutes providing that no deed shall be admitted to record until the tax thereon be paid, while a clerk is not bound to receive a deed for record until the tax on it has been paid, if he permits it to be deposited for record, in his office without payment, he is bound to record it,[1] and the record will be valid.[2] The statute is merely directory, and if the clerk records the deed, he himself assumes the taxes,[3] but may look for reimbursement to the person depositing it for record.[4]

4. Making Record and Sufficiency Thereof.—The original instrument[5] should be filed in the proper office[6] and recorded by the authorized officer,[7] in the appropriate book of record,[8] according to the order in which it is filed for record.[9]

a. RECORD OFFICE.—The statutes designate the office in which the record is to be made.[10] Subsequent purchasers cannot be expected to examine the records of any but the designated office, and therefore, if an instrument is recorded in an office not by

have been acknowledged before a justice of the peace of another State. *Held*, that in the absence of evidence to the contrary, the presumption was that the register who recorded the deed, had sufficient evidence at the time of record, of the official character of the magistrate. Forsaith *v.* Clark, 21 N. H. 409

1. Bussing *v.* Crain, 8 B. Mon. (Ky.) 593; People *v.* Bristol, 35 Mich. 28; Ridley *v.* M'Gehee, 2 Dev. (N. Car.) 40.

2. Hoffman *v.* Mackall, 5 Ohio St. 124; 64 Am. Dec. 637; Lucas *v.* Clafflin, 76 Va. 269.

But, under a statute which provides that no deed shall be held to be legally lodged for record until the tax be paid thereon, it was held that, even though a deed is left for record with the clerk, subsequent purchasers cannot be charged with constructive notice thereof if the tax is unpaid. Phillips *v.* Clark, 4 Met. (Ky.) 348; 83 Am. Dec. 471.

3. Lucas *v.* Clafflin, 76 Va. 269.

4. Bussing *v.* Crain, 8 B. Mon. (Ky.) 593. A mortgagee connot, in the absence of an agreement to that effect, hold the mortgagor liable for the payment of the fee for recording the mortgage, as its registration is solely for his benefit and protection. Webb on Rec. Tit., p. 237, n. 4; Simons *v.* Sewell, 64 Ala. 241.

5. Recording a copy of the instrument is not sufficient. Lewis *v.* Baird, 3 McLean (U. S.) 56; Porter *v.* Dement, 35 Ill. 478; St. John *v.* Conger, 40 Ill. 535; Blight *v.* Banks, 6 T. B. Mon. (Ky.) 192; 17 Am. Dec. 136; Lund *v.* Rice, 9 Minn. 230; Pollard *v.* Lively, 2 Gratt. (Va.) 216; Stevens *v.* Brown, 3 Vt. 420; 23 Am. Dec. 215. See also, Marsden *v.* Cornell, 62 N. Y. 215.

6. See *infra*, this title, *Record Office.*

7. See *infra*, this title, *Recording Officer.*

8. See *infra*, this title, *Record Book.*

9. Stim. Am. Stat. L., § 1619; New York L. Ins. Co. *v.* White, 17 N. Y. 469; Sawyer *v.* Adams, 8 Vt. 172; 30 Am. Dec. 459.

Therefore, the presumption will arise that a deed was handed to the recorder in the order in which they were filed or recorded. Brookfield *v.* Goodrich, 32 Ill. 363. But *compare*, Hatch *v.* Haskins, 17 Me. 391.

And if so recorded, it is immaterial that a mortgage was dated a year ahead. Jacobs *v.* Denison, 141 Mass. 117.

But see, Lane *v.* Duchac, 73 Wis. 646.

An agreement subsequent to a recorded mortgage, and relating to and dependent on such prior mortgage, may be recorded in its proper order with insertion of a reference to the record of the mortgage. Choteau *v.* Thompson, 2 Ohio St. 114. A record of this kind without such identifying reference was held ineffectual. Bassett *v.* Hathaway, 9 Mich. 28.

10. See Stim. Am. Stat. L., §§ 1613, 4532.

he statutes appointed for such purpose, the record cannot be reated as conveying constructive notice.[1]

b. RECORDING OFFICER.—It would seem scarcely necessary o state that, in order to render the recording effectual, it should e the act of an officer duly authorized and empowered to act in he premises.[2] But the duties of a recording officer are minisrial: therefore, he cannot be disqualified from recording an nstrument because he is a party to it.[3] And for the same reaon, he may appoint a deputy to act in his stead.[4] It seems to e sufficient filing of a record that the instrument is left with a erson who is actually discharging the duties of the office, hether he is a regularly appointed deputy or not,[5] or with a peron having charge of the office during a vacancy therein.[6]

c. RECORD BOOK.—An instrument must, of course, be ecorded in a book used for registration.[7] In many States there

1. McCan *v.* Bradley, 38 La. Ann. 82; Simon *v.* Kaliske, 1 Sweeny (N. .) 304; 34 How. Pr. (N. Y.) 261; 6 bb. Pr., N. S. (N. Y.) 224; Martin *v.* othchild, 42 Hun (N. Y.) 410; Wager *v.* Hodge, 34 Hun (N. Y.) 524; avis *v.* Selden, 29 Pa. St. 316.

2. Wade on Notice, § 144; Pearson *v.* owell, 100 N. Car. 86.

The official acts of a person appointd as clerk of a county by the "provional government of *Kentucky*" in 862, were not valid for any purpose, nd therefore a deed acknowledged bere, and recorded by such person, did ot operate as constructive notice, nor n a certified copy of it be regarded as vidence. Simpson *v.* Loving, 3 Bush Ky.) 458; 96 Am. Dec. 252.

But where an officer is acting under government *de facto*, though it be nlawful and revolutionary, if it be a aramount force within the district here the officer exercises his functions s official acts, not directly in d of the war power of the nlawful government, will be rearded as valid and binding. Wade on otice, par. 145. So the registry of a eed by a clerk continued to exercise s official duties in the State of *Virinia* after the passage of the ordinance secession while the country was uner control of the military power, was eld valid. Wade on Notice, par. 146, ote 4 and cases cited. Henning *v.* isher, 6 W. Va. 238.

3. Webb on Rec. Tit., § 148; Tessier Hall, 7 Mart. (La.) 411; Brockenorough *v.* Melton, 55 Tex. 493.

4. Dodge *v.* Potter, 18 Barb. (N. Y.) 193.

The fact that a record is in the handwriting of the grantor does not destroy its effect as a record; the presumption is that it was allowed by the register. Merrill *v.* Dawson, Hempst. (U. S.) 563.

5. Cook *v.* Hall, 6 Ill. 575. See also Fairbanks *v.* Davis, 50 Vt. 251.

6. Bishop *v.* Cook, 13 Barb. (N. Y.) 326; Deane *v.* Hutchinson, 40 N. J. Eq. 83; Stewart *v.* Beale, 68 N. Y. 629; 7 Hun (N. Y.) 405; Maley *v.* Tipton, 2 Head (Tenn.) 403.

7. The mere fact that an entry is made in a book which is a public record is no matter. A book in the county clerk's office, showing the names of purchasers of government land in the county, being kept only for purposes of taxation, is not constructive notice to subsequent purchasers. Betser *v.* Rankin, 77 Ill. 289; Lewis *v.* Barnhardt, 43 Fed. Rep. 854.

The copying of an instrument by the recorder in an old and disused record book for the purpose of fraud, and neglecting to index it, will not be treated as recording. Sawyer *v.* Adams, 8 Vt. 172; 30 Am. Dec. 459. See also New York L. Ins. Co. *v.* White, 17 N. Y. 469.

Duplicate copies of deeds properly filed and kept in the proper office, although not bound in the form of a book, yet each class being kept in separate bundles, was, under the circumstances, held sufficient. Mumford *v.* Wardwell, 6 Wall. (U. S.) 423.

are separate books of record for certain classes of instruments.[1] And, ordinarily, a writing must be recorded in the book set aside, by statute, for the recording of the class of instruments to which it belongs, or it will not be properly recorded so as to impute notice.[2] When a mortgage includes both real and personal property it should be recorded both as a mortgage of realty and as a chattel mortgage.[3]

But the authorities are not agreed as to the record in which a writing should be entered, which has the form of one class, but in fact belongs to another class of instruments. When a deed absolute upon its face is in reality a mortgage, the defeasance being in parol, or in a separate instrument not recorded, it would seem that recording a conveyance in the book for deeds ought to fully protect the interest of the mortgagee.[4] That it does, seems to be

1. Stim. Am. Stat. L. § 1621.

At a time when the law did not require that deeds and mortgages should be recorded in separate books, an absolute deed was recorded in a book labeled "mortgages." *Held*, that the record was valid and sufficient notice, it not being shown that the absolute deeds were recorded in a separate book. Switzer *v.* Knapp, 10 Iowa 72; 74 Am. Dec. 375.

Under *Texas* Rev. Stat. § 4304, requiring deeds of trust, mortgages, judgments or other instruments in writing intended to create a lien, to be recorded in a book or books separate from those in which deeds or other conveyances are recorded, it is not contemplated that each class of instruments creating such lien shall be recorded in a distinct book. The recordation, therefore, of a mechanic's lien in a book in which mortgages are recorded, is regular. Quinn *v.* Logan, 67 Tex. 600.

2. Edwards *v.* Meader, 11 N. Y. Supp. 285; Pitcher *v.* Barrows, 17 Pick. (Mass.) 361; 28 Am. Dec. 306.

A chattel mortgage will not be treated as recorded if entered on the record of instruments relating to mortgages of land. Williamson *v.* New Jersey Southern R. Co., 29 N. J. Eq. 311.

Recording a mortgage in the book of assignments of mortgages is not constructive notice. Parsons *v.* Lent, 34 N. J. Eq. 67.

3. Deane *v.* Hutchinson, 40 N. J. Eq. 83; Stewart *v.* Beale, 7 Hun (N. Y.) 405; 68 N. Y. 629; see also Merrill *v.* Ressler, 37 Minn. 82. But see Anthony *v.* Butler, 13 Pet. (U. S.) 423.

The registration of a mortgage as a mortgage of chattels is not necessary to pass the interest in machinery fixed in the soil, if the intention of the parties, as shown by the terms of the instrument, is that the machinery should pass with, and as part of the freehold. Potts *v.* New Jersey Arms, etc. Co., 17 N. J. Eq. 395.

4. The strict enforcement of the rule requiring an instrument to be recorded in the book intended for the class of instruments to which it belongs, or the record will be ineffectual as notice, cannot ordinarily be objected to in cases where an instrument relating to personalty is entered in a record set apart for instruments affecting realty, or writing dealing with realty is transcribed in the personalty records. In most cases, a person wishing to inform himself as to the state of a title to certain personalty ordinarily would not and should not be expected to examine records purporting to set forth the title to realty only, as such records, if properly kept, cannot give him any information in regard to the subject of his inquiry. Analogous reasoning would result in rendering ineffectual the entry of a mortgage in a book of assignments of mortgages. See *supra*, note 2.

But requirements that instruments affecting chattels real be recorded in the record of chattels generally, which book also includes chattels personal, may, in a measure, destroy the force of these considerations as to the second instance.

But the reason above set forth does not apply to cases mentioned in the text. A proper protection of the in-

stablished by the weight of authority.[1] It has been said in sup-ort of these decisions that a deed absolute upon its face is in law deed, whatever it may be in equity; and that its terms control s to the place where the recorder shall assign it for record, and s to the effect of the record.[2] But it is held, by another line of ases, that an instrument must be recorded according to its real ther than apparent character,[3] and, therefore, a mortgagee claim-g under an instrument in form a deed absolute, would not be rotected against a subsequent purchaser by a record thereof in e book of deeds.[4]

rests of one dealing with real prop-ty requires that he should guard ainst a prior absolute conveyance of even more than against an incum-ance on it; and so far as want of tice is concerned, such an one is not a position to complain that the cord of the deed has given him tice of too great an avderse interest. ebb on Rec. Tit., § 137.

1. Gibson *v.* Hough, 60 Ga. 588; De olf *v.* Strader, 26 Ill. 231; Clemons *v.* der, 9 Iowa 273; Young *v.* ompson, 2 Kan. 83; Ing *v.* Brown, Md. Ch. 521; Harrison *v.* Phillips' cademy, 12 Mass. 456; Benton *v.* choll, 24 Minn. 221; Marston *v.* illiams, 45 Minn. 116; Mobile Bank Tishomingo Sav. Inst., 62 Miss. 250; ellet *v.* Heilshorn, 4 Nev. 526; Kemp-*v.* Campbell, 44 Ohio St. 210; Hasel-e *v.* Espey, 13 Oregon 301; Rug-s *v.* Williams, 1 Head (Tenn.) 141; bson *v.* Seymour, 4 Vt. 518; Sey-our *v.* Darrow, 31 Vt. 122; Knowlton Walker, 13 Wis. 264.

In the decision of Kemper *v.* Camp-l, 44 Ohio St. 210, the court went en further than the text, and held t where a deed absolute on its face, in reality only a mortgage, was re-ded within the time allowed for the ording of deeds, it was sufficient, hough no such time is allowed for recording of mortgages.

. Webb on Rec. Tit., p. 220, n. 1; seltine *v.* Espey, 13 Oregon 301; nton *v.* Nicholl, 24 Minn. 221.

. Wade on Notice, § 186.

. North *v.* Belden, 13 Conn. 376; rt *v.* Chalker, 14 Conn. 77; Stearns Porter, 46 Conn. 313; Ives *v.* Stone, Conn. 446; Gregory *v.* Perkins, 4 v. (N. Car.) 50. See also Holcombe Ray, 1 Ired. (N. Car.) 340; Dukes Jones, 6 Jones (N. Car.) 14; Gulley Macy, 84 N. Car. 434.

These decisions are based on the general object of the recording statutes to prevent fraud and give security and stability to title. It is argued that it results from this purpose of the recording acts, that the debt should be so described as that it will not be within the power of the parties, should they be fraudulently inclined, to bring within its protecting shield other debts. To recognize such record as valid would be placing it within the power of the parties, by collusion, if they are so disposed, to set up any claim and for any amount as a substitute for the one really intended to be secured.

In *New York*, *Pennsylvania*, and *Louisiana*, the same conclusion is arrived at. Warner *v.* Winslow, 1 Sandf. Ch. (N. Y.) 430; White *v.* Moore, 1 Paige (N. Y.) 551; 24 Am. Dec. 230; Grimstone *v.* Carter, 3 Paige (N. Y.) 421; 24 Am. Dec. 230; James *v.* Morey, 2 Cow. (N. Y.) 246; 14 Am. Dec. 475; Jackson *v.* Van Valkenburgh, 8 Cow. (N. Y.) 260; Brown *v.* Dean, 3 Wend. (N. Y.) 208; Dey *v.* Dunham, 2 Johns. Ch. (N. Y.) 182; Gellig *v.* Maass, 28 N. Y. 191; Purdy *v.* Huntington, 42 N. Y. 343; 1 Am. Rep. 532; Manufacturers', etc., Bank *v.* Bank of Pennsylvania, 7 W. & S. (Pa.) 335; 42 Am. Dec. 240; Friedly *v.* Hamilton, 17 S. & R. (Pa.) 70; 17 Am. Dec. 638; Jaques *v.* Weeks, 7 Watts (Pa.) 261; McLanahan *v.* Reeside, 9 Watts (Pa.) 508; 36 Am. Dec. 136; Hendrickson's Appeal, 24 Pa. St. 363; Luch's Appeal, 44 Pa. St. 519; Edwards *v.* Trumbull, 50 Pa. St. 509; Calder *v.* Chapman, 52 Pa. St. 359; 91 Am. Dec. 163; Cordeviolle *v* Dawson, 26 La. Ann. 534. But these decisions seem to be founded on statutory provisions peculiar to those States. See Benton *v.* Nichol, 24 Minn. 221; Webb on Rec. Tit., § 138;

Whether or not an instrument must necessarily be recorded according to its true character, it certainly seems that it is entitled to be so recorded.[1]

The law on this matter has been made more confused than it otherwise would be by the application, by some courts, of a liberal construction to the provisions relating to the books of record,[2] the recognition of established usage,[3] and by resorting to the index as remedying defects in the record.[4]

d. SUFFICIENCY OF RECORD.—In transcribing the instrument on the record book, care should be taken to make an exact copy of the instrument[5]—even to the perpetuation of its errors and omissions. Although this is generally done in writing with ink, a record[6] is not vitiated by the fact that it is partly printed.[7] Certainly a printed record is as effective to protect *bona fide* pur-

Marston *v.* Williams, 45 Minn. 116; Young *v.* Thompson, 2 Kan. 83.

In *Michigan*, prior to the Revised Statutes of 1846, by the express provisions of the Laws of 1833, p. 284, § 3, such instruments could be properly recorded only in the book for mortgages. Thompson *v.* Mack, Harr. (Mich.) 149.

In the following States there are express statutes to the effect that the record of the deed shall be of no effect unless the defeasance is also recorded: *California*, *Dakota Territory*, Civ. Co., § 1740; *Delaware*, Rev. Co., ch. 83, § 18; *Maryland*, Rev. Co. 1878, art. 68, § 42; *Nebraska*, *New Jersey*, *New York*. See Jones on Mortg., § 548; Webb on Rec. Tit., § 139.

By *New Hampshire* Gen. Laws 1878, ch. 136, § 2, the condition of defeasance must be recorded in the instrument itself.

1. Nicklin *v.* Betts Spring Co., 11 Oregon 406; 5 Am. Rep. 477; Shaw *v.* Wilshire, 65 Me. 485.

2. Thus, the statute requiring entry in separate books has been held merely directory to the recorder. Gillespie *v.* Cammack, 3 La. Ann. 248; Robertson *v.* Brown, 5 La. Ann. 154; Smith *v.* Smith, 13 Ohio St. 532.

3. A mortgage of both real estate and personal property, recorded in the book for real estate only, according to the custom of the recording officer, was held properly recorded. Anthony *v.* Butler, 13 Pet. (U. S.) 423.

4. American Emigrant Co. *v.* Call, 22 Fed. Rep. 765.

5. Jones on Mortg., § 550; Wade on Notice, § 147.

It has been held that pasting a map in between the leaves of the record book is not recording. Caldwell *v.* Center, 30 Cal. 539; 89 Am. Dec. 131.

Recording the Seal.—The seal of a deed is sufficiently recorded if indicated upon the record by the word "seal" written within a scroll, or some similar devise. Dale *v.* Wright, 57 Mo. 110; Huey *v.* Van Wie, 23 Wis. 613; Putney *v.* Cutler, 54 Wis. 66. See Switzer *v.* Knapp, 10 Iowa 72; 74 Am. Dec. 375.

6. A recorder may not enter the words "not sealed" in the record opposite the names where the seal ought to be, to indicate that the instrument was not sealed. He has no authority of law for entering statements of facts. Farmers', etc., Bank *v.* Bronson, 14 Mich. 363. See Jones *v.* Martin, 16 Cal. 165.

7. Where the book, in which a mortgage was recorded, was composed of printed blanks of farm mortgages, similar to the one recorded, and the only writing with the hand was the filling of the blanks, the record was held sufficient. Maxwell *v.* Hartmann, 50 Wis. 660. There were statutes at the time of this decision which required that instruments shall be "recorded in a plain and distinct handwriting." (*Wisconsin*, Rev. Stats., § 758, subd. 2), and also, that "the words 'written' and 'writing' may be construed to include printing, lithographing, and any other mode of representing words and letters." But, irrespective of the statutes which may have controlled, this decision is in line with certain decisions relating to other public records. See RECORD.

sers as one wholly in ink writing. But, because of the small ability of pencil writing, this is not true in the case of record ten in pencil, and such record would be insufficient.[1]

he record must set forth a valid instrument having the prerequites to a valid recordation.[2] The identity of the parties to instrument[3] and the property conveyed or affected thereby[4]

Caldwell *v.* Center, 30 Cal. 539; m. Dec. 131. See also RECORD. See *supra*, this title, *Prerequisites Recording*.

Where the recorder in recording a , by mistake enters the name of her person as the grantor in the in place of the true grantor, the is not duly recorded. Jennings Wood, 20 Ohio 261. The reason his decision is clear: it is not practle for an intending purchaser to n information as to the state of a on's title, except by searching the d for the vendor's name, and thus directed to any conveyance that is made. But this cannot be ap- to requiring the name of the d party to the deed to appear the record, as it is ordinarily of importance that an intending purer should know to whom the prior eyance was made. It has, how- been decided that a mortgage d which does not contain the of the mortgagee is not effectual gainst a subsequent purchaser. ue *v.* Wright, 49 Iowa 539. The n for this decision is probably, as licated in Sinclair *v.* Slauson, 44 . 123; 38 Am. Rep. 235, that the d must be that of a valid instru- . See *supra*, this title, *Prerequito Recordation*. Now it is manihat there can be no mortgage witha mortgagee. See Chauncey *v.* ld, 24 N. Y. 330.

e omission of the name of the gagee from the record of a mort- has been said to be a defect of a nature that it instantly chald attention; that the suggestion stake when the record is examined vitable and spontaneous. It was fore held that, as the entry book d supply the name of the mortgagee, book and the record book together full information, and constituted e to all parties concerned. Sin- *v.* Slauson, 44 Mich. 123; 38 Am. 235.

hen a person is equally well known o different names, the recording leed made by him in which either name is used, will sufficiently notice the conveyance to subsequent purchasers. Gillespies *v.* Rogers, 146 Mass. 610; Jenny *v.* Zehnder, 101 Pa. St. 296.

Sufficiency of Entry of Name.—Where the mortgagors' names were written "Schelleng" in the body of the mortgage, but the mortgagors had properly signed it "Schilling," and the clerk in recording it had entered the names as "Shelleng," noting opposite each name, "in German," it was held that the difference was immaterial and the record good. Muehlberger *v.* Schilling, 19 N.Y. St. Rep. 1. The substitution of a "t" for the "d" in the name "Zehnder" was held not a fatal error. Jenny *v.* Zehnder, 101 Pa. St. 296.

Under the *Maryland* Code, art. 24, § 9, providing that to entitle a deed to registration, it must contain the names of a grantor and grantee, and art. 18, §§ 54, 55, requiring clerk to enter the Christian names and surnames of the parties after he records the deed, it was held that a mortgage executed to the "firm of Wehr, Hobelman & Gottlieb" was entitled to registration. Bernstein *v.* Hobelman, 70 Md. 29.

4. Bright *v.* Buchman, 39 Fed. Rep. 243; Adams *v.* Edgerton, 48 Ark. 419; Chamberlain *v.* Bell, 7 Cal. 292; 68 Am. Dec. 260; Tabor *v.* Sampson, 7 Colo. 426; Herman *v.* Deming, 44 Conn. 124; Murphy *v.* Hendricks, 57 Ind. 593; Scoles *v.* Wilsey, 11 Iowa 261; Holloway *v.* Platner, 20 Iowa 121; 89 Am. Dec. 517; Disque *v.* Wright, 49 Iowa 538; Davis *v.* Lutkiewiez, 72 Iowa 254; Green *v.* Witherspoon, 37 La. Ann. 751; Bank *v.* Ammon, 27 Pa. St. 172; Lally *v.* Holland, 1 Swan (Tenn.) 396; Mundy *v.* Vawter, 3 Gratt. (Va.) 518; Warren *v.* Syme, 7 W. Va. 474. See Van Meter *v.* Knight, 32 Minn. 205; Charter *v.* Graham, 56 Ill. 19.

The following descriptions were held insufficient: one describing the property as the west half of a certain tract of land instead of the east half, the proper description, Sanger *v.* Craigue, 10 Vt. 555; a description of the northwest quarter as the northeast quarter,

must be shown;[1] and, if the instrument creates a lien upon the property, the kind and full amount of the debt must appear.[2]

Mere clerical errors which do not or reasonably ought not so mislead a subsequent purchaser as to prejudice his interests, will not vitiate the record.[3] When a description of property con-

White *v.* McGarry, 2 Flip. (U. S.) 572; a description of lot one in block six as "lot and six," Nelson *v.* Wade, 21 Iowa 49; an entry mentioning only the starting point, omitting the remainder of circumscription. Burrows *v.* Baughman, 9 Mich. 213.

A description of lands conveyed as "all other lands owned by the vendor in the State of Louisiana" was held to be an insufficient description of any particular tract conveyed. Green *v.* Witherspoon, 37 La. Ann. 751.

A deed conveyed land to three partners in the proportion of an undivided half to one and an undivided fourth to each of the others, and added: "This being the proportional undivided interest of each of the above partners in the lumber firm and lands of Milo A. Skinner & Co." The first-named grantee mortgaged his undivided half. *Held*, that the deed did not necessarily import notice of the rights and interests of others in the portion mortgage. Van Slyck *v.* Skinner, 41 Mich. 186.

See also BOUNDARIES, vol. 2. p. 495.

Schedules or Inventories of Personal Property.—It follows, from the necessity of a recorded description which sufficiently identifies the property conveyed or affected, that, when it is necessary to the identification of the property affected by a chattel mortgage that a schedule or inventory of the chattels, which is referred to in the mortgage, be examined, the schedule must be recorded. Barkman *v.* Simmons, 23 Ark. 1; Sawyer *v.* Pennell, 19 Me. 167; Chapin *v.* Cram, 40 Me. 561; McKinnon *v.* McLean, 2 Dev. & B. Eq. (N. Car.) 79. But if the schedule is not necessary to the identification of the property, it need not be recorded. Lund *v.* Fletcher. 39 Ark. 325; 43 Am. Rep. 270.

1. Sturtevant's Appeal, 34 Pa. St. 149.

2. Thus, if the recorder enters the amount of the debt as less than it really is, such record is not notice of the full amount. Hill *v.* McNichol, 76 Me. 314. It will be a protection against subsequent purchasers, without notice of the true amount, to only the extent of the sum appearing on the record. Terrell *v.* Andrew Co., 44 Mo. 309; Frost *v.* Beekman, 1 Johns. Ch. (N. Y.) 288; Beekman *v.* Frost, 18 Johns (N. Y.) 544; 9 Am. Dec. 246; Gilchrist *v.* Gough, 63 Ind. 576; 30 Am. Rep. 250; 19 Alb L. J. 276. But, if the record states the amount as more than the claim, it would probably be a protection against subsequent purchasers to the extent of the true claim. Crawford *v.* Chicago, etc., R. Co., 112 Ill. 314.

A mortgage was given as security for the payment of several notes. The record omitted one note in the description, but gave the aggregate amount of the notes correctly. *Held*, that it was notice to purchaser for the full amount of the mortgage. Dargin *v.* Beeker, 10 Iowa 571.

Where the record of a mortgage wholly failed to set out the sum of the note secured by it, but referred to the note by its date, the names of the maker and payee, the date of its maturity, the rate of interest provided for, and the time it became payable, held that the record was sufficient. Fetes *v.* O'Laughlin, 62 Iowa 532.

3. Wade on Notice, § 161; Wyatt *v.* Barwell, 19 Ves. Jr. 435: Hughes *v.* Debnam, 8 Jones (N. Car.) 127: Muehlberger *v.* Schilling, 19 N. Y. St. Rep. 1; Tousley *v.* Tousley, 5 Ohio St. 78. See Woodson *v.* Allen, 54 Tex. 551; Lincoln Bldg., etc., Assoc. *v.* Hass, 10 Neb. 581.

Thus an omission in the record of the time in which a sale of the property may be made, after the mortgagee has taken possession on default made in the condition, was held immaterial; that the record showed all the material terms of the mortgage, and was sufficient to protect the mortgagee. Gillespie *v.* Brown, 16 Neb. 457.

Recording the Seal to the Certificate of Acknowledgment.—It has been held that the recorder need not copy the seal of the officer who took the acknowledgment. It is sufficient if the recorded certificate contains a recital that he affixed his seal of

veyed, which is imperfect and erroneous, is yet such that it will reasonably put one on an inquiry that would lead to a correct knowledge of the identity of the property intended to be conveyed, the record will charge notice.[1]

In very many States a chattel mortgage need not be recorded at length; filing and indexing is equivalent to registry.[2]

e. INDEXING.—If there is no express provision that a general alphabetical index of the recorded instruments be kept, an omission to index an instrument will not affect the validity of its record, although it may be the usage of the recording officer to index all instruments which are transcribed upon the record books.[3] And, even under statutes which require the recorder to make a general index, it has been said that since the index is merely to facilitate the examination of the records, an entire omission to make the index or an error therein, is not a matter which concerns the owner of the recorded instrument, but rather the searcher of the records; that, while the failure to index is an act of misprision, for which the recording officer is liable to the searcher of the records,[4] who is thereby misled to his injury, it

office. This authorizes the presumption that the seal was affixed. Jones *v.* Martin, 16 Cal. 165; Sneed *v.* Ward, 5 Dana (Ky.) 187; Griffin *v.* Sheffield, 38 Miss. 359; 77 Am. Dec. 646; Geary *v.* Kansas, 61 Mo. 378; Addis *v.* Graham, 88 Mo. 197; Ballard *v.* Perry, 28 Tex. 347. See Emmal *v.* Webb, 36 Cal. 197.

1. Webb on Rec. Tit., § 147; Wade on Notice, § 161; Dev. on Deeds, § 652; Partridge *v.* Smith, 2 Biss. (U. S.) 183; Lewis *v.* Hinman, 56 Conn. 55; Merrick *v.* Wallace, 19 Ill. 486; Erickson *v.* Rafferty, 79 Ill. 209; Dargin *v.* Beker, 10 Iowa 571; Jones *v.* Bamford, 21 Iowa 117; Thornhill *v.* Burthe, 29 La. Ann. 539; Roberts *v.* Bauer, 35 La. Ann. 453; Anderson *v.* Baughman, 7 Mich. 69; 74 Am. Dec. 699; Michigan Mut. L. Ins. Co. *v.* Conant, 40 Mich. 530; Wolfe *v.* Dyer, 95 Mo. 545; Tousley *v.* Tousley, 5 Ohio St. 78; Carter *v.* Hawkins, 62 Tex. 393; Polk *v.* Chaison, 72 Tex. 500.

A deficient description may be aided by a reference to another recorded instrument where the deficiency is supplied. Wallace *v.* Furber, 62 Ind. 103; Newman *v.* Tymeson, 13 Wis. 172; 80 Am. Dec. 735. A proper description in a recorded instrument which a subsequent purchaser would necessarily see in his examination of his grantor's title may tend to supply a deficiency in the description in certain cases. See Bent *v.* Coleman, 89 Ill. 364.

2. Webb on Rec. Tit., § 251, *citing* Loeb *v.* Milner, 21 Neb. 392; Brothers *v.* Mundell, 60 Tex. 240.

3. Schell *v.* Stein, 76 Pa. St. 398; 18 Am. Rep. 416. See Nichol *v.* Henry, 89 Ind. 54.

In Schell *v.* Stein, 76 Pa. St. 401, the court, by Agnew, C. J., said: "The duty of searchers is that of the officer, not of parties, and he must see to it that no mistakes are made in searching. If greater convenience induces the recorder to keep a general index, to save the handling of different books, and he omits to index a deed in it, and thereby overlooks a deed regularly recorded and duly indexed in the proper book, his certificate makes him liable to the party who is injured by it. But surely the one who has had his deed duly acknowledged or proved, recorded in the proper book, and certified under the hand and seal of the office of the recorder in due form, has done all the law requires of him. On what principle of law or sound reason shall he be required to supervise the officer's gratuitous indexing of deeds in an index not required by law? He is not to be presumed to be familiar, and as a fact, nine out of ten persons are not familiar with the system of the office. All the citizen can be bound to know is the law and he is warned by no law that there must be kept a general index."

4. See Bishop *v.* Schneider, 46 Mo. 472; 2 Am. Rep. 533; Green *v.* Gain-

cannot affect the validity of the record.[1] And the weight of authority certainly favors that construction of such statutes which denies that they make the index an essential part of the record.[2] It should be observed that the question as to who is to suffer in case of an omission to index is probably resolved by this construction of the statutes, for imposing the duty upon the purchaser to record the instrument evidencing his purchase cannot, under this construction, require indexing.[3] That is a duty which the recording officer owes to the public.

But, under statutes special and particular in their provisions, especially in that they clothe the index with the character of notice to subsequent purchasers,[4] decisions are found which estab-

ugton, 16 Ohio St. 548; Board of Com. *v.* Babcock, 5 Oregon 472; Curtis *v.* Lyman, 24 Vt. 338; 58 Am. Dec. 174.

1. Cooley on Torts, p. 387.

In Chatham *v.* Bradford, 50 Ga. 327; 15 Am. Rep. 693, the court by McCay, J., said: "When a deed has been duly copied upon the record book, it is difficult to say that it is not recorded. The steps to be taken for easy reference, as it seems to us, are matters with which the owner of the deed has nothing to do. He has caused his deed to be copied upon the public books; that is all the law requires of him, and that is all he can do. If any one desires to find the record, he can find it if he will take the trouble. The index is for the benefit of the searcher. It is the means furnished by the public to its citizens for an easy reference to the books of record. It is a provision, not for the benefit of the holder of the deed, but for the convenience of those who desire to examine the record. Ease of access is wholly a question of degree. A book may be indexed by the name of the grantor or grantee, or both; it ought to be by both. It is often convenient, too, in this State, to index the numbers of the lots of land conveyed. But obviously, all these are matters for the convenience of those who desire to examine the books. If the clerk fails to do his duty, he injures those who desire to search. The duty is, therefore, to the searcher and to the public, and not to the holder of the deed."

2. Wade on Notice, § 173; Webb on Rec. Tit., § 142; 1 Jones on Mortg., § 553; 1 Hilliard on Mortg., 721; 1 Washb. on Real Property, 578; Chatham *v.* Bradford, 50 Ga. 327; 15 Am. Rep. 693; Nichol *v.* Henry, 89 Ind. 54; Swan *v.* Vogel, 31 La. Ann. 38: Bishop *v.* Schneider, 46 Mo. 472; 2 Am. Rep. 533; Jordan *v.* Hamilton Co. Bank, 11 Neb. 499; Chase *v.* Bennett, 58 N. H. 428; Semon *v.* Terhune, 40 N. J. Eq. 364; Mutual L. Ins. Co. *v.* Dake, 87 N. Y. 257; 1 Abb. N. Cas. (N. Y.) 381; Green *v.* Garsington, 16 Ohio St. 548; 91 Am. Dec. 103; Board of Com. *v.* Babcock, 5 Oregon 472; Nicklin *v.* Betts Spring Co., 11 Oregon 406; Stockwell *v.* McHenry, 107 Pa. St. 237; 52 Am. Rep. 475; Curtis *v.* Lyman, 24 Vt. 338; 58 Am. Dec. 174; Barrett *v.* Prentiss, 57 Vt. 297. But *compare*, Hoyt *v.* Schuyler, 19 Neb. 652.

The statute did not require the recorder to note in any index the amount of any mortgage recorded in his office. A mortgage for $5,000 was recorded as being for $500, but was indexed as a mortgage for $5,000. It was held that knowledge that such prior mortgage was indexed as a mortgage for $5,000 was not sufficient to charge a subsequent mortgagee with knowledge of the true amount. Gilchrist *v.* Gough, 63 Ind. 576; 30 Am. Rep. 250.

Entry Book.—The provision of the statute requiring an entry book to be kept has been given the same construction, and declared not to make the entry book an essential part of the record. Nichols *v.* Henry, 89 Ind. 54. See Gilchrist *v.* Gough, 63 Ind. 576; 30 Am. Rep. 250.

But, where the name of the mortgagee was by mistake omitted in transcribing the instrument, but appeared in the entry book, the record was held to impart constructive notice. Sinclair *v.* Slawson, 44 Mich. 123; 38 Am. Rep. 235.

3. See article in 4 Cent. L. J. 346.

4. That these decisions are generally understood to be grounded upon stat-

the index on the same footing as the record book itself, and e indexing of the instrument an essential integral part of a plete and valid registration, so that the record is not notice nything which is required to be entered in the index, but ch it does not contain.[1]

the statute simply provides that a suitable index shall be e, it is sufficient if the index, as made, suitably answers the irements of such an index; that is, informs the person exam- g the title to certain property where the record of such title be found.[2]

ut the statutes, which impose the duty upon the recorder of ping a general index, sometimes provide for an index so full s details as to give, in addition to names and dates, a sub- tial description of the nature of the instrument and of the perty conveyed by it.[3] Yet, a mere clerical error in the x, which will not mislead a person making an ordinary dili- , skillful and careful examination of the records, will not lidate the constructive notice of the record.[4] And it seems an omission of the statutory requirements may sometimes cured by the transcript on the record book,[5] especially if e is a reference to the record book pointing out that the ssion is there supplied.[6]

When Record Effected.—It is the usual course, in effecting the rd, for an instrument to be deposited with the recording offi-

peculiar in their provisions, see b on Rec. Tit., § 143; Wade on ce, § 166; Dev. on Deeds, §§ 694, Cooley on Torts, p. 387; Board om. *v.* Babcock, 5 Oregon 472.

Barney *v.* McCarty, 15 Iowa 510; m. Dec. 427; Gwynn *v.* Turner, wa 1; Peters *v.* Ham, 62 Iowa Howe *v.* Thayer, 49 Iowa 154; baid *v.* Culbertsen, 59 Wis. 433. lso Lane *v.* Duchac, 73 Wis. 646. der a statute clothing the index the character of notice to subse- purchasers, it was held the in- would charge a purchaser with ructive notice, regardless of the hat there was a substantial error entry on the record book itself. e *v.* Larsen, 22 Wis. 142.

Smith *v.* Royalton, 53 Vt. 604.

hen an index to each volume is red to be made, it may be kept ate, or bound in with the record of which it is an index. Benton coll, 24 Minn. 221.

Webb on Rec. Tit., § 143, note 2, *Iowa*, Rev. Code 1873, § 1943; *onsin*, Rev. Stats. 1878, §§ 759, Oconto *v.* Jerrard, 46 Wis. 317.

ones *v.* Berkshire, 15 Iowa 248; n. Dec. 412; Barney *v.* Little, 15 Iowa 527. This latter case was one where a mortgage was indexed as recorded upon page "596," when in fact it was recorded upon page "546," but the arrangement on the index of the numbers of the pages was such that it would appear to have been misplaced or incorrectly numbered. See also Paige *v.* Lindsay, 69 Iowa 593; Hodgson *v.* Lovell, 25 Iowa 97; 95 Am. Dec. 775.

5. Bostwick *v.* Powers, 12 Iowa 456; Lane *v.* Duchac, 73 Wis. 646.

6. Thus, when the words "see record," or "for description see record," were written in the column where the description of the land should have been. Calvin *v.* Bowman, 10 Iowa 529; White *v.* Hampton, 13 Iowa 259; Breed *v.* Conley, 14 Iowa 269; 81 Am. Dec. 485; Pierce *v.* Weare, 41 Iowa 378.

But, where the index upon its face purports to set out the description of the land, yet, in fact, omits some material part thereof, it may be misleading, and cannot be supplied by the record to which a searcher for incumbrances would seemingly have no occasion to look. Scoles *v.* Wilsey, 11 Iowa 261; Noyes *v.* Horr, 13 Iowa 570; Stewart *v.* Huff, 19 Iowa 557.

cer, who makes an entry of the fact and time of filing[1] and places it among the accessible files of newly deposited unrecorded instruments. At an opportune time (in some States within a time specified by the statutes)[2] the recorder enrolls it upon the record books. This transcript then becomes the true and only record, since the owner of the instrument usually removes it from the record office after the enrollment has been made.[3] It will be observed that between the date of filing and that of the transcribing, the instrument itself remains in the recorder's office subject to public inspection. It is, therefore, with good reason that the completed record is declared, in most States by statute,[4] to relate back to the moment of filing the instrument, and give constructive notice from that time.[5]

1. See Stim. Am. Stat. L., § 1618.
2. See Stim. Am. Stat. L., § 1619.
3. Hatch *v.* Haskins, 17 Me. 391; Donald *v.* Beals, 57 Cal. 399.

In Terrell *v.* Andrew Co., 44 Mo. 312, the court by Wagner, J., said: "A person, in the examination of titles, first searches the records; and if he finds nothing there, he looks to see if any instruments are filed and not recorded. If nothing is found, and he has no actual notice, so far as he is concerned the land is unencumbered. If he finds a conveyance, he goes no further; he never institutes an inquiry to find whether the deed is correctly recorded or the contents literally transcribed. Indeed, to attempt to prosecute such a search would be idle and nugatory. Grantees do not usually leave their deeds lying in the recorder's office for the inspection of the public. After they are recorded, they take them out and keep them in their possession. In a large majority of cases it would not only entail expense and trouble, but it would be useless to attempt to get access to the original papers."

If the transcript is not a true copy it may be corrected. See *infra*, this title, *Correction of Errors in Record and Curative Acts.*

4. Stim Am. Stat. L., § 1617; Webb on Rec. Tit., § 16.
5. Jarvis *v.* Aikens, 25 Vt. 635.

What Constitutes Filing for Record.—(See FILE, vol. 7, p. 960.) In order that an instrument may be filed for record it must be carried to the recording clerk's office and left with the clerk for the purpose of having it recorded. Going to the clerk's office just before midnight, and, he not being there, taking it to his house just before sunrise the next morning and personally delivering it to him, stating the other attempt, does not make it good as a recorded deed from such previous day but only from the time of its actual delivery to the clerk. Horsley *v.* Garth, 2 Gratt. (Va.) 471; 44 Am. Dec. 393.

An instrument which is left with the recorder, with instructions not to record it until notified, will not be considered as filed for record until directions to record it are given. Bowen *v.* Fassett, 37 Ark. 507; Dedman *v.* Earle, 52 Ark. 164; Town *v.* Griffith, 17 N. H. 164; even though the clerk may have noted thereon the time of receiving it, Town *v.* Griffith, 17 N. H. 164. If recorded before such instructions are given the record is not notice. Haworth *v.* Taylor, 108 Ill. 275; Brigham *v.* Brown, 44 Mich. 59.

If the instrument, having been filed, is withdrawn from the office before it is copied on the books of the record, its operation as constructive notice is suspended until it is returned. Lawton *v.* Gordon, 37 Cal. 202; Kiser *v* Henston, 38 Ill. 252; Yerger *v.* Barg, 56 Iowa 77; Jones *v.* Parker, 73 Me. 248; Clamorgan *v.* Lane, 9 Mo. 446; Ward *v.* Watson, 24 Neb. 592; Hickman *v.* Perrin, 6 Coldw. (Tenn.) 135; Johnson *v.* Burden, 40 Vt. 567; 94 Am. Dec. 436. It is immaterial for what purpose it is withdrawn. Worcester Bank *v.* Cheeney, 87 Ill. 602. But *compare* Wilton *v.* Leslie, 26 Ohio St. 161. But the instrument will be of full effect from the time of its return. Woodruff *v.* Phillips, 10 Mich. 500.

The clerk's indorsement that an instrument was filed for record is not an essential part of the filing or registry. Gorham *v.* Summers, 25 Minn 81;

6. Correction of Errors in Record and Curative Acts.—If the recording officer should make an error or omit something in transcribing the instrument upon the record book, he may so correct the record as to make it a true representation of the instrument.[1] And so if the certificate of the official character of the officer taking the acknowledgment, which is a prerequisite to recordation in some States, is not recorded with the instrument, the omission may be afterwards supplied.[2] An amended record will take effect from the time the correction is made, but it can in no way impair the title acquired prior to the correction.[3]

Statutes have been enacted in different States for the purpose of validating records of conveyances which are defective because of some omission in the prescribed formalities, as want of the certificate of acknowledgment, of the notarial or official seal to the certificate of acknowledgment, of the requisite number of witnesses, or of the certificate of official character of the acknowledging officer. Notwithstanding the apparent retrospective operation of statutes of this kind, they have almost uniformly been held constitutional and valid.[4]

Metts *v.* Bright, 4 Dev. & B. (N. Car.) 173; 32 Am. Dec. 683; Boyce *v.* Stanton, 15 Lea (Tenn.) 346; Houghton *v.* Burnham, 22 Wis. 301. But it is usually held *prima facie* evidence of the fact and date of filing. Head *v.* Goodwin, 57 Me. 181; Jackson *v.* Phillips, 9 Cow. (N. Y.) 94. The clerk's entry is not conclusive evidence; parol evidence may be given to contradict it. Worcester Bank *v.* Cheeney, 87 Ill. 602; Town *v.* Griffith, 17 N. H. 165; Horsley *v.* Garth, 2 Gratt. (Va.) 471; 44 Am. Dec. 393.

1. Sellers *v.* Sellers, 98 N. Car. 13.

It seems that this may be done by interlineation. Sellers *v.* Sellers, 98 N. Car. 13. But see Doe *v.* Dugan, 8 Ohio 87; 31 Am. Dec. 432. And since the amended record can take effect only from the time the correction was made, it would seem that there can be no objection to recopying the whole record with the corrections in the proper order, with a marginal note on the first record indicating where the reformed record may be found. See King *v.* Bales, 44 Ind. 219.

In an action to reform a deed on the ground of mistake, the court ordered that certain words should be erased from the instrument, and that the record of such deed should be in like manner corrected. It was held that the court possessed no power to order the recorder of the county to change his record when he had correctly copied the deed; a new deed should be decreed and recorded. Toops *v.* Snyder, 47 Ind. 91.

2. Reasoner *v.* Edmundson, 5 Ind. 393; Ely *v.* Wilcox, 20 Wis. 523; 91 Am. Dec. 436.

3. Chamberlain *v.* Bell, 7 Cal. 292; 68 Am. Dec. 260; Davis *v.* Lutkiewiez, 72 Iowa 254; Baldwin *v.* Marshall, 2 Humph. (Tenn.) 116; Harrison *v.* Wade, 3 Coldw. (Tenn.) 505; McLough *v.* Hart, 51 Tex. 115.

4. Watson *v.* Mercer, 8 Pet. (U. S.) 88; Raverty *v.* Fridge, 3 McLean (U. S.) 230; Gillespie *v.* Reed, 3 McLean (U. S.) 377; Wallace *v.* Moody, 26 Cal. 387; Reed *v.* Kemp, 16 Ill. 445; Logan *v.* Williams, 76 Ill. 175; Buckley *v.* Earley, 72 Iowa 289; Brown *v.* Simpson, 4 Kan. 76; Ross *v.* Worthington, 11 Minn. 438; 88 Am. Dec. 95; German-American Bank *v.* White, 38 Minn. 471; Allen *v.* Moss, 27 Mo. 354; Stevens *v.* Hampton, 46 Mo. 404; Bishop *v.* Schneider, 46 Mo. 472; 2 Am. Rep. 533; Gatewood *v.* Hart, 58 Mo. 261; Barton *v.* Morris, 15 Ohio 408; Barnet *v.* Barnet, 15 S. & R. (Pa.) 72; Tate *v.* Stooltzfoos, 16 S. & R. (Pa.) 35; 16 Am. Dec. 546; Journeay *v.* Gibson, 56 Pa. St. 57; Hughes *v.* Cannon, 2 Humph. (Tenn.) 589; Maley *v.* Tipton, 2 Head (Tenn.) 403. But such acts cannot impair vested rights; Carpenter *v.* Dexter, 8 Wall. (U. S.) 513; Logan *v.* Williams, 76 Ill. 175; Brinton *v.* Seevers, 12 Iowa 389; nor affect the rights

7. **Refiling.**—In many States the record of a chattel mortgage is ineffectual after a certain time, and the instrument must be refiled before the expiration of the given period.[1]

IV. **Effect of Failure to Record**—1. **Owing to Neglect of Grantee**—*a.* As to the Parties.—It has been said that at common law it is not necessary to record a conveyance of title.[2] In order to pass title to land, livery of seisin is the only notoriety which the common law demands. Thus, because of the possibility of secret conveyances, especially after the adoption of the Statute of Uses,[3] subsequent conveyances might easily be made in fraud of persons. To remedy this evil the common-law requirements for the valid transfer of title have been supplemented by the additional statutory requisite of recordation. But, recordation being only a means for the prevention of fraud, it is not necessary, in the absence of the intervening rights of the subsequent purchasers, etc., specified in the statutes, that the conveyance be recorded in order to pass the legal title.[4] A deed or other written instrument is effectual as between the parties to it, and their heirs, without being recorded.[5] And, since an administrator is

of third persons; Gatewood *v.* Hart, 58 Mo. 261; Green *v.* Drinker, 7 W. & S. (Pa.) 440.

See Constitutional Law, vol. 3, p. 760, note 3; Acknowledgment, vol. 1, p. 162, note 1.

1. Webb on Rec. Tit., § 257–260. See Chattel Mortgages, vol. 3, pp. 194–195.

2. See *supra*, this title, *History and Construction.*

3. 27 Hen. VIII, ch. 10. By the provisions of this statute, estates, even of inheritance, in lands might be created and transferred by deed merely, without actual livery of seisin. 2 Min. Inst. 847.

In *America*, livery of seisin is unnecessary, it having been dispensed with either by express law or by usage. See Livery, vol. 13, p. 934, n. 1. Registration is equivalent to, and supersedes the necessity of livery of seisin. Bryan *v.* Bradley, 16 Conn. 474; Wyman *v.* Brown, 50 Me. 160; Williamson *v.* Carlton, 51 Me. 452; Matthews *v.* Ward, 10 Gill & J. (Md.) 443; Keys *v.* Davis, 1 Md. 39; Evans *v.* Horan, 52 Md. 611; Higbee *v.* Rice, 5 Mass. 344; 4 Am. Dec 63; Caldwell *v.* Fulton, 31 Pa. St. 475; 72 Am. Dec. 760.

4. See Chaffee *v.* Halpin, 62 Miss. 1; Aubuchon *v.* Bender, 44 Mo. 560; Jackson *v.* Burgott, 10 Johns. (N. Y.) 457; 6 Am. Dec. 349; Building Assoc. *v.* Clark, 43 Ohio St. 427; Moore *v.* Thomas, 1 Oregon 201; Portis *v.* Hill, 30 Tex. 529; 98 Am. Dec. 481; Wade *v.* Greenwood, 2 Rob. (Va.) 474; 40 Am. Dec. 759.

5. Robinson *v.* M'Donnell, 2 B. & Ad. 134; 5 M. & S. 228; Boughton *v.* Boughton, 1 Atk. 625; Sicard *v.* Davis, 6 Pet. (U. S.) 124; Bacon *v.* Northwestern Mut. L. Ins. Co., 131 U. S. 258; Andrews *v.* Burns, 11 Ala. 691; McCaskle *v.* Amarine, 12 Ala. 17; Center *v.* Planters', etc., Bank, 22 Ala. 743; Russell *v.* Cady, 15 Ark. 540; Jackson *v.* Allen, 30 Ark. 110; Hunter *v.* Watson, 12 Cal. 363; 73 Am. Dec. 543; French *v.* Gray, 2 Conn. 92; Hill *v* Meeker, 24 Conn. 211; Christy *v.* Burch, 25 Fla. 942; 25 Fla. 978; Rogers *v.* Kavanaugh, 24 Ill. 583; Stewart *v.* Mathews, 19 Fla. 752; Janes *v.* Penny, 76 Ga. 796; Ross *v.* Hole, 27 Ill. 104; Henthorn *v.* Doe, 1 Blackf. (Ind.) 157; Evans *v.* Pence, 78 Ind. 439; Davis *v.* Lutkiewiez, 72 Iowa 254; Bell *v.* Evans, 10 Iowa 353; Stephens *v.* Williams, 46 Iowa 540; Newsom *v.* Kurtz, 86 Ky. 277; Ralls *v.* Graham, 4 T. B. Mon. (Ky.) 120; Hancock *v.* Beverly, 6 B. Mon. (Ky.) 531; Boling *v.* Ewing, 9 Dana (Ky.) 76; Fitzhugh *v.* Croghan, 2 J. J. Marsh. (Ky.) 429; 19 Am. Dec. 139; McClain *v.* Gregg, 2 A. K. Marsh. (Ky.) 454; Philips *v.* Green, 3 A. K. Marsh. (Ky.) 7; 13 Am. Dec. 124; Liddell *v.* Rucker, 13 La. Ann. 569; Tilden *v.* Morrison, 33 La. Ann. 1067; McCall *v.* Irion, 41 La. Ann. 1126; Owens *v.* Miller, 29 Md. 144; Vose *v.*

orton, 4 Cush. (Mass.) 27; 50 Am. ec. 750; Sloan *v.* Holcomb, 29 Mich. 3; Burns *v.* Berry, 42 Mich. 176; eenleaf *v.* Edes, 2 Minn. 264; affee *v.* Halpin, 62 Miss. 1; Caldell *v.* Head, 17 Mo. 561; McCamart Patterson, 39 Mo. 100; Maupin *v.* nmons, 47 Mo. 304; Marcum *v.* leman, 8 Mont. 196; Keeling *v.* oyt (Neb. 1891), 48 N. W. Rep. 66; rrison *v.* McWhirter, 12 Neb. 152; own *v.* Manter, 22 N. H. 468; Whitnore *v.* Bean, 6 N. H. 47; Wilson *v.* oup, 2 Cow. (N. Y.) 195; 14 Am. ec. 458; Shuler *v.* Boutwell, 18 Hun . Y.) 171; Pancoast *v.* American eating, etc., Co., 66 How. Pr. (N. Y.) Wood *v.* Chapin, 13 N. Y. 509; 67 n. Dec. 62; Moseley *v.* Moseley, 15 Y. 334; Jackson *v.* Burgott, 10 hns. (N. Y.) 457; 6 Am. Dec. 349; ckson *v.* West, 10 Johns. (N. Y.) 5; Forrester *v.* Parker, 14 Daly (N.) 208; Leggett *v.* Bullock, Busb. (N. r.) 283; Walker *v.* Coltraine, 6 d. Eq. (N. Car.) 79; Irvin *v.* Smith, Ohio 226; Fosdick *v.* Barr, 3 Ohio 471; Sidle *v.* Maxwell, 4 Ohio St. 5; Building Assoc. *v.* Clark, 43 io St. 427; Belk *v.* Massey, 11 Rich. Car.) 614; Ashe *v.* Livingston, 2 y (S. Car.) 80; Penman *v.* Hart, 2 y (S. Car.) 251; Smith *v.* Starkther, 5 Day (Conn.) 207; Martin *v.* attlebam, 3 McCord (S. Car.) 205; nmons *v.* McKissick, 6 Humph. enn.) 259; Rogers *v.* Cawood, 1 an (Tenn.) 142; 55 Am. Dec. 729; ilkins *v.* May, 3 Head (Tenn.) 173; ines *v.* Walker, 77 Va. 92; Guerrant Anderson, 4 Rand. (Va.) 208; Wade Greenwood, 2 Rob. (Va.) 474; 40 n. Dec. 759; Darland *v.* Levins ash. T. 1889), 20 Pac. Rep. 309. e also Marcum *v.* Coleman, 8 Mont. 5; Dwight *v.* Scranton, etc., Lumber ., 69 Mich. 127. See JUDGMENTS, l. 12, p. 110, n. 1. And see Stim. n. Stat. L., § 1611 (B).

The non-registration of debentures ich were by their terms a charge on all the property of a company es not avoid them as to chattels ainst a liquidator in winding up oceedings commenced voluntarily d continued under supervision. *In* Marine Mansions Co., L. R., 4 Eq. 1.

By the *Ohio* statute of 1831 it s provided that mortgages "shall e effect from the time the same are livered to the recorder of the proper unty for record," without any specification as to third persons. In construing this statute, the courts have announced that "a mortgage has no effect either in law or equity previous to its delivery to the recorder of the county for record." Doe *v.* Bank of Cleveland, 3 McLean (U. S.) 140; Stansell *v.* Roberts, 13 Ohio 148; 42 Am. Dec. 193; Mayham *v.* Coombs, 14 Ohio 428; Holliday *v.* Franklin Bank, 16 Ohio 533; Bloom *v.* Noggle, 4 Ohio St. 45; Bercaw *v.* Cockerill 20 Ohio St. 163. But in later decisions, this language has been received with the qualification that it has exclusive reference to the effect of the instrument as to those not parties to it. Sidle *v.* Maxwell, 4 Ohio St. 236; Building Assoc. *v.* Clark, 43 Ohio St. 427.

In Sidle *v.* Maxwell, 4 Ohio St. 236, the court by Bartley, J., said: "Every statute must be construed according to its intent, and with reference to the mischief to be prevented, and the remedy provided. The manifest object of the statute requiring the record of mortgages is notice of the incumbrances created; and, of course, this notice has reference to persons other than those who are parties to the instrument. No sensible object could be accomplished in subjecting persons to the expense of this public record, with a view of notice to the parties themselves. The provision of the statute, therefore, declaring that mortgages shall take effect and have preference from the time of their delivery for record, has reference to the rights of persons other than the parties to the instruments, and was designed to regulate and fix with certainty the priority of right among incumbrances. The expression which has been used in some of the reported decisions in this State, 'that the delivery of a mortgage for record is part of the execution of the instrument,' is not strictly correct. All the decisions in which this language is used, determine simply the effect of the mortgage in relation to its giving a preference over other lien holders. The cause of Holliday *v.* Franklin Bank, 16 Ohio 532, in which the language of the court in this respect is most unguarded, and most needs qualification, simply determines that a mortgage previous to its delivery for record, has no effect, either at law or in equity, against a subsequent judgment. The result of all the decisions on this subject is, simply, that a mortgage does

simply a trustee succeeding to such rights only as the intestate possessed, an unrecorded mortgage will bind the mortgagor's administrator.[1] So an assignee in bankruptcy, or for the benefit of creditors, takes only the debtor's rights,[2] and holds the property subject to all such prior conveyances as would affect it in the hands of his assignor.[3] Like reasoning has been employed

not take effect as a recorded instrument, or, in other words, does not take effect in giving any priority over subsequently acquired liens, until it is delivered for record. In reality, the delivery of the mortgage for record is not a part of the execution of the instrument."

A lessee of land cannot object to an action by his landlord for a breach of covenant in not repairing, that the lease was void by 15 Car. II, ch. 17, for want of being registered; such act enacting that "no lease, etc., should be of force but from the time it should be registered," not avoiding it as between themselves, but only postponing its priority with respect to subsequent incumbrances registering their titles before. Hodson *v.* Sharpe, 10 East 350.

1. Andrews *v.* Burns, 11 Ala. 691; Kirkpatrick *v.* Caldwell, 32 Ind. 299. The latter case was one where an intestate had executed a mortgage on certain real estate to secure the purchase money. This mortgage was not recorded. The estate being insolvent, the administrator having no knowledge of the existence of the mortgage, sold the land under an order of the court for the purpose of producing assets to meet claims against the estate. It was held that the proceeds of the sale were subject to the mortgagee's lien, and that he was entitled to payment out of such proceeds in preference to general creditors. The court by Frazer, C. J., said: "It is only subsequent purchasers and incumbrancers in good faith and for value who are protected against an unrecorded mortgage. As against all the world besides, the registry imparts no virtue or force whatever to the instrument. As against the mortgagor and the estate while it remains in his hands, the lien is as perfect without registry as it is with it. It is so, also, against his general creditors while he lives, and after his death. No change was wrought in the rights of the mortgage with respect to the other creditors by his decease. The administrator was his personal representative, and, of course, took no better right than the intestate had.

But it is urged, that if the mortgagor had sold the land to an innocent purchaser and received the purchase-money during his lifetime, the mortgagee could not have pursued the fund in his hands, but must be content with the result of his remedy at law *in personam*, and therefore he cannot follow the proceeds in this case. The argument has apparent force, and, indeed it would be convincing if the administrator held the fund as the mortgagor would hold it in the case supposed. In the absence of fraud, the latter would hold it in his own right, but the administrator holds it as a mere trustee, to be disposed of under the control of the court, in the payment of debts, and any surplus by distribution. The money is in the hands of the administrator, and no equities have intervened in behalf of other creditors. There is no reason, therefore, why the court should not, for the purpose of justice, follow the proceeds, still in reach, and subject them to the lien which originally subsisted against the land, as is habitually done in other cases of trusts where the trustee has either willfully or ignorantly violated his duty by disposing of the trust estate."

But a conveyance by an executor under a power of sale contained in a will, to a purchaser for a valuable consideration, is good against a former grantee, whose deed was not recorded, and who was not in possession, the purchaser having no actual or constructive notice of the former deed, or of any claim of right under it. Stewart *v.* Mathews, 19 Fla. 752.

2. See ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, vol. 1, p. 854, n. 2.

3. Stewart *v.* Platt, 101 U. S. 731; Simon *v.* Openheimer, 20 Fed. Rep. 553; Fletcher *v.* Morey, 2 Story (U. S.) 555; National Bank *v.* Conway, 14 Nat. Bank. Reg. 513; 1 Hughes (U. S.) 37; *In re* Griffith, 1 Low. (U. S.) 431; *In re* Collins, 12 Blatchf. (U. S.) 548;

n deciding that judgment creditors are not within the intend-
nent of the recording acts, and are not entitled to the protection
hey give.[1] In some jurisdictions, the grantee under a quit-
claim deed will not receive the protection of these provisions, for
he reason that he, by the terms of his conveyance, takes only the
nterests of his grantor.[2] But the recording of an instrument
nay, of course, be made a part of its execution by the express
provisions of the statutes, and no title will pass until the instru-
nent is recorded.[3]

b. As to the Third Persons Comprehended by the Re-
cording Acts.—The purpose of the recording acts is undoubt-
edly, as has been expressed in the preamble to the act of 7th
Anne,[4] to protect purchasers of, or persons acquiring other interests
n property, from being overreached by prior secret conveyances
nd fraudulent incumbrances. To effect this end the statutes
usually declare that conveyances and other instruments affecting
itle shall be void as against subsequent purchasers and incum-
brancers unless they are recorded. Thus the law points out
pecifically the danger to which the party failing to record his

2 Nat. Bank. Reg. 379; Mitchell *v.* Winslow, 2 Story (U. S.) 630; Johnson *v.* Patterson, 2 Woods (U. S.) 443; *In re* Bruce, 16 Nat. Bank. Reg. 318; Coggeshall *v.* Potter, 1 Holmes (U. S.) 5; Mellon's Appeal, 32 Pa. St. 121; Webb on Rec. Tit., § 213. See Assignments for the Benefit of Creditors, vol. 1, p. 854, n. 3.

1. See *infra*, this title, *Who Are Protected—Creditors.*

2. See *infra*, this title, *The Persons Protected by Recording Acts.*

3. Palmer *v.* White, 70 Cal. 220.

Under the *English* statutes of enrollment of 27 Hen. VIII, ch. 16, § 1, it was provided as follows: "That no manors, lands, etc., shall pass, alter, or change from one to another, whereby any state of inheritance or freehold shall be made to take effect, etc., except the same bargain and sale be made by writing, indented, sealed, and enrolled, etc., within six months next after the date of the same writings indented, etc." Under this statute, it has been resolved that no estate passes until the deed be enrolled. 2 Inst. 671; Cro. Jac. 408; Cro. Car. 110, 216, 569.

Deed by Married Woman.—In a few states statutes have been enacted making recordation necessary to the validity of a conveyance of land by a married woman. 2 Min. Inst. 847; Scarborough *v.* Watkins, 9 B. Mon. (Ky.) 540; 50 Am. Dec. 529; Hillegas *v.* Hartley, 1 Hill Eq. (S. Car.) 106; Rorer *v.* Roanoke Nat. Bank, 83 Va. 589; Sewall *v.* Haymaker, 127 U. S. 719. But *compare* Christy *v.* Burch, 25 Fla. 942; 25 Fla. 978.

Tax Deed.—In the case of proceedings in the sale of lands for taxes, the statutes sometimes make recording necessary to the validity of the conveyance. There must be a strict compliance with such statutes in order to pass the title. Clark *v.* Tucker, 6 Vt. 181; Giddings *v.* Smith, 15 Vt. 344; Morton *v.* Edwin, 19 Vt. 81.

Unrecorded Instrument in Evidence.—In *North Carolina*, while it seems that a deed cannot be given in evidence to support a title until registered, yet, when registered, it relates back to the time of its execution, and the title becomes complete. Morris *v.* Ford, 2 Dev. Eq. (N. Car.) 412; Walker *v.* Coltrame, 6 Ired. Eq. (N. Car.) 79; Phifer *v.* Barnhart, 88 N. Car. 333; Ray *v.* Wilcox (N. Car. 1890), 12 S. E. Rep. 443. See Rogers *v.* Cawood, 1 Swan (Tenn.) 142; 55 Am. Dec. 729; Taylor *v.* M'Donald, 2 Bibb (Ky.) 420.

4. The preamble to this act is as follows: "Whereas by the different and secret way of conveying lands, etc., such as are ill-disposed have it in their power to commit frauds, and frequently do so, by means whereof several persons have been undone in their purchases and mortgages, by prior and secret conveyances, and fraudulent incumbrances."

title is exposed. The effect of failure to record may always be determined by the express provisions of the statute,[1] but the persons in whose favor the recording acts are designed to give that effect are not so easy of ascertainment.[2]

2. **Owing to Neglect of Recording Officer.** — The result of failure to record an instrument when such failure is chargeable to the grantee under the instrument, whose duty it is to record it has been stated. But the grantee may do all he can do to effect the record, by duly depositing the writing evidencing his conveyance with the recording officer, and yet, by the misprision of the recording officer in making the record, the instrument may either not be copied at all before it is removed from the files of the

1. And the courts cannot extend nor add to it. A tax purchaser took the decree by default, quieting his title as against the claims of a certain person who had, in fact, previously conveyed the land. His grantee, however, had not recorded the deed and was not made a party. *Held*, that the neglect to record the deed did not make the decree binding upon the grantee who was a stranger to the proceeding. Smith *v.* Williams, 44 Mich. 240.

So it cannot be said that the omission to file a chattel mortgage is, under the statute, fraudulent in law. Niagara Co. Bank *v.* Lord, 33 Hun (N. Y.) 557.

Nor can it be argued that under the provisions of the recording acts one who makes a conveyance which is not recorded, retains an interest in the conveyed property which may be subsequently transferred to an innocent purchaser. In Burns *v.* Berry, 42 Mich. 176, the court, by Marston, J., said: "The protection which this statute gives to a *bona fide* purchaser does not proceed upon the theory, and is not made to depend upon the fact, that the grantor at the time of such conveyance had any interest in the premises whatever, or that any passed from him by his conveyance to such subsequent purchaser. It is not by force of the conveyance, but by the terms of the statute, that such subsequent purchaser acquires title to the premises. His grantor having previously conveyed has no title left to convey, and could, therefore, by his deed, unaided by the statute, pass none to any third person. Our registry laws, however, step in, and for the purpose of protecting an innocent purchaser, give him what he supposed, and from an examination of the records had a right to suppose, he was acquiring by his purchase, and to this extent cut off the previous purchaser who negligently failed to record his conveyance." See Edwards *v.* McKernan, 55 Mich. 520, where this language is quoted with approval. In Earle *v.* Fiske, 103 Mass. 591, the court by Ames, J., recognizes the fact that it is not very logical to say that, after a man has literally parted with all his right and estate in a lot of land, there still remains in his hands an attachable and transferable interest in it, of exactly the same extent and value as if he had made no conveyance whatever. See 12 Abb. L. J. 117, for comments in this case, which support the reasoning of the *Michigan* judge above quoted. See also Mart. on Conv., § 285; Greenleaf *v.* Edes, 2 Minn. 264.

When Failure to Record Is Due to Unavoidable Circumstances.—The impossibility of recording the writing, as because unavoidable accidents prevent the attendance of the witnesses who are to prove it, or by reason of the casual loss or destruction of the writing itself, will not avert the legal consequences of the failure to record it. 2 Min. Inst., p. 857; Eppes *v.* Randolph, 2 Call (Va.) 125; Harvey *v.* Alexander, 1 Rand. (Va.) 219; 10 Am. Dec. 519; Withers *v.* Carter, 4 Gratt. (Va.) 407; 1 Am. Dec. 78.

The Instruments Avoided by the Recording Acts.—And, since the whole system of recordation depends on statutory enactment, the operation of the recording acts can extend to only those instruments which are required to be recorded by the terms or intendment of these statutes. Lissa *v.* Posey, 64 Miss. 352; Martin *v.* Nash, 31 Miss. 324.

2. See *infra*, this title, *The Persons Protected by the Recording Acts.*

ecord office, or so copied as to be of no value so far as the tility of the record lies in communicating information of the onveyance to persons searching the record. By a provision of tatutes which is common to nearly all the States, the record is ffected when the writing has been filed for record.[1] And, here this is the law, the rule is favored by what seems to be the eight of authority that the statutory duty to record his conveynce, which is imposed upon the grantee for the benefit of subseuent purchaser,[2] is sufficiently discharged when the grantee has uly deposited a valid instrument for record, and that the grantee ust be protected thereby, even though the recorder incorrectly anscribes the instrument upon the records, or fails to record it t all.[3] Yet, while this rule is, perhaps, supported by the larger

1. See *supra*, this title, *When Rec-d Effected*.

2. Mr. Devlin argues that the grantee a deed, the record of which is not fected by reason of the neglect of the cording officer, should not bear the ss, for the reason that the recording ts are intended for the benefit of subquent purchasers and incumbrancers. r. Devlin says: "The first grantee reires no protection. By the princies of the common law, in the abnce of statutory regulations, he suceeds, by his deed, to all the title of s grantor, and, unless the law places on him the obligation of doing some rticular act, his deed, on common w principles, is good against everydy." The purchaser, under the secnd conveyance, could, at common w, acquire nothing as against the rior conveyance. To remedy cerin evil practices, which were made ssible by this state of the law, the cording acts were enacted for the rpose of requiring the first grantee to ve notice of his deed by procuring its gistration, or to suffer the consequences its postponement to the conveyce to another. "Now, it is obvious," ys Mr. Devlin, "that the registration ws are intended for the benefit of the bsequent purchaser. And it seems us a reasonable rule that if the first antee does all that he has the power do to secure to subsequent purchass the benefit of this notice by the recd, he should not be held responsible cause the public officer failed to do s duty." 1 Dev. on Deeds, § 686.

Mr. Wade, in his treatise on the law notice, states a similar view: "If, en, the law is primarily for the proction of the subsequent purchaser, it ould seem that any breach of duty by the officer was a violation of his rights in the premises, and the delinquent official should be required to answer to him. The conclusion seems to follow inevitably, that, from the deposit of the instrument with the proper officer for record, it should be regarded as constructive notice to all persons who subsequently deal with the title, notwithstanding any errors by the officer in recording the instrument, or even when he neglects to record it." Wade on Notice, § 162.

This reasoning is also well expressed in the following cases: Merrick *v.* Wallace, 19 Ill. 486; Jennings *v.* Wood, 20 Ohio 261, dissenting opinion by Spalding, J.; Sawyer *v.* Adams, 8 Vt. 172; 30 Am. Dec. 459, dissenting opinion by Phelps, J. Article in 5 Cent. L. J., 3.

3. Dev. on Deeds, § 681; Webb on Rec. Tit., § 16; Wade on Notice, §§ 149–162; Steam Stone-Cutter Co. *v.* Sears, 23 Fed. Rep. 313; Polk *v.* Cosgure, 4 Biss. (U. S.) 437; Riggs *v.* Boylan, 4 Biss. (U. S.) 445; Mims *v.* Mims, 35 Ala. 23; Fonche *v.* Swain, 80 Ala. 153; Oates *v.* Walls, 28 Ark. 244; Case *v.* Hargadine, 43 Ark. 144; Meherin *v.* Oaks, 67 Cal. 57; Hartmyer *v.* Gates, 1 Root (Conn.) 61; Lewis *v.* Hinman, 56 Conn. 55; Cook *v.* Hall, 6 Ill. 575; Merrick *v.* Wallace, 19 Ill. 486; Kiser *v.* Heuston, 138 Ill. 252; Wolf *v.* Hunter, 10 Ill. App. 32; Chandler *v.* Scott, 127 Ind. 226; Kessler *v.* State, 24 Ind. 313; Poplin *v.* Mundell, 27 Kan. 138; Lee *v.* Bermingham, 30 Kan. 312; Bank of Ky. *v.* Haggin, 1 A. K. Marsh. (Ky.) 306; Payne *v.* Pavey, 29 La. Ann. 116; Lewis *v.* Klotz, 39 La. Ann. 259; Sykes *v.* Keating, 118 Mass. 517; Gillespie *v.* Rogers, 146 Mass. 610; People *v.* Bristol, 35 Mich. 28; Man-

number of decisions and the better reason, a not unimportant line of cases holds that the recording of an instrument is the duty of the grantee therein, and that he and a subsequent purchaser who has acted in ignorance of the omission or mistake, must suffer the loss resulting from a failure to record, whether due to his own or the recorder's neglect.[1]

gold *v.* Barlow, 61 Miss. 593; 48 Am. Rep. 84; Perkins *v.* Strong, 22 Neb. 725; Dickernan *v.* Puckhafer, 1 Daly (N. Y.) 489; Simonson *v.* Falihee, 25 Hun (N Y.) 570; Dodge *v.* Potter, 18 Barb. (N. Y.) 193; Bedford *v.* Tupper, 30 Hun (N. Y.) 174; Schell *v.* Stein, 76 Pa. St. 398; 18 Am. Rep. 416; Wood's Appeal, 82 Pa. St. 116; 13 Am. L. Reg. 255; Glading *v.* Frick, 88 Pa. St. 460; Clader *v.* Thomas, 89 Pa. St. 343; Nichols *v.* Reynolds, 1 R. I. 30; 36 Am. Dec. 238; Flowers *v.* Wilkes, 1 Swan (Tenn.) 408; Swepson *v.* Exchange & Deposit Bank, 9 Lea (Tenn.) 713; Throckmorton *v.* Price, 28 Tex. 605; Crews *v.* Taylor, 56 Tex. 461; Freiberger *v.* Magale, 70 Tex. 116; Beverly *v.* Ellis, 1 Rand (Va.) 102; Marlet *v.* Hinman, 77 Wis. 135; 31 Cent. L. J. 211. See Mutual L. Ins. Co. *v.* Dake, 87 N. Y. 257.

And this rule, as Mr. Devlin points out, certainly seems to be more in harmony with the principles stated in a subsequent section of this article (*Destruction of Record*) to the effect that the "destruction of the book in which the deed is recorded, by fire, the mad caprice of the mob, the mishaps of war, or the hands of some person who desires its destruction for a selfish and fraudulent purpose, cannot deprive the record of the effect of giving constructive notice, acquired by the original registration. When the record is destroyed, as a matter of fact, it must cease to give notice. Still it is considered on the soundest logic and reason, that when a person has filed his deed for record, he has complied with the law and cannot be affected by the subsequent destruction of the record. Why, then, should he be held responsible when the record is not totally destroyed, but rendered imperfect by the act of a public officer, whose acts he cannot supervise?" I Dev. on Deeds, § 686.

1. 2 Pom. Eq. Jur., § 654; Webb on Rec. Tit., § 18; Jones on Mortg., § 551; Shepherd *v.* Burkhalter, 13 Ga. 443; 58 Am. Dec. 523; Benson *v.* Green, 80 Ga. 230; Miller *v.* Bradford, 12 Iowa 14; Noyes *v.* Horr, 13 Iowa 570; Barney *v.* McCarty, 15 Iowa 510; 83 Am. Dec. 427; Whalley *v.* Small, 25 Iowa 184; Brydon *v.* Campbell, 40 Md. 331; Barnard *v.* Campan, 29 Mich. 162; Parret *v.* Shaubhut, 5 Minn. 323; Terrell *v.* Andrew Co., 44 Mo. 309; Green *v.* Gerrington, 16 Ohio St. 549; Jennings *v.* Wood, 20 Ohio 261; Sawyer *v.* Adams, 8 Vt. 172; 30 Am. Dec. 459. See also Gilchrist *v.* Gough, 63 Ind. 576; 19 Alb. L. J. 276; State *v.* Davis, 96 Ind. 539; Smith *v.* Lowry, 113 Ind. 37; Frost *v.* Beekman, 1 Johns. Ch. (N. Y.) 299; Beekman *v.* Frost, 18 Johns. (N. Y.) 544; 9 Am. Dec. 246; Peck *v.* Mallams, 10 N. Y. 509; New York L. Ins. Co. *v.* White, 17 N. Y. 469; Potter *v.* Dooley, 55 Vt. 512; International Ins. Co. *v.* Scales, 27 Wis. 640.

This doctrine is in Terrell *v.* Andrew Co., 44 Mo. 309, the court speaking by Wagner, J., defended as follows: "The statute says that when the deed is certified and recorded it shall impart notice of the contents from the time of filing. Certainly; but this is to be understood in the sense that the deed is rightly recorded, and the contents correctly spread upon the record. A person, in the examination of titles first searches the records; and if he finds nothing there, he looks to see if any instruments are filed and not recorded. If nothing is found, and he has no actual notice, so far as he is concerned, the land is unincumbered. If he finds a conveyance, he goes no further; he never institutes an inquiry to find whether the deed is correctly recorded or the contents literally transcribed. Indeed, to attempt to prosecute such a search would be idle and nugatory. Grantees do not usually leave their deeds lying in the recorder's office for the inspection of the public. After they are recorded, they take them out and keep them in their possession. In a large majority of cases it would not only entail expense and trouble, but it would be useless, to attempt to get access to the original papers. It never was intended to im-

In some cases, these principles seem to have sometimes been taken into consideration to determine whether or not the index is an essential part of the record.[1]

The prevalence of the one or the other of these doctrines will, of course, determine the question as to whom the recording officer will be liable for loss suffered by reason of his neglect in recording an instrument.[2]

V. The Persons Protected by the Recording Acts—1. Who Are Protected—*a.* In General.—The word purchaser, as used in the recording acts, is not employed in its broadest sense, including every person who acquires land otherwise than by descent; but in its more restricted vernacular sense, whereby it is signified that the acquisition was upon a valuable consideration.[3] In some

ose upon the purchaser the burden of ntering into a long and laborious earch to find out whether the recorder ad faithfully performed his duty. The bligation of giving the notice rests on e party holding the title. If he fails his duty, he must suffer the conseuences. If his duty is but imperfectly erformed, he cannot claim all the adintages and lay the fault at the door an innocent purchaser. Hard and ncertain would be the fate of subseuent purchasers if they could not rely on the records, but must be under e necessity, before they act, of tracg up the original deed to see that it is rrectly recorded.

"But it is said the recorder is required give bond for the faithful performce of all the duties enjoined on him law, and that this is for the benefit the subsequent purchaser who is inred by his dereliction, and that he must rsue his remedy against the recorder. his bond is for the benefit of any and ery person who may suffer injury by ason of the recorder's neglect to thfully discharge the duties of his ice. It was not Terrell in this case, o was injured; it was Andrew county e grantee in the instrument). The unty deposited the deed with the corder, and paid him for recording it. rough his negligence and inattention did his work inaccurately, so that it parted notice for only half the conleration, and the county suffered loss d injury in consequence thereof. e privity springs and exists between county and the recorder, and the unty is the proper party to proceed inst him to recover the loss."

In regard to the provision of the tute that the record shall be effectual to import notice from the time of filing the instrument with the recorder for record, the court in Miller *v.* Bradford, 12 Iowa 14, by Wright, J. said: "This statute, in our opinion, was only intended to fix the time from which notice to subsequent purchasers was to commence, and not to make such filing or depositing notice of the contents after the same was recorded. After the record of the deed, the record itself is the constructive notice of its contents, and it never was the intention of the legislature to hold a subsequent purchaser, buying after the recording, bound by the contents of a deed, ever so improperly and incorrectly recorded, because at some time a deed correct in the description of the property was filed with the recorder."

1. See Schell *v.* Stein, 76 Pa. St. 398; 18 Am. Rep. 416; Mutual L. Ins. Co. *v.* Dake, 87 N. Y. 257. But see *supra*, this title, *Indexing*.

2. See Public Officers, vol. 19, p. 461, n. 3; Cooley on Torts 384, *et seq.*

And when the grantee in the instrument is protected in accordance with the first-stated rule, the persons who can claim that they have suffered loss by reason of the failure of the recorder to enroll a conveyance prior to theirs will be determined by the principles stated *infra*, this title, under *The Persons Protected by the Recording Acts*.

3. Morris *v.* Daniels, 35 Ohio St. 406; Spielmann *v.* Kliest, 36 N. J. Eq. 199. See Purchase, vol. 19, p. 571.

Tenant in Common Taking by Partition.—A tenant in common whose interest becomes severed by partition is a purchaser of the interests of his co-tenants in the lands set apart for him.

States the term is by statute defined to mean every person to whom an estate or interest in land shall be conveyed; and also every assignee of a mortgage, lease, or other conditional estate.[1]

b. MORTGAGEE, TRUSTEE IN DEED OF TRUST, AND ASSIGNEE OF MORTGAGE.—A mortgagee,[2] or a trustee in deed of trust,[3]

Campan *v.* Barnard, 25 Mich. 381; Tharp *v.* Allen, 46 Mich. 389.

Member of Partnership. — Where property is put into the capital stock of a partnership by one partner, the other partner will stand in the attitude of a purchaser to the extent of his rights as a partner. Ringo *v.* Wing, 49 Ark. 457.

A mortgage executed by a member of a firm to his co-partner to secure advances made by the latter over and above his due proportion, gives a priority of lien over a prior unrecorded mortgage executed to a person not a member of the firm. Brazleton *v.* Brazleton, 16 Iowa 417.

Purchaser of Chose in Action.—A title by purchase from a mortgagor of a chose in action or fund, that represents mortgaged personal property, takes precedence of the titles under the mortgage to property which is represented by such fund, where the mortgage had never been recorded. Garland *v.* Plummer, 72 Me. 397.

Trespasser.—The term "purchaser" will not, of course, include mere trespassers, or persons obtaining possession of property by some wrongful act.

The recording of a chattel mortgage need not be alleged in an action by the mortgagee for the recovery of the mortgaged goods, which the defendant wrongfully took from the possession of the mortgagor while they were in his custody. Moses *v.* Walker, 2 Hilt. (N. Y.) 536.

A mere trespasser who is defendant in a petitory action cannot defeat a *prima facie* title made out by the plaintiff on the ground of the non-registry of such title. Coucy *v.* Cummings, 12 La. Ann. 748.

1. Stim. Am. Stat. L., § 1552; *Michigan* Stats., Howell's Ann., § 5688; *Minnesota*, Gen. Stats. 1878, ch. 40, § 25; *Nebraska*, Comp. Stats. 1881. pt. 1. ch. 73, § 45; 2 *New York* Rev. Stats., ch. 3, § 37; *Wisconsin*, Rev. Stats. 1878, § 2242; *Wyoming*, Rev. Stats. 1887, § 23.

2. Bailey *v.* Crim, 9 Biss. (U. S.) 95; Cook *v.* Parham, 63 Ala. 456; Whelan *v.* McCreary, 64 Ala. 319; Fagason *v.* Edrington, 49 Ark. 207; Salter *v.* Baker, 54 Cal. 140; Porter *v.* Greene, 4 Iowa 571; Seevers *v.* Delashmutt, 11 Iowa 174; 77 Am. Dec. 139; Welton *v.* Tizzard, 15 Iowa 495; Hewitt *v.* Rankin, 41 Iowa 53; Patton *v.* Eberhart, 52 Iowa 67; Kessey *v.* McHenry, 54 Iowa 189; Jordan *v.* McNeil, 25 Kan. 459; Halbert *v.* McCulloch, 3 Metc. (Ky.) 456; 79 Am. Dec. 556; Stockton *v.* Craddick, 4 La. Ann. 282; Pierce *v.* Faunce, 47 Me. 507; Burns *v.* Berry, 42 Mich. 176; Pomet *v.* Scranton, Walk. (Miss.) 406; Keith, etc., Coal Co. *v.* Bingham, 97 Mo 196; Brophy Min. Co. *v.* Brophy, etc., Min. Co., 15 Nev. 101; Lavalette *v.* Thompson, 13 N. J. Eq. 274; McDowell *v.* Lockhart, 93 N. Car. 191; Martin *v.* Jackson, 27 Pa. St. 504; 67 Am. Dec. 489; Hulett *v.* Mutual L. Ins. Co., 114 Pa. St. 142; Haynsworth *v.* Bischoff, 6 S. Car. 159; Bass *v.* Wheless, 2 Tenn. Ch. 531; Moore *v.* Walker, 3 Lea (Tenn.) 656; Huffman *v.* Blum, 64 Tex. 334; Steffian *v.* Milmo Nat. Bank, 69 Tex. 513; Singer Mfg. Co. *v.* Chalmer, 2 Utah 542; Weinburg *v.* Rempe, 15 W. Va. 829. See James *v.* Morey, 2 Cow. (N. Y.) 247; MORTGAGES, vol 15, p. 819, n. 1. In Willoughby *v.* Willoughby, 1 T. R. 763, Lord Hardwicke said: "When I speak of a purchaser for a valuable consideration, I include a mortgagee, for he is a purchaser *pro tanto*." That the statutes make the mortgagor the holder of the legal title will not affect the rule. Porter *v.* Greene, 4 Iowa 571.

A power in a mortgage to sell the land and pay the debt is part of the security and an interest in the land; and, as such, is protected by the statute against a prior unregistered deed. Bell *v.* Twilight, 22 N. H. 200.

3. Kesner *v.* Triggs, 98 U. S. 50; Sheffey *v.* Bank of Lewisburg, 33 Fed. Rep. 315; Gerson *v.* Pool, 31 Ark. 85; Fargason *v.* Edrington, 49 Ark. 207; Schumpert *v.* Dillard, 55 Miss. 348; Wickham *v.* Martin, 13 Gratt. (Va.) 427.

nless he be a trustee for the benefit of creditors generally,[1] is a urchaser, as the term is used in the recording acts.[2]

The assignee of a mortgage has been declared to come within he proper construction of the word purchaser.[3] And, in some tates, the statutory definition of the term expressly mentions ssignees of mortgages.[4]

c. CREDITORS.—The term purchaser undoubtedly presupposes he acquisition of some direct interest in the subject of at least uch force as is obtained by way of lien, and therefore does not omprehend mere general creditors.[5] And, since a creditor who as obtained a lien on the property of the debtor by attachment, udgment, or levy of execution, is regarded as acquiring only the ights which the debtor had, *i. e.*, that whatever rights he obtains re got under and not through his debtor,[6] and advances no new onsideration,[7] such creditor will not thereby be brought within he meaning of the term, and the failure to record will not invalidate an instrument as to a subsequent attachment, judgment, or xecution creditor.[8]

1. Webb on Rec. Tit., § 210. See *ifra*, this title, *Creditors*, n. 5.

2. 2 Min. Inst. 876.

3. Hayden *v.* Drury, 3 Fed. Rep. 782; urns *v.* Berry, 42 Mich. 176; Mott *v.* lark, 9 Pa. St. 399. *Compare* Hoyt . Hoyt, 8 Bosw. (N. Y.) 524.

4. See *supra*, this title, *Who are rotected*, n. 1, p. 576: Westbrook *v.* leason, 79 N. Y. 23; Decker *v.* Boice, 3 N. Y. 215; Smyth *v.* Knickerbocker . Ins. Co., 84 N. Y. 589.

5. 2 Min. Inst. 875–876; Stewart *v.* eale, 7 Hun (N. Y.) 405; *aff'd* in 68 . Y. 629. See DEBTOR AND CREDITR, vol. 5, p. 180, n. 9.

6. See ATTACHMENT, vol. 1, p. 930, otes 7 & 8; Brown *v.* Pierce, 7 Wall. J. S.) 205; Baker *v.* Morton, 12 Wall. J. S.) 150; Holden *v.* Garrett, 23 an. 98; English *v.* Law, 27 Kan. 242; ush *v.* Bush, 33 Kan. 550; Banning *v.* des, 6 Minn. 402; Rodgers *v.* Bonner, N. Y. 379; Blankenship *v.* Douglas, Tex. 228; 82 Am. Dec. 608.

7. See Norton *v.* Williams, 9 Iowa 8; Holden *v.* Garrett, 23 Kan. 98; aze *v.* Arper, 6 Minn. 220; Thomas Kelsey, 30 Barb. (N. Y.) 268; Fary *v.* McAlister, 39 Tex. 602; *infra*, is title, *What Persons Protected—Who Pay Valuable Consideration.*

8. **Attaching Creditors.** — Plant *v.* nyth, 45 Cal. 161; Le Clert *v.* Oullan, 52 Cal. 252; Shirk *v.* Thomas, 1 Ind. 147; Norton *v.* Williams, 9 wa 528; Savery *v.* Browning, 18 wa 246; First Nat. Bank *v.* Hayzlett, 40 Iowa 659; Moorman *v.* Gibbs, 75 Iowa 537; North Western Forwarding Co. *v.* Mahaffey, 36 Kan. 152; Burke *v.* Johnson, 37 Kan. 337; Greenleaf *v.* Edes, 2 Minn. 264; Stilwell *v.* McDonald, 39 Mo. 282; Potter *v.* McDowell, 43 Mo. 93; Reed *v.* Ownby, 44 Mo. 204; Sappington *v.* Oeschli, 49 Mo. 244; Hackett *v.* Callender, 32 Vt. 97. See *supra*, this title, *Statutory Instruments Relating to Judicial Proceedings*, note 4, p. 542.

Under a statute declaring unrecorded grants of real estate void as against "a purchaser or incumbrancer, who in good faith, and for a valuable consideration, acquires a title or lien by an instrument that is first recorded, "it was held that a writ of attachment is not an instrument within these terms; and, therefore, a deed, executed prior to the levy of attachment upon the property conveyed, though not recorded until after the levy, will prevail over the attachment. Hoag *v.* Howard, 55 Cal. 564; Morrow *v.* Graves, 77 Cal. 218.

Judgment Creditors.—Burn *v.* Burn, 3 Ves. 582; Finch *v.* Winchelsea, 1 P. Wms. 277; Brace *v.* Marlborough, 2 P. Wms. 491; Apperson *v.* Burgett, 33 Ark. 328; Pixley *v.* Huggins, 15 Cal. 127; Scott *v.* McMurran, 7 Blackf. (Ind.) 284; Orth *v.* Jennings, 8 Blackf. (Ind.) 420; Runyan *v.* McClellan, 24 Ind. 165; Bell *v.* Evans, 10 Iowa 353; Seevers *v.* Delashmutt, 11 Iowa 174; 77 Am. Dec. 139; Welton *v.* Tizzard,

But by the terms of the statutes in some States their protection is extended to creditors.[1] Yet, unless otherwise compelled by the express provisions of these statutes, the protection given against unrecorded conveyances will be limited to such creditors as have effected a lien on the conveying debtor's property by attachment, judgment, or otherwise, before the recordation of the prior conveyance.[2] It cannot be maintained that the lien

15 Iowa 495; Churchill *v.* Morse, 23 Iowa 229; Goodenough *v.* McCoid, 44 Iowa 659; Phelps *v.* Fockler, 61 Iowa 340; Sigworth *v.* Meriam, 66 Iowa 477; Holden *v.* Garrett, 23 Kan. 98; Righter *v.* Forrester, 1 Bush (Ky.) 278; Morton *v.* Robards, 4 Dana (Ky.) 258; Dunwell *v.* Bidwell, 8 Minn. 34; Money *v.* Dorsey, 7 Smed. & M. (Miss.) 15; Kelly *v.* Mills, 41 Miss. 267; Walton *v.* Hargroves, 42 Miss. 18; 97 Am. Dec. 429; Davis *v.* Owenby, 14 Mo. 170; 55 Am. Dec. 105; Valentine *v.* Havener, 20 Mo. 133; Potter *v.* McDowell, 43 Mo. 93; Black *v.* Long, 60 Mo. 181; Galway *v.* Malchou, 7 Neb. 285; Harral *v.* Gray, 10 Neb. 186; Herbert *v.* Building, etc., Assoc., 17 N. J. Eq. 497; 90 Am. Dec. 601; Schmidt *v.* Hoyt, 1 Edw. Ch. (N. Y.) 652; Thomas *v.* Kelsey, 30 Barb. (N. Y.) 268; Jackson *v.* Dubois, 4 Johns. (N. Y.) 216; Schroeder *v.* Gurney, 73 N. Y. 430; Bank of Muskingum *v.* Carpenter, 7 Ohio 21; 28 Am. Dec. 616; Tousley *v.* Tousley, 5 Ohio St. 78; Lake *v.* Doud, 10 Ohio 415; Heister *v.* Fortner, 2 Binn. (Pa.) 40; 4 Am. Dec. 417; Rodgers *v.* Gibson, 4 Yeates (Pa.) 111; Cover *v.* Black, 1 Pa. St. 493; Watson *v.* Willard, 9 Pa. St. 95; Coleman *v.* Bank of Hamburg, 2 Strobh. Eq. (S. Car.) 285; 49 Am. Dec. 671. See also Carraway *v.* Carraway, 27 S. Car. 576; JUDGMENTS, vol. 12, p. 111, n. 4.

In *California* it is decided that the lien of a judgment is not a conveyance within the meaning of the registry acts. Wilcoxson *v.* Miller, 49 Cal. 193.

But in *Ohio* cases decided later than those above cited, the rule has been established by weight of decisions that the general lien of a subsequent judgment will have preference over a prior unrecorded instrument, yet, in some of these cases the rule is not approved upon principle, and is only adhered to from the force of decisions. Mayham *v.* Coombs, 14 Ohio 428; Jackson *v.* Luce, 14 Ohio 514; Holliday *v.* Franklin Bank, 14 Ohio 533; White *v.* Denman, 1 Ohio St. 110; Fosdick *v.* Barr, 3 Ohio St. 471.

Execution Creditors.—Holden *v.* Garrett, 23 Kan. 66. There is no appreciable distinction between an attachment and a levy of an execution or a judgment lien, except that which results from the amount of expense incurred in the latter proceedings, and such expense cannot be regarded as placing the creditor in the situation of a *bona fide* purchaser. 1 Jones on Mortg., § 460, *citing* Hart *v.* Farmers' etc. Bank, 33 Vt. 252.

1. In some States unrecorded deeds are declared void as against "creditors:" *Dist. of Columbia*, *North Carolina*, *South Carolina*, Rev. Stats., 1873, p. 422, § 1. In other States the term "all creditors" is used: *Delaware*, *Florida*, *Illinois*, *Kentucky*, *Mississippi* (by Rev. Code, 1880, § 1212), *Nebraska*, *Tennessee*, *Texas* (by Rev. Stats., § 4332), *Virginia* (by Code 1873, ch. 114, § 5).

2. Jones on Chat. Mortg., § 245; Simon *v.* Openheimer, 20 Fed. Rep. 553; Ohio L. Ins. Co. *v.* Ledyard, 8 Ala. 866; Center *v.* Planters', etc., Bank, 22 Ala. 743; Hardaway *v.* Semmes, 38 Ala. 657; Martin *v.* Dryden, 6 Ill. 187; McFadden *v.* Worthington, 45 Ill. 362; Dixon *v.* Doe, 1 Smed. & M. (Miss.) 70; Pickett *v.* Banks, 11 Smed. & M. (Miss.) 445; Nugent *v.* Priebatsch, 61 Miss. 402; Ransom *v.* Schmela, 13 Neb. 77; Thompson *v.* Van Vetchen, 27 N. Y. 568; Jones *v.* Graham, 77 N. Y. 628; Stewart *v.* Beale, 7 Hun (N.Y.) 405; 68 N. Y. 629; Niagara Co. Bank *v.* Lord, 33 Hun (N. Y.) 557; Martin *v.* Rothschild, 42 Hun (N. Y.) 410; Button *v.* Rathbone, 43 Hun (N. Y.) 147; Mellon's Appeal, 32 Pa. St. 121; King *v.* Fraser, 23 S. Car. 543; Chester *v.* Greer, 5 Humph. (Tenn.) 26; Ayres *v.* Duprey, 27 Tex. 593; 86 Am. Dec. 657; Grace *v.* Wade, 45 Tex. 527; McKeen *v.* Sultenfuss, 61 Tex. 325; Overstreet *v.* Manning, 67 Tex. 657. See JUDGMENTS, vol. 12, p. 111, n. 5.

of a judgment will attach to only those interests which the debtor still actually has; for it will attach to all interests which appear from the records to be in the judgment debtor.[1]

d. PURCHASER AT EXECUTION SALE.—Even though judgment and other lien creditors do not receive the protection which the recording acts give to purchasers, it is settled by the weight of authority that a purchaser at an execution sale, founded on the judgment of such creditor, is within the meaning of the term purchasers, as it is employed in the recording acts, and will receive their protection from the date of his purchase.[2] And it is, of course, indisputable that, when the statutes include judgment creditors within their protection, a purchaser at the execution sale must also be secured against prior unrecorded conveyances.[3] And this is so even if the judgment creditor himself should be

In *Arkansas*, *Colorado*, *Minnesota* and *New Jersey*, the statutes, in terms, apply to "judgment creditors."

A judgment lien will prevail over a prior unrecorded mortgage, although it has been foreclosed and execution levied before the judgment was obtained. Richards *v.* Myers, 63 Ga. 762.

In *Wisconsin* it seems that when the mortgagee of chattels delays the filing of his mortgage at the request of the mortgagor, and in order that the credit of the latter may not be injured, he is estopped to assert such mortgage as against creditors who, after the execution of the mortgage and before its filing, gave credit to the mortgagor upon the faith that his property was unincumbered; and this is so although the mortgagee had no actual intent to defraud any creditor. Standard Paper Co. *v.* Guenther, 67 Wis. 101; Sanger *v.* Guenther, 73 Wis. 354.

1. Sash *v.* Hardick, 5 Dill. (U. S.) 105; Stevenson *v.* Texas etc. R. Co., 105 U. S. 703; 12 Am. & Eng. R. Cas. 393; Simon *v.* Openheimer, 20 Fed. Rep. 553; Massey *v.* Westcott, 40 Ill. 160; Welles *v.* Baldwin, 28 Minn. 408; Catlin *v.* Bennatt, 47 Tex. 165.

2. Barker *v.* Bell, 1 Ala. Sel. Cas. 75; Smith *v.* Randall, 6 Cal. 47; 65 Am. Dec. 475; Hunter *v.* Watson, 12 Cal. 363; 73 Am. Dec. 543; Pixley *v.* Huggins, 15 Cal. 128; Doe *v.* Hall, 2 Ind. 556; 54 Am. Dec. 460; Lee *v.* Bermingham, 30 Kan. 312; Atwood *v.* Bearss, 45 Mich. 469; Draper *v.* Bryson, 26 Mo. 108; 69 Am. Dec. 483; Den *v.* Richman, 13 N. J. L. 43; Jackson *v.* Town, 4 Cow. (N. Y.) 599; 15 Am. Dec. 405; Jackson *v.* Chamberlin, 8 Wend. (N. Y.) 625; Scribner *v.* Lockwood, 9 Ohio 184; Hibberd *v.* Bovier, 1 Grant's Cas. (Pa.) 266; Heister *v.* Fortner, 2 Binn. (Pa.) 40; 4 Am. Dec. 417; Kauffelt *v.* Bower, 7 S. & R. (Pa.) 64; Morrison *v.* Funk, 23 Pa. St. 421; Wilson *v.* Shoenberger, 34 Pa. St. 121; Leger *v.* Doyle, 11 Rich. (S. Car.) 109; McKnight *v.* Gordon, 13 Rich. Eq. (S. Car.) 222; 94 Am. Dec. 164; Herring *v.* Cannon, 21 S. Car. 212; 53 Am. Rep. 661; Ehle *v.* Brown, 31 Wis. 405; Girardin *v.* Lampe, 58 Wis. 267.

In *Mississippi* it is denied that one purchasing at an execution sale is within the meaning of the term purchaser; it is held that a purchaser at a sheriff's sale, like every other assignee by act and operation of law, only takes the interest of the debtor. Kelly *v.* Mills, 41 Miss. 267; Nugent *v.* Pnebatsch, 61 Miss. 402. Dr. Minor, the eminent commentator upon the common and statute law of *Virginia*, in defining who are purchasers within the policy of the registration statute, says: "Purchasers are understood to include all persons who, by contract, have acquired a direct interest in the subject, whether by way of lien, as by mortgage or deed of trust, or by absolute conveyance in contradistinction to creditors, who are persons claiming debts and demands, and have either no lien at all on the property in question, or one arising by act of law (*e. g.*, by judgment, etc.) and not by contract." 2 Min. Inst. 875, 876.

3. Stevenson *v.* Texas, etc., R. Co., 105 U. S. 703; 12 Am. & Eng. R. Cas. 393; Taylor *v.* Doe, 13 How. (U. S.) 287; McNitt *v.* Turner, 16 Wall. (U. S.) 352; Newman *v.* Davis, 24 Fed. Rep. 609; Ohio L. Ins. Co. *v.* Ledyard,

the purchaser.[1] Some courts have gone so far as to hold that, even in the absence of such statute, the judgment creditor purchasing at the execution sale is comprehended by the term purchaser,[2] but this construction of the term has been denied.[3]

e. PURCHASER AT BANKRUPT SALE.—It would seem that the general rule protecting an execution purchaser would apply to a purchaser at bankrupt sale, and it has been held that a person purchasing at such sale will be protected against a prior unrecorded conveyance made by the bankrupt.[4] But, as has been said, the assignee in bankruptcy succeeds to those rights only which the debtor can himself assert,[5] and some courts, by applying the rule of *caveat emptor* to bankrupt sales, have decided that the purchaser takes the property subject to all the claims that might have been enforced against the bankrupt.[6]

2. What Persons Protected—*a.* IN GENERAL.—The purchasers for whose benefit the recording acts were designed, are

8 Ala. 866; Nugent *v.* Pnebatsch, 61 Miss. 402; Herring *v.* Cannon, 21 S. Car. 212; 53 Am. Rep. 661; Ayres *v.* Duprey, 27 Tex. 593; 86 Am. Dec. 657; Wallace *v.* Campbell, 54 Tex. 87; Grace *v.* Wade, 45 Tex. 522; Holmes *v.* Buckner, 67 Tex. 107.

1. It is as Mr. Devlin says: "In those States where the judgment lien is entitled to precedence over an unrecorded deed or incumbrance, this question" (whether the judgment creditor purchasing at the execution sale is a "purchaser") "cannot arise. If the lien of the judgment is superior, so must be the title acquired by virtue of a sale under the judgment." 1 Dev. on Deeds, § 642.

2. Hunter *v.* Watson, 12 Cal. 363; 73 Am. Dec. 543; Foorman *v.* Wallace, 75 Cal. 552; Halloway *v.* Platner, 20 Iowa 121; 89 Am. Dec. 517; Gower *v.* Doheney, 33 Iowa 36; Butterfield *v.* Walsh, 36 Iowa 534; Cooley *v.* Wilson, 42 Iowa 425; Waldo *v.* Russell, 5 Mo. 387; Wood *v.* Chapin, 13 N. Y. 509; 67 Am. Dec. 62; Barto *v.* Tompkins Co. Nat. Bank, 15 Hun (N. Y.) 11. And see opinion of Dillon, J., in Vannice *v.* Bergen, 16 Iowa 555, and Evans *v.* McGlasson, 18 Iowa 150.

In *Indiana* this rule was established by a divided court in Rooker *v.* Rooker, 75 Ind. 571, and reluctantly followed in Vititio *v.* Hamilton, 86 Ind. 137; but these cases were overruled in Shirk *v.* Thomas, 121 Ind. 147.

3. Shirk *v.* Thomas, 121 Ind. 147; McClenaghen *v.* McClenaghen, 1 Strobh. Eq. (S. Car.) 295; 47 Am. Dec. 534; Ayers *v.* Duprey, 27 Tex. 593; 86 Am. Dec. 657.

And, since the judgment lien only binds the interests which the judgment debtor has not previously conveyed (see *supra* this title, *Creditors*), the ground upon which the purchaser at the sheriff's sale, who is also the plaintiff in the execution to whom the proceeds are payable, can be placed within the protection given to purchasers is not easily perceived; for the creditor is in no more unfavorable position after, than he was before the sale at which he takes a sheriff's deed, without advancing any new consideration. That rule certainly seems untenable, in view of the requirement of a purchaser that he pay a new consideration. See *infra*, this title, *What Person Protected—Who Pay Valuable Consideration.* 1 Dev. on Deeds, § 642; McClenaghen *v.* McClenaghen, 1 Strobh. Eq. (S. Car.) 295; 47 Am. Dec. 532.

4. Holbrook *v.* Dickenson, 56 Ill. 497.

5. See *supra*, this title, *Effect of Failure to Record—As to the Parties*, notes 2 and 3, p. 570.

6. Webb. on Rec. Tit., p. 341, n. 3, *citing* Bump on Bank'cy (9th ed.), 471, 484; McKiernan *v.* Fletcher, 2 La. Ann. 438; Baker *v.* Vining, 30 Me. 121; 50 Am. Dec. 617; Anderson *v.* Miller, 7 Smed. & M. (Miss.) 589; Renick *v.* Dawson, 55 Tex. 102; Fletcher *v.* Ellison, 1 Tex. Un. Cas. 661.

after purchasers[1] of the same property[2] from the same

1. Coffin *v.* Ray, 1 Met. (Mass.) 212; Deeley *v.* Dwight, 11 N. Y. Supp. 60; Grandin *v.* Anderson, 15 Ohio St. 286. The statutes of many States make use of the terms "subsequent purchasers" and "subsequent creditors." Stim. Am. Stat. L., § 1611; Webb on Rec. Tit., § 194.

2. The purchaser must of course be one who purchases the same object or tract of land. Bazemore *v.* Davis, 55 Ga. 504; Harman *v.* Oberdorfer, 33 Gratt. (Va.) 497. But the expression "same property" need not be limited to its concrete meaning, but also comprehends the right or interest which may be obtained in a thing. This is exemplified in the cases which consider one claiming under a quitclaim deed as not being within the protection of the recording acts.

Purchaser Under Quitclaim Deed.—The grantee under a quitclaim deed, where a quitclaim deed is considered as conveying only the title which is actually in the grantor, has, in a great number of well considered cases, been treated as manifestly a purchaser of only the interest remaining in his grantor at the time of his purchase, acquiring nothing at all if the grantor has previously transferred his title to another, and therefore not entitled to the protection which the recording acts only extend to purchasers of the same property. Dodge *v.* Briggs, 27 Fed. Rep. 160; Walker *v.* Miller, 11 Ala. 1067; Smith *v.* Mobile Bank, 21 Ala. 125; Derrick *v.* Brown, 66 Ala. 92; Snow *v.* Lake, 20 Fla. 656; 51 Am. Rep. 625; Bragg *v.* Paulk, 42 Me. 502; Nash *v.* Bean, 74 Me. 340; McAdow *v.* Black, 6 Mont. 601; Richards *v.* Snyder, 11 Oregon 511; Baker *v.* Woodward, 12 Oregon 3; American Mortg. Co. *v.* Hutchinson, 19 Oregon 334; Rogers *v.* Burchard, 34 Tex. 441; 7 Am. Rep. 283; Harrison *v.* Boring, 7 Tex. 255; Richardson *v.* Levi, 67 Tex. 359. See Adams *v.* Cuddy, 13 Pick. (Mass.) 460; 25 Am. Dec. 330. There are also numerous *dicta* to the same effect in cases decided in the United States Supreme Court. Oliver *v.* Piatt, 3 How. (U. S.) 333; May *v.* Le Claire, 11 Wall. (U. S.) 217; Alexander *v.* Rodriguez, 12 Wall. (U. S.) 3. See also De Veaux *v.* Fosbender, 7 Mich. 579, in which case the court was equally divided.

And in *Illinois* it has been held that if the words used in a quitclaim deed indicate an intention on the part of the grantor to pass only such land as he owns at the time of its execution, the land embraced in a prior valid deed will be considered to be reserved from its operation, and will not pass thereby, although the prior deed remains unrecorded. Hamilton *v.* Doolittle, 37 Ill. 473.

In *Minnesota* this question has received thorough consideration under a statute declaring that "a deed of quitclaim and release, of the form in common use, shall be sufficient to pass all the estate which the grantor could lawfully convey by deed of bargain and sale." In construing this statute in Martin *v.* Brown, 4 Minn. 282, the court by Emmett, C. J., said: "If the legislature intended, by the use of the term 'lawfully convey,' to limit the estate conveyed, to such as the grantor has a legal right to convey, then, as he may not lawfully convey land which he has already conveyed to another, but may release any real or fancied interest remaining in him, nothing passes beyond his actual interest at the time of the conveyance, whatever that may be. When, therefore, a person relies on a mere quitclaim of the interest which a party may have in property, he does so at his peril, and must see to it that there is an interest to convey. He is presumed to know what he is purchasing, and takes his own risk." Therefore a quitclaim deed, recorded, does not affect the interest or estate passed by a prior unrecorded deed by the same grantor to another grantee. In Marshall *v.* Roberts, 18 Minn. 405; 10 Am. Rep. 201, the court by Berry, J., said: "These provisions" (those of the registration acts), "as will appear from a moment's reflection, so far from militating against the views expressed in the cases cited" (Martin *v.* Brown, 4 Minn. 282, etc.), "come to their aid, since it is only the purchaser of the same real estate, or any portion thereof, who, by his priority of record, cuts out the title of a prior purchaser. For when the second purchaser obtains by his quitclaim deed only what his grantor had (his grantor's right, title, and interest), at the time when such deed was made, he is not a purchaser of the same real estate (or any part

grantor,[1] and who would suffer loss by reason of the prior conveyance.[2]

Analogous to the rule that the subsequent purchaser must be one purchasing from the same grantor is the proposition that

thereof) which his grantor had previously conveyed away, and therefore no longer has."

But in 1875 this rule was changed by statute, so that a quitclaim deed may be placed on the same footing as deeds of bargain and sale. Strong *v.* Lynn, 38 Minn. 315.

But in another line of cases it is held that the recording acts make no distinction between quitclaims and other deeds, and that a quitclaim deed in the hands of a *bona fide* purchaser will prevail over a prior unrecorded deed. White *v.* McGarry, 2 Flip. (U. S.) 572; Brown *v.* Banner Coal, etc., Co., 97 Ill. 214; 37 Am. Rep. 105; Chapman *v.* Sims, 53 Miss. 163; Fox *v.* Hall, 74 Mo. 315; 41 Am. Rep. 316; Willingham *v.* Hardin, 75 Mo. 429; Boogher *v.* Neece, 75 Mo. 383; Munson *v.* Ensor, 94 Mo. 504; Snowden *v.* Tyler, 21 Neb. 199; Mart. on Conv., §§ 59, 285; article by Mr. Martindale in 12 Cent. L. J. 127, *et seq;* 1 Dev. on Deeds, § 673. But see the comment on the case of Snowden *v.* Tyler, 21 Neb. 199, in Hastings *v.* Nissen, 31 Fed. Rep. 597, where the court by Brewer, J., denies that that case is authoritative of the above proposition. The court says: "The settled law of the Supreme Court of the *United States* is that one who takes by simply a quitclaim deed is not a *bona fide* purchaser without notice. While the question presented is one of local law, in which the Federal Courts follow the settled rule of the Supreme Court of the State, the Supreme Court of *Nebraska* has never directly decided contrary to the rule of the *United States* Supreme Court."

In *California*, it is held that quitclaim deeds come within the statutory definition of the term "conveyance," and, as the recording acts in terms extend their protection to conveyances, their provisions are as applicable to quitclaim deeds as to other deeds. Graff *v.* Middleton, 43 Cal. 341; Frey *v.* Clifford, 44 Cal. 335. See comments on these cases in Allison *v.* Thomas, 72 Cal. 562; 1 Am. St. Rep. 89; Cutler *v.* James, 64 Wis. 173; 54 Am. Rep. 603. In Allison *v.* Thomas, 72 Cal. 562; 1 Am. St. Rep. 89, the court by Temple, J., said: "Unless these cases are justified by the peculiar wording of the statute, they seem to be against the decisions elsewhere upon the subject. It has been uniformly held that a conveyance of the right, title and interest of the grantor vests in the purchaser only what the grantor himself could claim, and the covenants in such deed, if there were any, were limited to the estate described. This construction is in accord with the obvious meaning of the language. The grantee in such a deed necessarily takes only what the grantor then had and subject to all defects and equities which then could have been asserted against the grantor. To this rule this court has made an exception founded upon the recording act, and still another has been recognized in reference to sales made by the sheriff under execution."

Although a purchaser at a sheriff's sale receives only a quitclaim deed, the general rule is that he is protected by the recording acts. Roberts *v.* Bourne, 23 Me. 165; 39 Am. Dec. 614. See Morris *v.* Daniels, 35 Ohio St. 406. See *supra*, this title, *Who are Protected — Purchaser at Execution Sale.*

The doctrine that one who claims under a quitclaim deed will not be protected against a prior unrecorded deed must be limited to the strict sense of that technical species of conveyance. If from the terms of the deed, the adequacy of the price paid, or other circumstances, it appears that the grantor intended to convey, and the grantee expected to be invested with, a fee simple title or other particular estate, the purchaser will be entitled to protection. Webb Rec. Tit., §§ 27, 183; Van Rensselaer *v.* Kearney, 11 How. (U. S.) 298; Flagg *v.* Mann, 2 Sumn. (U. S.) 487; Sweet *v.* Green, 1 Paige (N. Y.) 473; 19 Am. Dec. 442; Harrison *v.* Boring, 44 Tex. 255; Taylor *v.* Harrison, 47 Tex. 454; 26 Am. Dec. 304.

1. Long *v.* Dollarhide, 24 Cal. 218; Smith *v.* Williams, 44 Mich. 240; Sessions *v.* Reynolds, 7 Smed. & M. (Miss.) 130.

2. Poett *v.* Stearns, 31 Cal. 78.

the creditors referred to, in some of the statutes, are creditors of the grantor in the unrecorded instrument.[1] But the rule does not restrict the operation of the recording acts to immediate purchasers from the grantor; the recording acts apply as well to mediate purchasers deriving their title from him through mesne conveyances.[2] So, a purchaser from the grantor's heir will be preserved against an unrecorded instrument executed by the grantor.[3] But of course this will not protect a claim against

1. Webb on Rec. Tit., § 195; Pierce *v.* Turner, 5 Cranch (U. S.) 154; Magniac *v.* Thompson, 7 Pet. (U. S.) 348; Whittington *v.* Doe, 9 Ga. 23; Dwight *v.* Scranton, etc., Lumber Co., 67 Mich. 507; Chaffee *v.* Halpin, 62 Miss. 1; Morgan *v.* Elam, 4 Yerg. (Tenn.) 375; Baldwin *v.* Baldwin, 2 Humph. (Tenn.) 476.

2. Fallas *v.* Pierce, 30 Wis. 443; Hooker *v.* Pierce, 2 Hill (N. Y.) 650; Dillingham *v.* Bolt, 37 N. Y. 198; Hawley *v.* Bennett, 5 Paige (N. Y.) 111; Ledyard *v.* Butler, 9 Paige (N. Y.) 132.

3. **Purchaser From Grantor's Heir.**—Chadwick *v.* Turner, L. R., 1 Ch. 310; Kennedy *v.* Northrup, 15 Ill. 148; Rupert *v.* Mark, 15 Ill. 540; Earle *v.* Fiske, 103 Mass. 491, commented on in 12 Alb. L. J. 117; Burns *v.* Berry, 42 Mich. 176; Youngblood *v.* Vastine, 46 Mo. 239; 2 Am. Rep. 509, *overruling* Caldwell *v.* Head, 17 Mo. 561 and McCamant *v.* Patterson, 39 Mo. 110; Whittemore *v.* Bean, 6 N. H. 47; Powers *v.* McFerran, 2 S. & R. (Pa.) 44; Harris *v.* Arnold, 1 R. I. 125; McCulloch *v.* Endaly, 3 Yerg. (Tenn.) 346; Newton *v.* Taylor, 47 Tex. 454; Holmes *v.* Johns, 56 Tex. 41. See *dictum* to this effect in Zimpleman *v.* Robb, 53 Tex. 274.

But it has been held in some cases that the statutes will not warrant an interpretation which will place the grantee of the heir within the statutes so as to protect him against the ancestor's grantee who claims under an unrecorded instrument. Hill *v.* Meeker, 24 Conn. 211; Webb *v.* Wilcher, 33 Ga. 565; Ralls *v.* Graham, 4 T. B. Mon. (Ky.) 120; Hancock *v.* Beverly, 6 B. Mon. (Ky.) 531; Harlan *v.* Seaton, 18 B. Mon. (Ky.) 312. The reasoning by which these decisions are attempted to be supported is that, the ancestor having conveyed away all his interests in the property, the heir can take nothing by inheritance (see *supra*, this title, *Effect of Failure to Record, As to the Parties*, n. 5, p. 568) and, having no interest in the property previously conveyed, can convey no interest therein. But the insufficiency of such reasoning has been recognized even by courts which have applied the rule to the particular case under consideration. In Harlan *v.* Seaton, 18 B. Mon. (Ky.) 312, the court questions the wisdom of the rule, but yields to the doctrine of *stare decisis*. Nor should the fact that the heir obtains only the interest of the ancestor receive any weight in this matter. The effect of the recording acts is not, in any case, to keep an interest in the grantor until the instrument is recorded, which may be conveyed by a subsequent instrument, but simply avoids such unrecorded writing as to a subsequent one. See *supra*, this title, *Effect of Failure, As to Third Persons Comprehended by the Recording Acts*, n. 1, p. 572. It would seem that the recognition of the true principle upon which the recording acts operate, by an adherence to the plain language of the statute, will result in giving their protection to such purchasers from the grantor's heir. See Youngblood *v.* Vastine, 46 Mo. 239. In Harlan *v.* Seaton, 18 B. Mon. (Ky.) 312, the court by Simpson. J., said: "The heirs-at-law are as much the apparent owners of the land as the grantor was in his lifetime, and the protection of innocent purchasers being the evident object of the statute, it would seem to be just and reasonable, and not only consistent with, but promotive of, the legislative intention, to give it such a construction as would make it operate as a remedy for the whole evil, which was intended to guard against." The consideration which has induced some courts to hold that a purchaser under a quitclaim deed, who, by the very terms of this conveyance, takes only his grantor's right, title, and interest, cannot prevail over a prior grantee, namely: that he takes only that interest which his grantor has not previously conveyed,

some person who may, at some future day, become the owner by descent of certain premises, against an unrecorded conveyance or incumbrance of such premises.[1]

Many of the statutes limit their protection to purchasers in good faith. But, even though the statutes do not in terms demand good faith in the purchaser, they will be construed to intend to protect only *bona fide* purchasers.[2]

b. WITHOUT ACTUAL NOTICE OF PRIOR CONVEYANCE.—The recording acts have been enacted for the purpose of preventing fraud upon subsequent purchasers by placing the means of obtaining information of prior alienations within the reach of all persons contemplating the acquisition of some interest in certain lands or property. But if such prospective purchaser has actual notice of a prior conveyance of the property the necessity of recordation as to him is removed; for it cannot be said that a prior conveyance of which he has knowledge can be employed in fraud of him. On the contrary, it has been declared, at an early period in the history of the recording acts, that the taking of a conveyance with knowledge of a prior right, makes a person a *mala fide* purchaser.[3] And, although the policy of the doctrine

cannot apply to such purchaser from the grantor's heir, who intends to purchase, and. because of the silence of the records, has reason to believe that he will acquire the title to the inheritance. Holmes *v.* Johns, 56 Tex. 52; Wade on Notice, § 222; Webb on Rec. Tit., § 184. If, in jurisdictions where the above mentioned rule is in vogue, the purchaser from the heir takes a quit-claim deed, the result will, of course, be otherwise. Hastings *v.* Nissen, 31 Fed. Rep. 597; Rogers *v.* Burchard, 7 Alb. L. J. 69, 234.

1. Westervelt *v.* Voorhis, 42 N. J. Eq. 179; Voorhis *v.* Westervelt, 43 N. J. Eq. 642; 3 Am. St. Rep. 315.

2. Corey *v.* Alderman, 46 Mich. 540; Van Rensselaer *v.* Clark, 17 Wend. (N. Y.) 25; 31 Am. Dec. 280; Hooker *v.* Pierce, 2 Hill (N. Y.) 650; Brown *v.* Johnston, 7 Abb. N. Cas. (N. Y.) 188; Mitchell *v.* Aten, 37 Kan. 33; 1 Am. St. Rep. 231. See *infra*, this title, *Without Actual Notice of Prior Conveyance.*

See farther as to what constitutes a *bona fide* purchaser, BONA, vol. 2, p. 444; FRAUDULENT CONVEYANCES, vol. 8, p. 756, *et seq.*; FRAUDULENT SALES, vol. 8, p. 840, *et seq.*

3. In Le Neve *v.* Le Neve, Ambl. 436; 3 Atk. 646; 1 Ves. 64; L. C. Eq. 23, Lord Hardwicke said: "The ground of it is plainly this: That the taking of a legal estate after notice of a prior right, makes a person *mala fide* purchaser; and not that he is not a purchaser for a valuable consideration in every other respect. This is a species of fraud and *dolus malus* in itself; for he knew the first purchaser had the clear right of the estate, and after knowing that, he takes away the right of another person by getting the legal estate.

"If a person does not stop his hand, but gets the legal estate when he knew the right was in another, *machinatus ad circumveniendum.* It is a maxim, too, in our law, that *fraus et dolus nemini patrocinari debent.* Vide Co., 3 Rep. 78; 7 Rep. 38."

This idea of treating a subsequent purchase by a person having knowledge of a prior one as fraudulent has, in some early English cases, resulted in limiting the application of the doctrine of actual notice to a state of facts where notice is so direct and full as to render a subsequent purchase an act of positive fraud. Jolland *v.* Stainbridge, 3 Ves. Jr. 478; Hine *v.* Dodd, 2 Atk. 275; Davis *v.* Strathmore, 16 Ves. 419; Ford *v.* White, 16 Beav. 123; Chadwick *v.* Turner, L. R., 1 Ch. Div. 310; Sugd. on Vendors, ch. 16, §§ 5, 10; 1 Story Eq. Jur. § 398. "It has," says Sir William Grant, M. R., in Wyatt *v.* Barwell, 19 Ves. 439, "been much doubted whether courts ought ever to have suffered the question of notice to be agitated as against

has sometimes been questioned, the rule that actual notice to one before he becomes a complete purchaser will supply recordation has been generally established, either by the application of that equitable principle by the courts, or its declaration by statute.[1] It would seem that, where lien creditors are protected by the recording provisions, a creditor affected with notice of a prior conveyance before his lien attaches will take subject to

a party who has duly registered his conveyance; but they have said, 'We cannot permit fraud to prevail; and it shall only be in cases where the notice is so clearly proved as to make it fraudulent in the purchaser to take and register a conveyance in prejudice to the known title of another, that we will suffer the registered deed to be affected.'"

1. Webb on Rec. Tit., § 216; Article in 14 Cent L. J. 122; Devlin on Deeds, § 725, n. 1; Doe *v.* Allsop, 5 B. & Ald. 142; 73 E. C. L. 46; Pomfret *v.* Lord Winsor, 2 Ves. 472; Jolland *v.* Stainbridge, 3 Ves. 478; Davis *v.* Strathmore, 16 Ves. 419; Wyatt *v.* Barwell, 19 Ves. 439; Jennings *v.* Moore, 2 Verm. 609; 2 Bro. P. C. 278; Benham *v.* Keane, 3 DeG. F. & J. 318; Hine *v.* Dodd, 3 Atk. 275; Mill *v.* Hill, 22 Eng. L. & Eq. 20; Ford *v.* White, 16 Beav. 120; Le Neve *v.* Le Neve, Amb. 436; Ves. 64; 2 Lead. Eq. Cas. 23; Chadwick *v.* Turner, L. R. 1 Ch. 310; Roland *v.* Hart, L. R. 6 Ch. 678; Greaves *v.* Tofield, L. R. 14 Ch. Div. 563; Dresser *v.* Missouri R. Co., 93 U. S. 92; Stroud *v.* Lockart, 4 Dall. (U. S.) 53; The John T. Moore, 3 Woods (U. S.) 61; Hardy *v.* Harbin, 4 Sawy. (U. S.) 603; Norton *v.* Meader, 4 Sawy. (U. S.) 603; Alexander *v.* Rodriguez, 2 Wall. (U. S.) 323; Cordova *v.* Hood, 17 Wall. (U. S.) 1; Boone *v.* Chiles, 10 Pet. (U. S.) 177; Brush *v.* Ware, 15 Pet. (U. S.) 93; Ohio L. Ins. Co. *v.* Ledyard, 8 Ala. 866; Wallis *v.* Rhea, 10 Ala. 451; Nelson *v.* Dunn, 15 Ala. 501; Dearing *v.* Watkins, 16 Ala. 20; Johnson *v.* Thweatt, 18 Ala. 41; Smith *v.* Branch Bank, 21 Ala. 25; Hoole *v.* Attorney-Gen'l, 22 Ala. 190; De Vandal *v.* Malone, 25 Ala. 272; Boyd *v.* Beck, 29 Ala. 703; Wyatt *v.* Stewart, 34 Ala. 716; Wells *v.* Morrow, 38 Ala. 125; Newsome *v.* Collins, 43 Ala. 656; Burch *v.* Carter, 44 Ala. 115; Ponder *v.* Scott, 44 Ala. 41; Campbell *v.* Roach, 45 Ala. 667; Dudley *v.* Witter, 46 Ala. 664; Corbitt *v.* Clenny, 52 Ala. 480; Lambert *v.* Newman, 56 Ala. 623; Chapman *v.* Holding, 60 Ala. 522; Bernstein *v.* Humes, 60 Ala. 582; 31 Am. Rep. 52; Lindsay *v.* Veasey, 62 Ala. 421; Wimbish *v.* Montgomery Mut. Bldg. Assoc., 59 Ala. 575; Stidham *v.* Mathews, 59 Ark. 650; Holman *v.* Patterson, 29 Ark. 357; Haskell *v.* State, 31 Ark. 91; Brown *v.* Hanauer, 48 Ark. 277; Fargason *v.* Edrington, 49 Ark. 207; Woodworth *v.* Guzman, 1 Cal. 203; Stafford *v.* Lick, 7 Cal. 479; Hunter *v.* Watson, 12 Cal. 363; 73 Am. Dec. 543; Galland *v.* Jackman, 26 Cal. 79; 85 Am. Dec. 172; Fair *v.* Stevenot, 29 Cal. 486; Smith *v.* Yule, 31 Cal. 180; 89 Am. Dec. 167; Lawton *v.* Gordon, 37 Cal. 202; O'Rourke *v.* O'Connor, 39 Cal. 442; Moss *v.* Atkinson, 44 Cal. 3; Thompson *v.* Pioche, 44 Cal. 508; Jones *v.* Marks, 47 Cal. 242; Donald *v.* Beals, 57 Cal. 399; Hilton *v.* Young, 73 Cal. 196; Sigourney *v.* Munn, 7 Conn. 324; Wheaton *v.* Dyer, 15 Conn. 307; Bush *v.* Golden, 19 Conn. 594; Blatchley *v.* Osborn, 33 Conn. 226; Hamilton *v.* Nutt, 34 Conn. 501; Bank of New Milford *v.* New Milford, 36 Conn. 94; Clark *v.* Fuller, 39 Conn. 238; Downs *v.* Yonge, 17 Ga. 295; Wyatt *v.* Elam, 19 Ga. 335; Doe *v.* Roe, 25 Ga. 55; Burkhalter *v.* Ector, 25 Ga. 55; Poulet *v.* Johnson, 25 Ga. 403; Lee *v.* Cato, 27 Ga. 637; 73 Am. Dec. 746; Allen *v.* Holding, 29 Ga. 485; Helms *v.* May, 29 Ga. 121; Allen *v.* Holden, 32 Ga. 418; Williams *v.* Adams, 43 Ga. 407; Brown *v.* Wells, 44 Ga. 573; Seabrook *v.* Brady, 47 Ga. 650; Virgin *v.* Wingfield, 54 Ga. 451; Bryant *v.* Booze, 55 Ga. 438; Finch *v.* Beal, 68 Ga. 594; Blalock *v.* Newhill, 78 Ga. 245; Clark *v.* Plumstead, 11 Ill. App. 57; Doe *v.* Reed, 5 Ill. 117; Rupert *v.* Marks, 15 Ill. 542; Morrison *v.* Kelly, 22 Ill. 610; 74 Am. Dec. 169; Ogden *v.* Haven, 24 Ill. 57; Dickenson *v.* Breeden, 30 Ill. 279; Truesdale *v.* Ford, 37 Ill. 210; Cabeen *v.* Breckenridge, 48 Ill. 91; Chicago, etc., R. Co. *v.* Kennedy, 70 Ill. 350; Baldwin *v.* Sager, 70 Ill. 503; Shepardson *v.* Stevens, 71

Ill. 646; Chicago *v.* Witt, 75 Ill. 211; Erickson *v.* Rafferty, 79 Ill. 209; Frye *v.* Partridge, 82 Ill. 267; Hewitt *v.* Clark, 91 Ill. 605; Redden *v.* Miller, 95 Ill. 336; Ricks *v.* Doe, 2 Blackf. (Ind.) 346; Sparks *v.* State Bank, 7 Blackf. (Ind.) 469; Brose *v.* Doe, 2 Ind. 666; Wiseman *v.* Hutchinson, 20 Ind. 40; Crassen *v.* Swoveland, 22 Ind. 427; Croskey *v.* Chapman, 26 Ind. 333; Wilson *v.* Hunter, 30 Ind. 466; Kirkpatrick *v.* Caldwell, 32 Ind. 299; Paul *v.* Connersville, etc., R. Co., 51 Ind. 530; Maxwell *v.* Brooks, 54 Ind. 98; Petry *v.* Ambrosher, 100 Ind. 510; Clift *v.* Nay, 105 Ind. 355; Hunsinger *v.* Hofer, 110 Ind. 390; Strohm *v.* Good, 113 Ind. 93; Warburton *v.* Lauman, 2 Greene (Iowa) 420; Miller *v.* Chittenden, 2 Iowa 315; Blain *v.* Stewart, 2 Iowa 378; Bell *v.* Thomas, 2 Iowa 384; Dussaume *v.* Burnett, 5 Iowa 95; Wilson *v.* Holcomb, 13 Iowa 110; Jones *v.* Berkshire, 15 Iowa 248; 83 Am. Dec. 412; Coe *v.* Winters, 15 Iowa 481; Wilson *v.* Miller, 16 Iowa 111; Jones *v.* Bamford, 21 Iowa 217; Hoy *v.* Allen, 27 Iowa 208; Kittridge *v.* Chapman, 36 Iowa 348; Watson *v.* Phelps, 40 Iowa 482; Smith *v.* Dunton, 42 Iowa 48; Blanchard *v.* Ware, 43 Iowa 530; Dillon *v.* Schugar, 73 Iowa 434; Kirkwood *v.* Koester, 11 Kan. 471; Setter *v.* Alvey, 15 Kan. 157; Jones *v.* Lapham, 15 Kan. 540; Johnston *v.* Gwathmey, 4 Litt. (Ky.) 317; 14 Am. Dec. 135; Hardin *v.* Harrington, 11 Bush (Ky.) 367; Mueller *v.* Engeln, 12 Bush (Ky.) 441; Honore *v.* Bakewell, 6 B. Mon. (Ky.) 67; 43 Am. Dec. 147; Thornton *v.* Knox, 6 B. Mon. (Ky.) 74; Underwood *v.* Ogden, 6 B. Mon. (Ky.) 606; Hopkins *v.* Gerrard, 7 B. Mon. (Ky.) 312; Vanmeter *v.* McFaddin, 8 B. Mon. (Ky.) 442; Forepaugh *v.* Appold, 17 B. Mon. (Ky.) 631; Bell *v.* Haw, 8 Mart., N. S. (La.) 243; Moore *v.* Jourdan, 14 La. Ann. 417; Swan *v.* Moore, 14 La. Ann. 845; Smith *v.* Lambeth, 15 La. Ann. 566; Porter *v.* Cole, 4 Me. 20; Webster *v.* Maddox, 6 Me. 256; Kent *v.* Plummer, 7 Me. 464; Butler *v.* Stevens, 26 Me. 484; Copeland *v.* Copeland, 28 Me. 525; Spofford *v.* Weston, 29 Me. 140; Hanley *v.* Morse, 32 Me. 287; Hull *v.* Noble, 40 Me. 480; Merrill *v.* Ireland, 40 Me. 569; Porter *v.* Sevey, 43 Me. 619; Goodwin *v.* Cloudman, 43 Me. 577; Rich *v.* Roberts, 48 Me. 548; Beal *v.* Gordon, 55 Me. 482; U. S. Ins. Co. *v.* Shriver, 3 Md. Ch. 381; Baynard *v.* Norris, 5 Gill (Md.) 483; 46 Am. Dec. 647; Price *v.* McDonald, 1 Md. 403; 54 Am. Dec. 657; Winchester *v.* Baltimore, etc., R. Co., 4 Md. 231; Johns *v.* Scott, 5 Md. 81; General Ins. Co. *v.* U. S. Ins. Co., 10 Md. 517; 69 Am. Dec. 174; Owens *v.* Miller, 29 Md. 144; *In re* Leiman, 32 Md. 225; Green *v.* Early, 39 Md. 223; Reiff *v.* Eshleman, 52 Md. 582; Froshburg, etc., Bldg. Assoc. *v.* Hamill, 55 Md. 313; McMechan *v.* Griffing, 3 Pick. (Mass.) 149; 15 Am. Dec. 198; Curtis *v.* Mundy, 3 Met. (Mass.) 405; Buttrick *v.* Holden, 13 Met. (Mass.) 355; Lawrence *v.* Stratton, 6 Cush. (Mass.) 163; Hennessey *v.* Andrews, 6 Cush. (Mass.) 170; Parker *v.* Osgood, 3 Allen (Mass.) 487; Dooley *v.* Wolcott, 4 Allen (Mass.) 406; George *v.* Kent, 7 Allen (Mass.) 16; Sibley *v.* Leffingwell, 8 Allen (Mass.) 584; Mara *v.* Pierce, 9 Gray (Mass.) 306; Pingree *v.* Coffin, 12 Gray (Mass.) 288; Norcross *v.* Widgery, 2 Mass. 505; Farnsworth *v.* Childs, 4 Mass. 637; 3 Am. Dec. 249; White *v.* Foster, 102 Mass. 375; Connihan *v.* Thompson, 111 Mass. 270; Lamb *v.* Pierce, 113 Mass. 72; Wetherell *v.* Spencer, 3 Mich. 123; Doyle *v.* Stevens, 4 Mich. 87; Fitzhugh *v.* Barnard, 12 Mich. 105; Blanchard *v.* Tyler, 12 Mich. 339; 86 Am. Dec. 57; Case *v.* Erwin, 18 Mich. 434; Palmer *v.* Williams, 24 Mich. 328; Baker *v.* Mather, 25 Mich. 51; Hosley *v.* Holmes, 27 Mich. 416; Barnard *v.* Campau, 29 Mich. 162; Shotwell *v.* Harrison, 30 Mich. 179; Munroe *v.* Eastman, 31 Mich. 283; Reynolds *v.* Ruchman, 35 Mich. 80; Hommel *v.* Devinney, 39 Mich. 522; Stetson *v.* Cook, 39 Mich. 750; Waldo *v.* Richmond, 40 Mich. 380, Atwood *v.* Bearss, 47 Mich. 72; Daughaday *v.* Paine, 6 Minn. 443; Ross *v.* Worthington, 11 Minn. 438; 88 Am. Dec. 95; Coy *v.* Coy, 15 Minn. 119; Roberts *v.* Grace, 16 Minn. 126; Lamberton *v.* Mechanics' Nat. Bank, 24 Minn. 281; Paulson *v.* Clough, 40 Minn. 494; Dixon *v.* Doe, 1 Smed. & M. (Miss.) 70; McRaven *v.* McGuire, 9 Smed. & M. (Miss.) 34; McLeod *v.* First Nat. Bank, 42 Miss. 99; Parker *v.* Foy, 43 Miss. 260; 55 Am. Rep. 484; Avent *v.* McCorkle, 45 Miss. 221; Harrington *v.* Allen, 48 Miss. 493; Bass *v.* Estill, 50 Miss. 300; Buck *v.* Paine, 50 Miss. 648; Claiborne *v.* Holmes, 51 Miss. 146; Loughridge *v.* Bowland, 52 Miss. 553; Deason *v.* Taylor, 53 Miss. 697; Allen *v.* Poole, 54 Miss. 323; Wasson *v.*

Connor, 54 Miss. 351; Masterson *v.* West End, etc., R. Co., 5 Mo. App. 64; Draper *v.* Bryson, 17 Mo. 71; 57 Am. Dec. 257; Speck *v.* Riggin, 40 Mo. 405; Maupin *v.* Emmons, 47 Mo. 304; Digman *v.* McCollum, 47 Mo. 375; Rhodes *v.* Outcalt, 48 Mo. 367; Major *v.* Bukley, 51 Mo. 231; Fellows *v.* Wise, 55 Mo. 413; Eck *v.* Hatcher, 58 Mo. 235; Muldrow *v.* Robinson, 58 Mo. 331; Ridgeway *v.* Holliday, 59 Mo. 444; Roberts *v.* Moseley, 64 Mo. 507; Young *v.* Kellar, 94 Mo. 581; 4 Am. St. Rep. 405; Gibson *v.* Milne, 1 Nev. 526; Grellet *v.* Heilshorn, 4 Nev. 526; Gilson *v.* Boston, 11 Nev. 413; Colby *v.* Kennisston, 4 N. H. 262; Rogers *v.* Jones, 8 N. H. 264; Brown *v.* Manter, 22 N. H. 468; Bell *v.* Twilight, 22 N. H. 500; Warren *v.* Swett, 31 N. H. 332; Patten *v.* Moore, 32 N. H. 382; Tucker *v.* Tilton, 55 N. H. 223; Hoit *v.* Russell, 56 N. H. 559; Janvrin *v.* Janvrin, 60 N. H. 169; Hulsizer *v.* Opdyke (N. J. 1888), 13 Atl. Rep. 669; Holmes *v.* Stout, 10 N. J. Eq. 419; Smallwood *v.* Lewin, 15 N. J. Eq. 60; Smith *v.* Vreeland, 16 N. J. Eq. 199; Van Doren *v.* Robinson, 16 N. J. Eq. 256; Hoy *v.* Bramhall, 19 N. J. Eq. 563; 97 Am. Dec. 687; Raritan Water Co. *v.* Veghte, 21 N. J. Eq. 463; Gale *v.* Morris, 30 N. J. Eq. 285; Morris *v.* White, 36 N. J. Eq. 324; Van Keuren *v.* Central R. Co., 38 N. J. L. 165; De Ruyter *v.* St. Peter's Church, 2 Barb. Ch. (N. Y.) 556; Ten Eick *v.* Simpson, 1 Sandf. Ch. (N. Y.) 244; Griffith *v.* Griffith, 1 Hoffm. Ch. (N. Y.) 153; Dey *v.* Dunham, 2 Johns. Ch. (N. Y.) 182; Rochester Sav. Bank *v.* Averell, 26 Hun (N. Y.) 643; Governeur *v.* Lynch, 2 Paige (N. Y.) 300; Grimstone *v.* Carter, 3 Paige (N. Y.) 421; 24 Am. Dec. 230; Jackson *v.* Van Valkenburgh, 8 Cow. (N. Y.) 260; Jackson *v.* Tuttle, 9 Cow. (N. Y.) 233; Jackson *v.* Page, 4 Wend. (N. Y.) 385; Tuttle *v.* Jackson, 6 Wend. (N. Y.) 213; 21 Am. Dec. 306; Parks *v.* Jackson, 11 Wend. (N. Y.) 442; 25 Am. Dec. 56; Van Rensselaer *v.* Clark, 17 Wend. (N. Y.) 25; 31 Am. Dec. 280; Jackson *v.* Leek, 19 Wend. (N. Y.) 339; Schutt *v.* Large, 6 Barb. (N. Y.) 373; Butler *v.* Veile, 44 Barb. (N. Y.) 166; Penfield *v.* Dunbar, 64 Barb. (N. Y.) 239; Jackson *v.* Given, 8 Johns. (N. Y.) 137; 5 Am. Dec. 328; Jackson *v.* Sharp, 9 Johns. (N. Y.) 163; 6 Am. Dec. 267; Jackson *v.* Burgott, 10 Johns. (N. Y.) 457; 6 Am. Dec. 349; Jackson *v.* West, 10 Johns. (N. Y.) 466; Jackson *v.* Elston, 12 Johns. (N. Y.) 452; Dunham *v.* Dey, 15 Johns. (N. Y.) 555; 8 Am. Dec. 282; Howard Ins. Co. *v.* Halsey, 8 N. Y. 271; 39 Am. Dec. 478; Hill *v.* Beebe, 13 N. Y. 556; Williamson *v.* Brown, 15 N. Y. 354; Gibert *v.* Peteler, 38 N. Y. 165; Acer *v.* Westcott, 46 N. Y. 384; Weaver *v.* Barden, 49 N. Y. 286; Brown *v.* Volkenning, 64 N. Y. 76; Page *v.* Waring, 76 N. Y. 463; Ellis *v.* Horrman, 90 N. Y. 416; Mack *v.* Phelan, 92 N. Y. 20; White *v.* Foster, 102 N. Y. 375; Pike *v.* Armistead, 1 Dev. Eq. (N. Car.) 110; Fleming *v.* Burgin, 2 Ired. Eq. (N. Car.) 584; Bailey *v.* Wilson, 1 Dev. & B. Eq. (N. Car.) 182; Hodges *v.* Spicer, 79 N. Car. 223; Cunningham *v.* Buckingham, 1 Ohio 264; Brown *v.* Kirkman, 1 Ohio St. 116; McKenzie *v.* Perrill, 15 Ohio St. 162; Morris *v.* Daniels, 35 Ohio St. 406; Irvin *v.* Smith, 17 Ohio 226; Stannis *v.* Nicholson, 2 Oregon 333; Carter *v.* Portland, 4 Oregon 350; Musgrove *v.* Bonser, 5 Oregon 314; 20 Am. Rep. 737; Mandaudus *v.* Mann, 14 Oregon 450; Hibberd *v.* Bovier, 1 Grant's Cas. (Pa.) 266; Jaques *v.* Weeks, 7 Watts (Pa.) 261; Manufacturers' etc. Bank *v.* Bank of Pa., 7 W. & S. (Pa.) 335; 42 Am. Dec. 240; Krider *v.* Dafferty, 1 Whart. (Pa.) 303; Correy *v.* Caxton, 4 Binn. (Pa.) 140; Randall *v.* Silverthorn, 4 Pa. St. 173; Solms *v.* McCulloch, 5 Pa. St. 473; Britton's Appeal, 45 Pa. St. 172; Murphy *v.* Nathans, 46 Pa. St. 512; Smith's Appeal, 47 Pa. St. 128; Speer *v.* Evans, 47 Pa. St. 141; Nice's Appeal, 54 Pa. St. 200; Maul *v.* Rider, 59 Pa. St. 167; Butcher *v.* Yocum, 61 Pa. St. 168; 100 Am. Dec. 625; Parke *v.* Neely, 90 Pa. St. 52; Lahr's Appeal, 90 Pa. St. 507; Follweiler *v.* Lutz, 102 Pa. St. 585; Harris *v.* Arnold, 1 R. I. 125; Tillinghast *v.* Champlin, 4 R. I. 215; 67 Am. Dec. 510; City Council *v.* Page, 1 Spear Eq. (S. Car.) 212; Martin *v.* Sale, 1 Bailey Eq. (S. Car.) 1; Fowke *v.* Woodward, 1 Spears Eq. (S. Car.) 233; Warnock *v.* Wightman, 1 Brev. (S. Car) 331; M'Fall *v.* Sherrard, Harp. (S. Car.) 295; Knotts *v.* Geiger, 4 Rich. (S. Car.) 32; Tart *v.* Crawford, 1 McCord (S. Car.) 265; Cabiness *v.* Mahon, 2 McCord (S. Car.) 273; Wallace *v.* Craps, 3 Strobh. (S. Car.) 266; Ingrem *v.* Phillips, 3 Strobh. (S. Car.) 565; Murrell *v.* Watson, 1 Tenn. Ch. 342; Lillard *v.* Rucker, 9 Yerg. (Tenn.) 64;

such conveyance, and that is the doctrine which generally prevails.[1] So a purchaser at an execution sale, where the lien of a

Tharpe *v.* Dunlap, 4 Heisk. (Tenn.) 686; Brevard *v.* Neely, 2 Sneed (Tenn.) 164; Gaskill *v.* Badge, 3 Lea (Tenn.) 144; Kirkpatrick *v.* Ward, 5 Lea (Tenn.) 434; Otis *v.* Payne, 86 Tenn. 663; Beaty *v.* Whitaker, 23 Tex. 526; Ayres *v.* Duprey, 27 Tex. 594; 86 Am. Dec. 657; Portis *v.* Hill, 30 Tex. 529; 98 Am. Dec. 481; Rodgers *v.* Burchard, 34 Tex. 441; 7 Am. Rep. 283; Allen *v.* Root, 39 Tex. 589; Littleton *v.* Giddings, 47 Tex. 109; Willis *v.* Gay, 48 Tex. 463; 26 Am. Rep. 328; Bonner *v.* Stephens, 60 Tex. 616; Stewart *v.* Thompson, 3 Vt. 255; Brackett *v.* Wait, 6 Vt. 411; Corliss *v.* Corliss, 8 Vt. 373; Blaisdell *v.* Stevens, 16 Vt. 179; Stafford *v.* Ballou, 17 Vt. 329; Smith *v.* Hall, 28 Vt. 364; Morrill *v.* Morrill, 53 Vt. 74; 38 Am. Rep. 659; Hill *v.* Murray, 56 Vt. 177; Doswell *v.* Buchanan, 3 Leigh (Va.) 365; 23 Am. Dec. 280; McClure *v.* Thistle, 2 Gratt. (Va.) 182; Mundy *v.* Vawter, 3 Gratt. (Va.) 518; Long *v.* Weller, 29 Gratt. (Va.) 347; Wood *v.* Krebbs, 30 Gratt. (Va.) 708; Vest *v.* Michie, 31 Gratt. (Va.) 149; 31 Am. Rep. 722; Newman *v.* Chapman, 2 Rand. (Va.) 98; 14 Am. Dec. 766; Smith *v.* Proffitt, 82 Va. 823; Cosgray *v.* Core, 2 W. Va 353; Cox *v.* Cox, 5 W. Va. 335; Cain *v.* Cox, 23 W. Va. 594; Parker *v.* Kane, 4 Wis. 1; 65 Am. Dec. 283; Ely *v.* Wilcox, 20 Wis. 523; 91 Am. Dec. 436; Hoppin *v.* Doty, 25 Wis. 591; Fallass *v.* Pierce, 30 Wis. 469; Hoxie *v.* Price, 31 Wis. 82; Gilbert *v.* Jess, 31 Wis. 110; Brinkman *v.* Jones, 44 Wis. 498; Helms *v.* Chadbourne, 45 Wis. 73; Bergeron *v.* Richardott, 55 Wis. 129.

In *Arkansas*, *Indiana*, *Kansas*, *Maine*, *Tennessee*, *Massachusetts*, *Missouri*, *New Mexico*, *Utah*, and *Wisconsin* the subsequent purchaser who is protected against an unrecorded instrument must be without "actual notice." In *Ohio*, the subsequent purchaser must be one having "no knowledge" of the former conveyance. In some States "actual" notice is required as to mortgages, though not as to deeds: *California*, Civ. Code, § § 1107, 1214, 2950; *Dakota*, Rev. Code (1877), § 1741*a*. See Webb Rec. Tit., § 12.

Under a statute providing that the subsequent purchaser "must be a *bona fide* purchaser," it will not be considered that one having notice of a previous transfer, is a purchaser in good faith. Hunter *v.* Watson, 12 Cal. 363; 73 Am. Dec. 543; Smith *v.* Dunton, 42 Iowa 48; Blanchard *v.* Tyler, 12 Mich. 339; 86 Am. Dec. 57; Maybee *v.* Moore, 90 Mo. 340; Jackson *v.* Burgott, 10. Johns. (N. Y.) 457; 6 Am. Dec. 349; Wood *v.* Chapin, 13 N. Y. 509; 67 Am. Dec. 62; Dunham *v.* Dey, 15 Johns. (N. Y.) 554; 8 Am. Dec. 282; Paine *v.* Mason, 7 Ohio St. 199; Otis *v.* Payne, 86 Tenn. 663; Bonner *v.* Stephens, 60 Tex. 616.

What Constitutes Notice.—As to what constitutes such notice as will supply the want of recordation, besides the above cases, see NOTICE, vol. 16, p. 787.

1. Hitz *v.* National etc. Bank, 111 U. S. 722; Weld *v.* Madden, 2 Cliff. (U. S.) 584; Wyatt *v.* Stewart, 34 Ala. 716; Thomas *v.* Vanlieu, 28 Cal. 616; O'Rourke *v.* O'Connor, 39 Cal. 442; Goddard *v.* Prentice, 17 Conn. 546; Mead *v.* New York, etc., R. Co., 45 Conn. 199; Massey *v.* Hubbard, 18 Fla. 687; Cox *v.* Milner, 23 Ill. 422; Williams *v.* Tatnall, 29 Ill. 553; Milmine *v.* Burnham, 76 Ill. 362; City Nat. Bank *v.* Dayton, 116 Ill. 257; Hoy *v.* Allen, 27 Iowa 208; Kessey *v.* McHenry, 54 Iowa 187; Bacon *v.* Thompson, 60 Iowa 286; Pfeaff *v.* Jones, 50 Md. 263; Priest *v.* Rice, 1 Pick. (Mass.) 164; 11 Am. Dec. 156; Lawrence *v.* Stratton, 6 Cush. (Mass.) 163; Pickett *v.* Banks, 11 Smed. & M. (Miss.) 446; Longbridge *v.* Bowland, 52 Miss. 546; Garwood *v.* Garwood, 9 N. J. L. 193; Morris *v.* White, 36 N. J. Eq. 324; Ayres *v.* Duprey, 27 Tex. 593; 86 Am. Dec. 657; McKamey *v.* Thorp, 61 Tex. 648; Freiberg *v.* Magale, 70 Tex. 116; Hart *v.* Farmers', etc., Bank, 33 Vt. 252; Cox *v.* Wayt, 26 W. Va. 807. See JUDGMENTS, vol. 12, p. 111, n. 6.

But under the statutes of *Tennessee* and *Virginia* the creditors receiving the protection of the statute cannot be affected by notice of a prior unregistered conveyance. Washington *v.* Trousdale, Mart. & Y. (Tenn.) 385; Lookout Bank *v.* Noe, 86 Tenn. 21; 2 Min. Inst. 872; Guenant *v.* Anderson, 4 Rand. (Va.) 208. Under the statutes of *New Jersey* a creditor cannot be affected by a prior unrecorded chattel mortgage, although having notice

udgment is not superior to an unrecorded instrument, can be in no more favorable position than the judgment creditor, if he has notice of a prior unrecorded conveyance.[1]

But the doctrine of notice will not prevent a purchaser with notice taking from one without notice from acquiring title as against a prior unrecorded instrument,[2] and, conversely, a purchaser without notice from a person having notice of a conveyance prior to his own, will be protected by the recording acts.[3] But the first of these rules will not operate in favor of the original purchaser *mala fide*, when he re-acquires the title after it has

hereof. Sayre *v.* Hewes, 32 N. J. Eq. 652.

In *Pennsylvania* it is decided that actual knowledge in the creditor before the debts were contracted will void the judgment lien as against a prior unrecorded mortgage. Britton's Appeal, 45 Pa. St. 172. But see Hulings *v.* Guthrie, 4 Pa. St. 123; Uhler *v.* Hutchinson, 23 Pa. St. 110.

1. 1 Dev. on Deeds, § 638; Byers *v.* Angles, 16 Ark. 543; Chapman *v.* Coats, 26 Iowa 288; Moyer *v.* Schick, Pa. St. 242.

2. Harrison *v.* Forth, Prec. Ch. 51; Randlyn *v.* Ord, 1 Atk. 571; Lowther Carlton, 2 Atk. 139; Ferrars *v.* Cherry, 2 Vern. 383; Sweet *v.* Southote, 2 Bro. C. C. 66; McQueen *v.* Farnhar, 11 Ves. 467; Fletcher *v.* Peck, 6 Cranch (U. S.) 87; Alexander *v.* Peneton, 8 Cranch (U. S.) 462; Vattier Hinde, 7 Pet. (U. S.) 252; Boone *v.* Chiles, 10 Pet. (U. S.) 177; Cahalan *v.* Monroe, 56 Ala. 303; Shinn *v.* Shinn, Ill. App. 141; McShirley *v.* Birt, 44 Md. 382; Lindsey *v.* Rankin, 4 Bibb (Ky.) 482; Blight *v.* Banks, 6 T. B. Mon. (Ky.) 192; 17 Am. Dec. 136; Halstead *v.* Bank of Ky., 4 J. J. Marsh. (Ky.) 554; Boynton *v.* Rees, 8 Pick. (Mass.) 329; 19 Am. Dec. 326; Dana *v.* Newhall, 13 Mass. 498; Trull *v.* Bigelow, 16 Mass. 406; 8 Am. Dec. 144; Lankhouser *v.* Lay, 78 Mo. 458; Holmes *v.* Stout, 4 N. J. Eq. 492; Ruthers *v.* Kingslan, 7 N. J. Eq. 178; Webber *v.* Van Steenburgh, 46 Barb. (N. Y.) 211; Varick *v.* Briggs 6 Paige (N. Y.) 323; Griffith *v.* Griffith, 9 Paige (N. Y.) 315; Allison *v.* Hagan, 12 Nev. 3; Bracken *v.* Miller, 4 W. & S. (Pa.) 12; Moore *v.* Curry, 36 Tex. 668; Harber *v.* Richardson, 57 Vt. 408; Tracy *v.* Wilson, 4 Munf. (Va.) 313; Pringle *v.* Dunn, 37 Wis. 449; 19 Am. Rep. 772. See also FRAUDULENT CONVEYANCES, vol. 8, p. 758, n. 4.

3. Wood *v.* Mann, 1 Sumn. (U. S.) 506; Mallory *v.* Stodder, 6 Ala. 801; LeGrande *v.* Eufala Nat. Bank, 81 Ala. 123; 60 Am. Rep. 140; Fargason *v.* Edrington, 49 Ark. 207; Truluck *v.* Peeples, 3 Ga. 446; Lee *v.* Cato, 27 Ga. 637; 73 Am. Dec. 746; Choteau *v.* Jones, 11 Ill. 300; 50 Am. Dec. 460; Jennings *v.* Gage, 13 Ill. 610; 56 Am. Dec. 476; Fawcett *v.* Osborn, 32 Ill. 411; 83 Am. Dec. 278; Paris *v.* Lewis, 85 Ill. 597; Cook *v.* Stone, 63 Iowa 352; Hardin *v.* Harrington, 11 Bush (Ky.) 367; Knox *v.* Silloway, 10 Me. 201; Hagthorp *v.* Hook, 1 Gill & J. (Md.) 270; Somes *v.* Brewer, 2 Pick. (Mass.) 184; 13 Am. Dec. 406; Glidden *v.* Hunt, 24 Pick. (Mass.) 221; Connecticut *v.* Bradish, 14 Mass. 296; Trull *v.* Bigelow, 16 Mass. 406; 8 Am. Dec. 144; Moody *v.* Blake, 117 Mass. 23; 19 Am. Rep. 394; Morse *v.* Curtis, 140 Mass. 112; 54 Am. Rep. 456; Price *v.* Martin, 46 Miss. 489; Galatian *v.* Erwin, Hopk. Ch. (N. Y.) 48; Demarest *v.* Wynkoop, 3 Johns. Ch. (N. Y.) 129; 8 Am. Dec. 467; Fort *v.* Burch, 5 Den. (N. Y.) 187; Saltus *v.* Everett, 20 Wend. (N. Y.) 267; 32 Am. Dec. 541; Hawley *v.* Cramer, 4 Cow. (N. Y.) 717; Jackson *v.* Van Valkenburgh, 8 Cow. (N. Y.) 260; Mowrey *v.* Walsh, 8 Cow. (N. Y.) 243; Varick *v.* Briggs, 6 Paige (N. Y.) 323; Simon *v.* Kaliske, 37 How. Pr. (N. Y.) 249; Westbrook *v.* Gleason, 79 N. Y. 23; Decker *v.* Boice, 83 N. Y. 215; Slattery *v.* Schwannecke, 118 N. Y. 543; Doherty *v.* Stimmel, 40 Ohio St. 294; London *v.* Youmans, 31 S. Car. 147; Day *v.* Clark, 25 Vt. 397; Tompkins *v.* Powell, 6 Leigh (Va.) 576; Ely *v.* Wilcox, 20 Wis. 523; 91 Am Dec. 436; Fallass *v.* Pierce, 30 Wis. 443; Pringle *v.* Dunn, 37 Wis. 449; 19 Am. Rep. 772; Snyder *v.* Boulder Co., 8 West Coast Rep. 533. See FRAUDULENT CONVEYANCES, vol. 8, p. 756, n. 4.

passed through the hands of purchasers not affected with notice.[1] In conformity with these principles, if the judgment creditor is protected, notice cannot affect the purchaser at an execution sale;[2] and, in all cases, if one buying at an execution sale is treated as a purchaser within the recording acts, notice to the judgment creditor cannot affect the purchaser at an execution sale who is without notice.[3]

In some States, statutes provide that a mortgage shall take effect, or be a lien on the mortgaged property, from the time of its registration. Under these provisions an unrecorded mortgage has been held to be of no effect, and constitutes no lien against a stranger, although he may have actual notice of its existence.[4] And actual notice will not usually supply the want of recordation when this is necessary to the validity of the instrument.[5]

c. WHO PAY VALUABLE CONSIDERATION.—The recording acts were intended for the protection of those who should part with something of value, or suffer some loss, by reason of having acted upon the faith of a conveyance and in ignorance of some prior transaction which, in the absence of the operation of these provisions, would defeat the intended acquisition of some new interest. It is necessary that the subsequent purchaser, in order

1. Wade on Notice, § 63; Story Eq. Jur., § 410; Kennedy *v.* Daly, 1 Sch. & Lef. 355; Schutt *v.* Large, 6 Barb. (N. Y.) 373.

The same reason which applies to protect one purchasing with notice from a purchaser without notice of a prior conveyance will not operate in favor of the original purchaser *mala fide*, when he re-acquires the title after it has passed through the hands of *bona fide* purchasers.

In the former case to hold the property subject to prior equities, whenever it subsequently came to the hands of one who had notice of such equity, would be to give the honest purchaser but a fruitless advantage. Such a rule would deprive the property of nearly its entire market value, because purchasers without notice would become more difficult to find as the defect of title became more generally known.

But, in the latter case, but a single purchaser is disqualified, which could not materially affect the market value of the property. Besides, to extend to him protection as an innocent purchaser because of the purgation of title by passing through clean hands, would be to facilitate the perpetration of fraud. See Wade on Notice, §§ 62, 63.

2. Fash *v.* Ravesies, 32 Ala. 451; Shepherd *v.* Burkhalter, 13 Ga. 443; 58 Am. Dec. 523; Smith *v.* Jordan, 25 Ga. 687; Humphrey *v.* Copeland, 54 Ga. 543; Guiteau *v.* Wisely, 47 Ill. 433; Nugent *v.* Priebatsch, 61 Miss. 402; Wood *v.* Chapin, 13 N. Y. 509; 67 Am. Dec. 62; Condit *v.* Wilson, 36 N. J. Eq. 370; Uhler *v.* Hutchinson, 23 Pa. St. 110; Butler *v.* Maury, 10 Humph. (Tenn.) 420; Grace *v.* Wade, 45 Tex. 527.

3. Miles *v.* King, 5 S. Car. 146.

4. Neal *v.* Speigle, 33 Ark. 63; Fry *v.* Martin, 33 Ark. 203; Dodd *v.* Parker, 40 Ark. 536; Wright *v.* Graham, 42 Ark. 140; Stansell *v.* Roberts, 13 Ohio 148; 42 Am. Dec. 193; Mayhew *v.* Coombs, 14 Ohio 428; Building Assoc. *v.* Clark, 43 Ohio St. 427; excepting chattel mortgages, Paine *v.* Mason, 7 Ohio St. 199; including also deeds of trust, Robinson *v.* Willoughby, 70 N. Car. 358; Fleming *v.* Burgin, 2 Ired. Eq. (N. Car.) 584; Traders' Nat. Bank *v.* Woodlawn Mfg. Co., 96 N. Car. 298.

5. Webb on Rec. Tit., § 189; Chenyworth *v.* Daily, 7 Ind. 284; Lockwood *v.* Slevin, 26 Ind. 124; Ross *v.* Menefee, 125 Ind. 432; Travis *v.* Bishop, 13 Met. (Mass.) 304.

to be entitled to the protection of the recording acts, obtain his conveyance for a valuable consideration.[1]

This would, of course, exclude a mere volunteer who takes by gift, devise, inheritance, etc., from the benefits of these statutes.[2]

A conveyance or mortgage of property in satisfaction of an antecedent indebtedness, although good as between the parties,[3] will not, according to the weight of authority, entitle the grantee to be considered a purchaser for value.[4] It is said that the purchaser in this case is placed in no worse condition by his pur-

1. Webb on Rec. Tit., § 104; Wade on Notice, § 226; Mart. on Conv., § 284; Big. on Fraud, p. 307; Wormley *v.* Wormley, 8 Wheat. (U. S.) 449; Gerson *v.* Pool, 31 Ark. 85; Frey *v.* Clifford, 44 Cal. 335; Coon *v.* Browning, 10 Kan. 85; Palmer *v.* Williams, 24 Mich. 328; Smith *v.* Williams, 44 Mich. 240; Aubuchon *v.* Bender, 44 Mo. 560; Snowden *v.* Tyler, 21 Neb. 199; Haughwout *v.* Murphy, 21 N. J. Eq. 118; Dickerson *v.* Tillinghast, 4 Paige (N. Y.) 215; 25 Am. Dec. 528; Wood *v.* Chapin, 13 N. Y. 509; 67 Am. Dec. 62; Worthy *v.* Caddell, 76 N. Car. 82; Morris *v.* Daniels, 35 Ohio St. 406; Evans *v.* Templeton, 69 Tex. 375; 5 Am. St. Rep. 71; Spurlock *v.* Sullivan, 36 Tex. 511.

2. Webb on Rec. Tit., § 204; 2 Pom. Eq. Jur., § 747; Snodgrass *v.* Ricketts, 13 Cal. 359; Morse *v.* Wright, 60 Cal. 260; Bowen *v.* Prout, 52 Ill. 354; Roseman *v.* Miller, 84 Ill. 297; Upshaw *v.* Hargrove, 6 Smed. & M. (Miss.) 286; Boon *v.* Barnes, 23 Miss. 136; Bishop *v.* Schneider, 46 Mo. 472; 2 Am. Rep. 533; Patten *v.* Moore, 32 N. H. 382; Frost *v.* Beckman, 1 Johns. Ch. (N. Y.) 288; Swan *v.* Ligan, 1 McCord Eq. (S. Car.) 227; Pearce *v.* Jackson, 61 Tex. 642. And even a voluntary conveyance, though not recorded, is valid against any subsequent voluntary conveyance of the same property by the grantor. Way *v.* Lyon, 3 Blackf. (Ind.) 76.

3. Steiner *v.* McCall, 61 Ala. 413; Turner *v.* McFee, 61 Ala. 468.

4. Webb on Rec. Tit., § 207; Dev. on Deeds, § 632; 1 Jones on Mortg., § 458; Story Eq. Jur., § 1503; Willard Eq. Jur. 256; Bybee *v.* Hawkett, 12 Fed. Rep. 649; Morse *v.* Godfrey, 3 Story (U. S.) 364; Peoples' Sav. Bank *v.* Bates, 120 U. S. 556; Gafford *v.* Stearns, 51 Ala. 434; Short *v.* Battle, 52 Ala. 456; Coleman *v.* Smith, 55 Ala. 368; Alexander *v.* Caldwell, 55 Ala. 517; Bartlett *v.* Varner, 56 Ala. 580, Wilson *v.* Knight, 59 Ala. 172; Thurman *v.* Stoddard, 63 Ala. 336; Cook *v.* Parham, 63 Ala. 456; Sweeney *v.* Bixler, 69 Ala. 539; Banks *v.* Long, 79 Ala. 319; Johnson *v.* Graves, 27 Ark. 557; Withers *v.* Little, 56 Cal. 370; Chance *v.* McWhorter, 26 Ga. 315; Metropolitan Bank *v.* Godfrey, 23 Ill. 531; Norton *v.* Williams, 9 Iowa 528; Clark *v.* Barnes, 72 Iowa 563; Holden *v.* Garrett, 23 Kan. 98; Halstead *v.* Bank of Ky., 4 J. J. Marsh. (Ky.) 554; Repp *v.* Repp, 12 Gill & J. (Md.) 341; Clarke *v.* Flint, 22 Pick. (Mass.) 243; Buffington *v.* Gerrish, 15 Mass. 156; 8 Am. Dec. 97; Jewett *v.* Tucker, 139 Mass. 566; Baze *v.* Arper, 6 Minn. 220; Perkins *v.* Swank, 43 Miss. 360; Hinds *v.* Pugh, 48 Miss. 268; Schumpert *v.* Dillard, 55 Miss. 348; McAdow *v.* Black, 6 Mont. 601; Mingus *v.* Condit, 23 N. J. Eq. 313; Pancoast *v.* Duval, 26 N. J. Eq. 445; Van Heusen *v.* Radcliff, 17 N. Y. 580; 72 Am. Dec. 480; Lawrence *v.* Clark, 36 N. Y. 128; De Lancey *v.* Stearns, 66 N. Y. 157; Union Dime Sav. Inst. *v.* Duryea, 67 N. Y. 84; Jones *v.* Graham, 77 N. Y. 628; Pickett *v.* Barron, 29 Barb. (N. Y.) 505; Thomas *v.* Kelsey, 30 Barb. (N. Y.) 268; Tiffany *v.* Warren, 37 Barb. (N. Y.) 571; Webster *v.* Van Steenbergh, 46 Barb. (N. Y.) 211; Stalker *v.* McDonald, 6 Hill (N. Y.) 93; 40 Am. Dec. 389; Coddington *v.* Bay, 20 Johns. (N. Y.) 637; 11 Am. Dec. 342; Cary *v.* White, 7 Lans. (N. Y.) 1; 52 N. Y. 138; Dickerson *v.* Tillinghast, 4 Paige (N. Y.) 215; 25 Am. Dec. 528; Manhattan Co. *v.* Everston, 6 Paige (N. Y.) 457; Padgett *v.* Lawrence, 10 Paige (N. Y.) 170; 40 Am. Dec. 232; Westervelt *v.* Haff, 2 Sandf. Ch. (N. Y.) 98; Harris *v.* Horner, 1 Dev. & B. Eq. (N. Car.) 455; 30 Am. Dec. 182; Ashton's Appeal, 73 Pa. St. 153; Spurlock *v.* Sullivan; 36 Tex. 511; Farley *v.* McAlister, 39 Tex. 602;

chase than he was before.[1] Therefore, when a mortgage is given to secure an antecedent debt, the mortgagee must have given an extension of time, surrendered some security, or otherwise relinquished some safeguard to his position as a debtor.[2] But the above rule is not universally accepted; in some States the discharge of a pre-existing debt is held a valuable consideration.[3]

d. WITH CONVEYANCE FIRST RECORDED.—Recordation is required for the protection of subsequent purchasers only. To require a subsequent conveyance of title to be recorded in order that a prior purchaser of the same property may be able to obtain information of its existence would not be in furtherance of the general design of these statutes, which was to protect purchasers from being undone by prior secret conveyances by making the means of obtaining information thereof available to that end. And so, it is not necessary to his full protection, in the absence of statutory provisions so requiring, that the subsequent purchaser record the instrument under which he claims before the recordation of the conveyance of the prior purchaser.[4] But,

McKamey *v.* Thorp, 61 Tex. 653; Overstreet *v.* Manning, 67 Tex. 657. See MORTGAGES, vol. 15, p. 757, n. 6.

1. See Webb on Rec. Tit., § 207, n. 3; McKamey *v.* Thorp, 61 Tex. 648; Wright *v.* Douglass, 10 Barb. (N. Y.) 107; Dickerson *v.* Tillinghast, 4 Paige (N. Y.) 215; 25 Am. Dec. 528.

2. Webb on Rec. Tit., § 209, *citing* Gilchrist *v.* Gough, 63 Ind. 576; 30 Am. Rep. 250; Busenbarke *v.* Ramey, 53 Ind. 499; Carey *v.* White, 52 N. Y. 138; Ashton's Appeal, 73 Pa. St. 153.

This surrender or cancellation of a security held by a creditor will be efficient to constitute him a purchaser for value. Goodman *v.* Simonds, 20 How. (U. S.) 343; Youngs *v.* Lee, 12 N. Y. 551; Padgett *v.* Lawrence, 10 Paige (N. Y.) 170; 40 Am. Dec. 232; Spurlock *v.* Sullivan, 36 Tex. 511.

So the extension of the time for the payment of the debt will be deemed sufficient to entitle the creditor to the protection given to a purchaser for value. Thames *v.* Rembert, 63 Ala. 561; Downing *v.* Blair, 75 Ala. 216; Sargent *v.* Sturm, 22 Cal. 359; 83 Am. Dec. 118; Gilchrist *v.* Gough, 63 Ind. 576; 30 Am. Rep. 250; 19 Alb. L. J., 276; Busenbarke *v.* Ramey, 53 Ind. 499; Port *v.* Embree, 54 Iowa 14; Schumpert *v.* Dillard, 55 Miss. 348; Coddington *v.* Bay, 20 Johns. (N. Y.) 637; 11 Am. Dec. 342; Farmers' etc. Bank *v.* Wallace, 45 Ohio St. 153; Ingram *v.* Morgan, 4 Humph. (Tenn.) 66; 40 Am. Dec. 626; Griswold *v.* Davis, 31 Vt. 390.

It has been held that, when the mortgagee in a mortgage, taken for a pre-existing debt not extended, enters into possession and assumes control of the business connected with the mortgaged property, the responsibility thus assumed becomes a valid present consideration for the mortgage. Clark *v.* Barnes, 72 Iowa 563.

3. Webb on Rec. Tit. 207; Dev. on Deeds, § 632; Metford *v.* Metford, 9 Ves. 100; Partridge *v.* Smith, 2 Biss. (U. S.) 183; Bayley *v.* Greenleaf, 7 Wheat. (U. S.) 46; Hunter *v.* Watson, 12 Cal. 373; 73 Am. Dec. 543; Frey *v.* Clifford, 44 Cal. 335; Gassen *v.* Hendrick, 74 Cal. 444; City Nat. Bank *v.* Goodrich, 3 Colo. 139; Work *v.* Brayton, 5 Ind. 396; Babcock *v.* Jordan, 24 Ind. 14; Wert *v.* Naylor, 93 Ind. 431; Ruth *v.* Ford, 9 Kan. 17; Soule *v.* Shotwell, 52 Miss. 236; Evans *v.* Greenhow, 15 Gratt. (Va.) 153; Exchange Bank *v.* Knox, 19 Gratt. (Va.) 739; Cammack *v.* Soran, 30 Gratt. (Va.) 292.

4. Steele *v.* Spencer, 1 Pet. (U. S.) 552; Miller *v.* Merine, 43 Fed. Rep. 261; Coster *v.* Bank of Ga., 24 Ala. 37; McGuire *v.* Barker, 61 Ga. 339; De Courcey *v.* Collins, 21 N. J. Eq. 357; Sanborn *v.* Adair, 29 N. J. Eq. 338; Hawley *v.* Bennett, 5 Paige (N. Y.) 104; Jackson *v.* Campbell, 19 Johns. (N. Y.) 281; Northrup *v.* Brehmer, 8 Ohio 392; Byrd *v.* Wilcox, 8 Baxt. (Tenn.) 68; Ranney *v.* Hogan, 1 Tex. Un. Cas. 253. See also Galway *v.* Malchow, 7 Neb. 285; Fallas *v.* Pierce, 30 Wis. 443.

although such requirement may not be in full accord with the general design of the recording provisions, from a desire to secure a prompt record of conveyances, and to afford a means for the ready determination of certain questions of priority which would otherwise arise,[1] the protection of the recording acts is limited, in most of the States, to a purchaser whose deed or conveyance is first duly recorded.[2] This requirement must be complied with in order to support the claim of the subsequent purchaser to the protection afforded by the recording acts.[3]

e. WHO ARE COMPLETE PURCHASERS.—A subsequent purchaser in order to receive protection from the recording acts, must be a complete purchaser.[4] He must have paid purchase money, and not merely secured its payment,[5] and must also, according to some authorities, have received his conveyance, and not merely a contract to convey.[6] But in regard to the latter requirement, later authority is to the effect that the purchaser need not have

1. See *supra*, this title, *Time of Record.*

2. See Stim. Am. Stat. L., § 1611.

3. Doe *v.* Bank of Cleveland, 3 McLean (U. S.) 140; Brookfield *v.* Goodrich, 32 Ill. 363; Simmons *v.* Stum, 101 Ill. 454; Brose *v.* Doe, 2 Ind. 666; Hopping *v.* Burnam, 2 Greene (Iowa) 9; Clabaugh *v.* Byerly, 7 Gill (Md.) 54; 48 Am. Dec. 575; General Ins. Co. *v.* U. S. Ins. Co., 10 Md. 517; Talbott *v.* Crippen, 52 Mich. 633; Goar *v.* McCanless, 60 Miss. 244; Hubbart *v.* Walker, 19 Neb. 94; Taylor *v.* Thomas, N. J. Eq. 331; Jackson *v.* Campbell, 9 Johns. (N. Y.) 281; Fort *v.* Burch, Den. (N. Y.) 187; Page *v.* Waring, 5 N. Y. 463; Moore *v.* Thomas, 1 Oregon 201; Lightner *v.* Mooney, 10 Watts (Pa.) 407; Ebner *v.* Goundie, 5 W. & S. (Pa.) 49; Goundie *v.* Northampton Water Co., 7 Pa. St. 233; Pennsylvania Salt Mfg. Co. *v.* Neel, 54 Pa. St. 9; Boyce *v.* Boyce, 6 Rich. Eq. (S. Car.) 302; Rogers *v.* Wheaton, 88 Penn. 665; Fallas *v.* Pierce, 30 Wis. 43.

4. 2 Min. Inst. 877; Steele *v.* Spencer, Pet. (U. S.) 552.

5. 2 Min. Inst. 877; Brown *v.* Welch, 3 Ill. 343; 68 Am. Dec. 549; Bennett Titherington, 6 Bush (Ky.) 192; Paul Fulton, 25 Mo. 156; Union Canal Co. *v.* Young, 1 Whart. (Pa.) 410; Am. Dec. 212; Evans *v.* Templeton, Tex. 375; Lamar *v.* Hale, 79 Va. 37. See Losey *v.* Simpson, 11 N. J. Eq. 246.

A non-negotiable obligation or security given by the purchaser, from which he may be relieved upon failure of consideration either at law or equity, will not be sufficient payment. Roseman *v.* Miller, 84 Ill. 297; Westbrook *v.* Gleason, 79 N. Y. 23; Dickerson *v.* Tillinghast, 4 Paige (N. Y.) 215; 25 Am. Dec. 528; Kunkle *v.* Wolfersberger, 6 Watts (Pa.) 126. But this does not comprehend the absolute transfer of negotiable securities made by third persons; payment may be made by such transfer. Patten *v.* Moore, 32 N. H. 382; Harris *v.* Norton, 16 Barb. (N. Y.) 264; Williams *v.* Beard, 1 S. Car. 309.

And if an obligation or security is given on which the defense of failure of consideration has actually been cut off, it will be treated as payment. Baldwin *v.* Sager, 70 Ill. 503; Partridge *v.* Chapman, 81 Ill. 137; Kitteridge *v.* Chapman, 36 Iowa 348; Rush *v.* Mitchell, 71 Iowa 333. And it has been held in some cases, that an irrevocable obligation such as a negotiable note, or a bid at sheriff's sale, or the assumption of the debt of the vendor, so that the purchaser is thereby absolutely substituted for the debtor, will be sufficient as payment. Webb on Rec. Tit., § 205; *citing* Jackson *v.* Winslow, 9 Cow. (N. Y.) 13; Freeman *v.* Deming, 3 Sandf. Ch. (N. Y.) 327; Frost *v.* Beekman, 1 Johns. Ch. (N. Y.) 288; Williams *v.* Beard, 1 S. Car. 309; Case *v.* Jennings, 17 Tex. 673.

6. Butler *v.* Douglass, 1 McCrary (U. S.) 630; Taylor *v.* McDonald, 2 Bibb (Ky.) 420; 2 Min. Inst. 877.

received a conveyance of the legal title, but it is sufficient that he has a full right to call for it.[1]

It has been stated as a general rule that the purchaser of an equitable title, since he purchases a title imperfect on its face, takes it subject to all prior equities and trusts that would affect his vendor;[2] but this principle has been denied, upon the ground that it cannot be sustained as being in accordance with the recording acts.[3] And where equitable titles and interests are, either by the express provisions of the statutes, or by construction, subjected to the requirements of the recording acts, that doctrine is not tenable.[4]

A purchaser who has paid part of the purchase money will usually be protected to the extent of the payment actually made.[5]

VI. Effect of Record.—1. As Constructive Notice.—The recording acts impose the duty of recording their conveyances on grantees for the purpose of placing the power of obtaining knowledge thereof within the reach of all. When, therefore, the instrument is recorded, that has been done, and the requirement of the statute has been satisfied.[6] This has given rise to the common statement that the record is notice to all the world.[7] But it is to be remembered, that at common law, there reposed no duty upon the grantee to give any kind of notice of his conveyance, and that recordation is purely an additional statutory requirement in con-

1. Preston *v.* Nash, 75 Va. 949; 76 Va. 1; Lamar *v.* Hale, 79 Va. 147. See Paul *v.* Fulton, 25 Mo. 156.

2. Walton *v.* Hargroves, 42 Miss. 18; 97 Am. Dec. 435; Reed *v.* Dickey, 2 Watts (Pa.) 459; Kramer *v.* Arthurs, 7 Pa. St. 165; York *v.* McNutt, 16 Tex. 14; 67 Am. Dec. 607.

3. Bellas *v.* McCarty, 10 Watts (Pa.) 13; Rhines *v.* Baird, 41 Pa. St. 256.

4. Webb on Rec. Tit., § 203; Lewis *v.* Johnson, 68 Tex. 448.

5. Webb on Rec. Tit., § 206; Courts *v.* Cisna, 7 Biss. (U. S.) 260; Wormley *v.* Wormley, 8 Wheat. (U. S.) 421; Fowler *v.* Merrill, 11 How. (U. S.) 375; Dresser *v.* Missouri, etc., R. Co., 93 U. S. 92; Dufphey *v.* Frenaye, 5 Stew. & P. (Ala.) 215; Kittridge *v.* Chapman, 36 Iowa 348; Kohl *v.* Lynn, 34 Mich. 360; Youst *v.* Martin, 3 S. & R. (Pa.) 423; Huyler *v.* Dahony, 48 Tex. 239; Fletcher *v.* Ellison, 1 Tex. Un. Cas. 672.

In regard to the manner in which this protection may be attained, Mr. Webb says: "Courts of equity, it has been said, may afford this protection in several ways; as by permitting the plaintiff to enforce his claim to the whole land only upon condition of his doing equity by refunding to the defendant the amount already paid before receiving the notice; or even, when the plaintiff has been guilty of laches, or the defendant has made valuable improvements, by decreeing that the land itself should remain free from any claim on the plaintiff's part, and that his remedy should be confined to a recovery of the portion of the purchase money which was unpaid at the time the notice was received." Webb on Rec. Tit., § 206, *citing* 2 Pom. Eq. Jur., § 750; Baldwin *v.* Sager, 70 Ill. 503; Marchbanks *v.* Banks, 44 Ark. 48; Paul *v.* Fulton, 25 Mo. 156; Haughwout *v.* Murphy, 21 N. J. Eq. 118; Frost *v.* Beekman, 1 Johns. Ch. (N. Y.) 288; Farmers' L. & T. Co. *v.* Maltby, 8 Paige (N. Y.) 361; Everts *v.* Agnes, 4 Wis. 343; Union Canal Co. *v.* Young, 1 Whart. (Pa.) 410; 30 Am. Dec. 212.

6. See Shaw *v.* Poor, 6 Pick. (Mass.) 86; 17 Am. Dec. 347.

7. Hine *v.* Dodd, 2 Atk. 275; Simpson *v.* Montgomery, 25 Ark. 365; 99 Am. Dec. 228; Maul *v.* Rider, 59 Pa. St. 167.

veyancing. It has been said that it is solely because a subsequent conveyance (in many States, a subsequent recorded conveyance) in compliance with the statute defeats a prior unrecorded title, that the record of a prior title is held to be constructive notice to subsequent purchasers.[1] Consequently the record of an instrument is notice thereof to those persons only who, in the absence of recordation, could require the operation of the statutes to effect their protection.[2] And the record is notice to subsequent purchasers in only the same line of record title.[3] A person who purchases certain property from one who has already conveyed it away cannot be affected with record notice of conveyances made by the prior grantee by the record of such derivative conveyances, if the conveyance by the common grantor is unrecorded. So, where one conveys land by deed which is not recorded,[4] but

1. See Taylor *v.* Maris, 5 Rawle (Pa.) 51.

In Moore *v.* Thomas, 1 Oregon, 201, the court by Williams, C. J., says: 'Lord Hardwicke says, in the case of Hine *v.* Dodd, 2 Atk. 275, that the meaning of the registry act was to prevent parol proofs of notice, or not notice.' Effect ought to be given to the 'meaning' as far as practicable, so that the titles to real estate in the country may be matters of public records, and not, 'be, or cease to be,' as shall happen by the testimony of forgetful or false witnesses. Where all conveyances of real estate are recorded, persons know where to look for information as to titles, and upon what to depend; and we are disposed, at this early day, so far as our statute will warrant, to install this system of safety and certainty, and to hold that a recorded conveyance of real estate, not vitiated by fraud, shall in all cases have priority over a conveyance not recorded."

2. See Webb on Rec. Tit., § 21; Dennis *v.* Burritt, 6 Cal. 670; Bates *v.* Norcross, 14 Pick. (Mass.) 224; Edwards *v.* McKernan, 55 Mich. 520; Stuyvesant *v.* Hall, 2 Barb. Ch. (N. Y.) 151; Maul *v.* Rider, 59 Pa. St. 167; Leach *v.* Beattie, 33 Vt. 195.

The mere fact that a mortgage or deed of the whole land, by one tenant in common, was duly recorded, does not amount to constructive notice to the co-tenant of the existence of such a deed, and of a claim to the exclusive ownership of the land. Leach *v.* Beattie, 33 Vt. 195; Holley *v.* Hawley, 39 Vt. 525; 94 Am. Dec. 350.

In Gillett *v.* Gaffney, 3 Colo. 366, the court by Elbert, J., said: "A deed duly recorded is constructive notice of its existence, and of its contents, to all persons claiming what is thereby conveyed under the same grantor by subsequent purchase or mortgage, but not to other persons. 3 Wash. Real Prop. 319, § 53. In the case of Maul v. Rider, 59 Pa. St. 167, Sharswood, J., says: 'That the record of a deed is constructive notice to all the world, is too broad an enunciation of the doctrine. Such record is constructive notice only to those who are bound to search for it as subsequent purchasers and mortgagees, and all others who deal with it on the credit of the title in the line of which the recorded deed belongs.'"

3. Harper *v.* Bibb, 34 Miss. 472; 69 Am. Dec. 397; Crockett *v.* Maguire, 10 Mo. 34; Digman *v.* McCollum, 47 Mo. 372; Odle *v.* Odle, 73 Mo. 289; Cook *v.* Travis, 20 N. Y. 400; Leiby *v.* Wolf, 10 Ohio 83; Blake *v.* Graham, 6 Ohio St. 580; 67 Am. Dec. 360; Maul *v.* Rider, 59 Pa. St. 167; Woods *v.* Farmere, 7 Watts (Pa.) 382; Kansas City Land Co. *v.* Hill, 87 Tenn. 589.

4. Thus, where A conveys to B, who neglects to record his deed but conveys to C, the record of the deed from B to C will not charge a subsequent purchase from A with notice. Fenno *v.* Sayre, 3 Ala. 458; De Yampert *v.* Brown, 28 Ark. 166; Felton *v.* Pitman, 14 Ga. 530; Bazemore *v.* Davis, 55 Ga. 504; Thursby *v.* Myers, 57 Ga. 155; Chicago *v.* Witt, 75 Ill. 211; Carbine *v.* Pringle, 90 Ill. 302; Kerfoot *v.* Cronin, 105 Ill. 609; Corbin *v.* Sullivan, 47 Ind. 356; Huber *v.* Bossart, 70 Iowa

the grantee makes a mortgage back to the grantor to secure the purchase money, the record of the mortgage will not impart notice thereof to a subsequent purchaser of the same property from the grantor.[1]

It is only a subsequent conveyance which defeats a prior unrecorded conveyance, and, therefore, only persons who purchase subsequently to the recordation can be said to be charged with notice of a recorded conveyance.[2] The operation of the record as notice is prospective and not retrospective. Hence, the record of a deed does not give constructive notice to persons holding under prior contract so as to invalidate payments made by them on the contract.[3] A prior mortgagee cannot be charged with notice of, and cannot be affected by a subsequent mortgage or deed, by the mere record thereof.[4] He may, without receiving anything on the mortgage debt, release to the mortgagor a portion of the property mortgaged without impairing his

718; Roberts *v.* Bourne, 23 Me. 165; 39 Am. Dec. 614; Tilton *v.* Hunter, 24 Me. 29; Traphagen *v.* Irwin, 18 Neb. 195; Losey *v.* Simpson, 11 N. J. Eq. 246; Bingham *v.* Kirkland, 34 N. J. Eq. 229; Cook *v.* Travis, 22 Barb. (N. Y.) 338; Page *v.* Waring, 76 N. Y. 463; Tarbell *v.* West, 86 N. Y. 280; Lightner *v.* Mooney, 10 Watts (Pa.) 407; Hetherington *v.* Clark, 30 Pa. St. 393; Calder *v.* Chapman, 52 Pa. St. 359; 91 Am. Dec. 163; Harris *v.* Arnold, 1 R. I. 125; Watson *v.* Chalk, 11 Tex. 93; Thompson *v.* Westbrook, 56 Tex. 265; Holmes *v.* Buckner, 67 Tex. 107; Ely *v.* Wilcox, 20 Wis. 523; 91 Am. Dec. 436.

In *Louisiana*, the contrary rule has been established, and recordation imparts notice notwithstanding a break in the record. In the earlier cases, Slidell, J. dissented from the majority opinion. Stockton *v.* Briscoe, 1 La. Ann. 249; McGill *v.* McGill, 4 La. Ann. 262; Cotton *v.* Stacker, 5 La. Ann. 677; Poydras *v.* Laurans, 6 La. Ann. 771. And a similar decision in a later case was rested upon the doctrine of *stare decisis*. Hollingsworth *v.* Wilson, 32 La. Ann. 1012.

1. Davis *v.* Lutkiewiez, 72 Iowa 254; Veazie *v.* Parker, 23 Me. 170; Pierce *v.* Taylor, 23 Me. 246; Locey *v.* Simpson, 11 N. J. Eq. 246; Boyd *v.* Mundorf, 30 N. J. Eq. 545; Bingham *v.* Kirkland, 34 N. J. Eq. 229; Dusenbury *v.* Hulbert, 59 N. Y. 541. See Bright *v.* Buckman, 39 Fed. Rep. 243.

2. Wade on Notice, § 203; McCabe *v.* Grey, 20 Cal. 509; George *v.* Wood, 9 Allen (Mass.) 80; 85 Am. Dec. 741; Truscott *v.* King, 6 Barb. (N. Y.) 349; Moyer *v.* Hinman, 13 N. Y. 191; Ackerman *v.* Hunsicker, 85 N. Y. 49; 39 Am. Rep. 621; Kendall *v.* Niebuhr, 45 N. Y. Super. Ct. Rep. 551; Taylor *v.* Maris, 5 Rawle (Pa.) 51; Lake *v.* Shumate, 20 S. Car. 23; Holley *v.* Hawley, 59 Vt. 525; 94 Am. Dec. 350; Deuster *v.* McCamus, 14 Wis. 307.

3. Cook *v.* Dillon, 9 Iowa 407; 74 Am. Dec. 354; Baldwin *v.* Thompson, 15 Iowa 504.

4. Shirras *v.* Caig, 7 Cranch (U. S.) 34; *In re* Haake, 7 Nat. Bank. Reg. 61; 2 Sawy. (U. S.) 241; Birnie *v.* Main, 29 Ark. 591; Peters *v.* Jamestown Bridge Co., 5 Cal. 335; 63 Am. Dec. 134; Frye *v.* Bank of Illinois, 11 Ill. 381; Iglehart *v.* Crane, 42 Ill. 268; Doolittle *v.* Cook, 75 Ill. 354; Heaton *v.* Prather, 84 Ill. 330; Meacham *v.* Steele, 93 Ill. 135; Small *v.* Stagg, 95 Ill. 39; Cook *v.* Dillon, 9 Iowa 407; 74 Am. Dec. 354; Baldwin *v.* Thompson, 15 Iowa 504; Brown *v.* Simons, 44 N. H. 475; Hoy *v.* Bramhall, 19 N. J. Eq. 563; 97 Am. Dec. 687; Cogswell *v.* Stout, 32 N. J. Eq. 240; Howard Ins. Co. *v.* Halsey, 8 N. Y. 271; 59 Am. Dec. 478; Young *v.* Guy, 87 N. Y. 457; Stuyvesant *v.* Home, 1 Sandf. Ch. (N. Y.) 419; King *v.* McVickar, 3 Sandf. Ch. (N. Y.) 192; Howard Ins. Co. *v.* Halsey, 4 Sandf. (N. Y.) 565; 9 Leg. Obs. 214; New York L. Ins., etc., Co. *v.* Smith, 2 Barb. Ch. (N. Y.) 82; Guion *v.* Knapp, 6 Paige (N. Y.) 35; 29 Am. Dec. 741; Wetmore *v.* Roberts, 10 How. Pr. (N. Y.) 54; Ranney *v.* Hardy, 43 Ohio St. 157; Frick's Appeal, 101 Pa. St. 485.

security of the whole mortgage debt upon the remainder.[1] This doctrine that a record has only a prospective effect in imparting notice has been applied where the mortgage was given to secure future advances, to protect the mortgagee making advances under it even after a subsequent incumbrance or conveyance of the same property made by the mortgagor had been recorded.[2] It has also resulted in the rule that the mere recording of an assignment of a mortgage is not of itself notice of such assignment to the mortgagor, so as to invalidate the subsequent payments on the mortgage debt made by him to the assignor.[3]

But the rule that a recorded instrument imparts constructive notice must be limited to those instruments recorded after the grantor therein acquired the title to the property thereby conveyed. To hold otherwise, by imposing upon a subsequent purchaser the duty of examining the records indefinitely, would militate against the practical advantages of the recording system.[4] So, if one conveys land by deed and the grantee makes a mortgage back to secure the purchase money and the mortgage is recorded before the deed, a subsequent purchaser from the grantee is not chargeable with record notice of the mortgage.[5] But in some cases, it has been held that the principle of estoppel will operate to protect the grantee before title acquired, by causing the title to inure to his benefit, even against subsequent purchasers from the grantor after he obtains the record title without recording his conveyance after the title is so acquired by his grantor.[6]

That the record of an instrument imparts constructive notice has often been declared by the courts.[7] In connection with its

1. Jones on Mortg., § 562; Dennis *v.* Burritt, 6 Cal. 670; George *v.* Wood, 9 Allen (Mass.) 80; 85 Am. Dec. 741; Cooper *v.* Bigly, 13 Mich. 463; Vanorden *v.* Johnson, 14 N. J. Eq. 376; 82 Am. Dec. 254; Ward *v.* Hague, 25 N. J. Eq. 397; Howard Ins. Co. *v.* Halsey, 8 N. Y. 271; 59 Am. Dec. 478; Deuster *v.* McCamus, 14 Wis. 307; Straight *v.* Harris, 14 Wis. 509.

2. But, it has been held, on the other hand, that it was the duty of the mortgagees in mortgages given to secure future advances, to examine the records and see whether liens of other persons had not attached in the time between the execution of their mortgage and the making of the advance. See MORTGAGES, vol. 15, pp. 796–801, where this matter is fully treated.

3. See MORTGAGES, vol. 15, p. 844, notes 2 and 3.

4. Wade on Notice, §§ 214–216; Dev. on Deeds, §§ 723–724; Hetzel *v.* Barber, 69 N. Y. 1; Buckingham *v.* Hanna, 2 Ohio St. 551; Sands *v.* Beardsley, 32 W. Va. 594. See note to Salisbury Sav. Soc. *v.* Cutting, 50 Conn. 113. *Contra* Digman *v.* McCollum 47 Mo. 372; Edwards *v.* McKernan, 55 Mich. 526.

5. Faircloth *v.* Jordan, 18 Ga. 350; Wing *v.* McDowell, Walk. (Mich.) 175; Boyd *v.* Mundorf, 30 N. J. Eq. 545; Farmers' L. & T. Co. *v.* Maltby, 8 Paige (N. Y.) 361; Page *v.* Waring, 76 N. Y. 463; Calder *v.* Chapman, 52 Pa. St. 359; 91 Am. Dec. 163.

But the mere fact that a mortgage is dated before the mortgagor's conveyance will be immaterial if it was recorded after he acquired title. Semon *v.* Terlume, 40 N. J. Eq. 364.

6. Tefft *v.* Munson, 57 N. Y. 97. See also ESTOPPEL, vol. 7, p. 11, n. 6. But see Dev. on Deeds, § 722.

7. McCormack *v.* James, 36 Fed. Rep. 14; Berson *v.* Numan, 63 Cal. 550; Osborn *v.* Carr, 12 Conn. 195; Begein *v.* Brehm, 123 Ind. 160; Tod

proper limitations this expression is a convenient statement of the effect of recordation. So, from the effect of the record of the certificate as constructive notice, a sheriff's deed relates back to the date of the recorded certificate of sale.[1] And, where a bond for title is within the recording acts, a deed made in pursuance of recorded bond conveys the title as it stood when the bond was recorded.[2] In entire harmony with the effect given to recordation, it may be said that a purchaser will charge with notice of the state of the record title of his own grantor but also that of each preceding grantor in the entire series of conveyances.[3] And, if any of such grantors have made a conveyance which is prior to the one through which the purchaser traces his title, he will, if such

v. Benedict, 15 Iowa 591; Thomas *v.* Kennedy, 24 Iowa 397; 95 Am. Dec. 740; Cushing *v.* Ayer, 25 Me. 383; Humphreys *v.* Newman, 51 Me. 40; McMechan *v.* Griffing, 3 Pick. (Mass.) 149; Shaw *v.* Poor, 6 Pick. (Mass.) 86; 17 Am. Dec. 347; Quirk *v.* Thomas, 6 Mich. 76; Hedstrom *v.* Kingsbury, 40 Mich. 636; Edwards *v.* McKernan, 55 Mich. 520; Reynolds *v.* Case, 60 Mich. 76; Harper *v.* Bibb, 34 Miss. 472; 69 Am. Dec. 397; Learned *v.* Corley, 43 Miss. 707; Miller *v.* Whitson, 40 Mo. 97; Digman *v.* McCollum, 47 Mo. 372; Harral *v.* Gray, 10 Neb. 186; Tripe *v.* Marcy, 39 N. H. 439; Hoy *v.* Bramhall, 19 N. J. Eq. 563; 97 Am. Dec. 687; Locker *v.* Riley, 30 N. J. Eq. 104; Wallace *v.* Silsby, 42 N. J. L. 1; Schutt *v.* Large, 6 Barb. (N. Y.) 373; James *v.* Morey, 2 Cow. (N. Y.) 246; 14 Am. Dec. 475; Parkist *v.* Alexander, 1 Johns. Ch. (N. Y.) 397; Johnson *v.* Stagg, 2 Johns. (N. Y.) 510; Berry *v.* Mutual Ins. Co., 2 Johns. Ch. (N. Y.) 603; Brinckerhoff *v.* Lansing, 4 Johns. Ch. (N. Y.) 70; 8 Am. Dec. 538; Wendell *v.* Wadsworth, 20 Johns. (N. Y.) 663; Irvin *v.* Smith, 17 Ohio 226; Grandin *v.* Anderson, 15 Ohio St. 286; Knouff *v.* Thompson, 16 Pa. St. 357; Martin *v.* Sale, 1 Bailey's Eq. (S. Car.) 1; Godbold *v.* Lambert, 8 Rich. Eq. (S. Car.) 155; 70 Am. Dec. 192; Belk *v.* Massey, 11 Rich. (S. Car.) 614; Annely *v.* De Saussure, 12 S. Car. 488; Clason *v.* Shepherd, 6 Wis. 369.

In a number of States, this is declared by statute. See Stim. Am. Stat. L., § 1625.

Thus, the averment of proper registration of a chattel mortgage is equivalent to an averment of notice. Whittlesloffee *v.* Strauss, 83 Ala. 517.

It has been held, on the ground that the record is constructive notice, that the deposit of an instrument revoking a power of attorney in the office where the power had been recorded, constituted a complete revocation, without giving other notice to either the agent or the third persons with whom he dealt before the power was extinguished. Arnold *v.* Stevenson, 2 Nev. 234.

Effect as Notice of Record of Conveyances to Persons Not Bona Fide Purchasers.—The fact that mere volunteers cannot claim protection against prior conveyances under the recording acts will not render the record of a voluntary conveyance invalid as to purchaser subsequent thereto. The record of a voluntary conveyance will be as effective for the purpose of giving notice to subsequent parties as though it were for a valuable consideration. Beal *v.* Warren, 2 Gray (Mass.) 447. Or the fact that a deed, given without consideration is fraudulent as against the grantor's creditors, will not prevent its recordation from operating as notice of its existence to subsequent purchasers. Stevens *v.* Morse, 47 N. H. 532.

Record of Agreement as to Priority.—When a waiver of priority by one mortgagee in favor of a later mortgagee is recorded it will bind subsequent assignee of the first mortgage. Clason *v.* Shepherd, 6 Wis. 369.

1. McMutrie *v.* Riddell, 9 Colo. 497; Hazard *v.* Cole, 7 Idaho 276.

2. Snapp *v.* Peirce, 24 Ill. 156. But see O'Neil *v.* Wabash Ave., etc., Soc., 4 Biss. (U. S.) 482.

3. Martin *v.* Nash, 31 Miss. 324; Acer *v.* Westcott, 1 Lans. (N. Y.) 193; McAteer *v.* McMullen, 2 Pa. St. 32. See 2 Pom. Eq. Jur. 67.

conveyance has been recorded, be chargeable with notice of each conveyance derived therefrom even to the last conveyance in the unbroken record series.[1]

Under the doctrine that the record is constructive notice, if an earlier instrument is not recorded until after a later one, yet before a third purchaser acquires some right from the second, the third purchaser takes subject to all rights which the first purchaser had against his grantor.[2]

The constructive notice given by record, must be understood to be only such notice as the purchaser would obtain from an actual examination of the records of which he is charged with notice; the constructive notice which flows exclusively from matters of record cannot be more extensive than the facts stated in the record.[3]

1. Spielmann *v.* Kliest, 36 N. J. Eq. 199; Briggs *v.* Palmer, 20 Barb. (N. Y.) 392. This is a necessary sequence of the rule stated *supra*, this title, in *What Persons Protected—In General*, n. 2, p. 583, that the protection which the recording acts give purchasers against prior unrecorded conveyances extends not only to the immediate purchaser from the grantor but to persons claiming title through such immediate purchasers by derivative conveyances.

2. Thus, if A conveys to B, and afterwards to C, who effects the record of his deed before the one to B is recorded, but had actual notice thereof when he bought, the subsequent record of B's deed will charge constructive notice, and any purchaser from C, after such record, will take subject to B's rights. North *v.* Knowlton, 23 Fed. Rep. 163; Mahoney *v.* Middleton, 41 Cal. 41; Morrison *v.* Kelly, 22 Ill. 610; 74 Am. Dec. 169; English *v.* Waples, 13 Iowa 57; Flynt *v.* Arnold, 1 Met. (Mass.) 619; Van Aken *v.* Gleason, 34 Mich. 477; Jackson *v.* Post, 9 Cow. (N. Y.) 120; 15 Wend. (N. Y.) 588; Van Rensselaer *v.* Clark, 17 Wend. (N. Y.) 25; 31 Am. Dec. 280; Schutt *v.* Large, 6 Barb. (N. Y.) 373; Ring *v.* Steele, 3 Keyes (N. Y.) 450; Goelet *v.* McManus, 1 Hun (N. Y.) 306; Fallass *v.* Pierce, 30 Wis. 443, denying the authority of Ely *v.* Wilcox, 20 Wis. 523; 91 Am. Dec. 436, to the contrary; Erwin *v.* Lewis, 32 Wis. 376.

But it has been held that while the recording of the prior deed after the second is constructive notice of its existence to a purchaser from the vendee in the second deed, such purchaser cannot thereby be affected by the actual knowledge of his vendor. Day *v.* Clark, 25 Vt. 397.

Where T, a purchaser of land at a sale in partition, executed a mortgage to secure the purchase money, and after the execution of such mortgage, but before the same was filed for record, entered into a contract in writing for the sale of the land to W, who, at the time of entering into such contract, had no notice of the mortgage, and before anything had been done between T and W towards the execution of the contract of sale, the mortgage was duly filed for record, it was held that, prior to anything being done towards the execution of the contract of sale, the equities of the mortgagees in the unrecorded mortgage were at least equal to those of W, and that from the moment the mortgage was filed for record, it became a legal lien, and constructive notice of the incumbrance it created as against W. Kyle *v.* Thompson, 11 Ohio St. 616.

3. Mims *v.* Mims, 35 Ala. 23; Chamberlain *v.* Bell, 7 Cal. 294; 68 Am. Dec. 260; Hunt *v.* Mansfield, 31 Conn. 488; Shepherd *v.* Burkhalter, 13 Ga. 443; 58 Am. Dec. 523; Johnson *v.* Wheelock, 63 Ga. 623; Metropolitan Bank *v.* Godfrey, 23 Ill. 531; Duke *v.* Strickland, 43 Ind. 496; Gilchrist *v.* Gough, 63 Ind. 576; 30 Am. Rep. 250; 19 Alb. L. J. 276; State *v.* Davis, 96 Ind. 539; Pruitt *v.* Pruitt, 91 Ind. 595; Singer *v.* Scheible, 109 Ind. 575; Smith *v.* Lowry, 113 Ind. 37; Fetes *v.* O'Laughlin, 62 Iowa 532; Miller *v.* Bradford, 12 Iowa 14; Haynes *v.* Seachrest, 13 Iowa 455; Barney *v.* McCarty, 15 Iowa 510; 83 Am. Dec. 427; Whalley *v.* Small, 25 Iowa 184; Miller *v.* Ware, 31 Iowa 524; Disque *v.*

If an instrument is either not authorized by law to be recorded, or is not authorized to be recorded by reason of its defective execution or the failure to comply with the prerequisites to recordation, its enrollment on the records is of no effect, and it cannot be said that it will charge with constructive notice.[1]

2. In Evidence.—In *England*, it is the practice, on the conveyance of land, to deliver all the title deeds to the purchaser, and it is reasonable there to require him to produce the original deed given to a prior grantee. But in the *United States*, the practice

Wright, 49 Iowa 538; Jones *v.* McNarrin, 68 Me. 334; 28 Am. Rep. 66; Hill *v.* McNichol, 76 Me. 314; Brydon *v.* Campbell, 40 Md. 331; Barrows *v.* Baughman, 9 Mich. 213; Hinchman *v.* Town, 10 Mich. 508; Barnard *v.* Campau, 29 Mich. 164; Loomis *v.* Brush, 36 Mich. 40; Parrett *v.* Shaubhut, 5 Minn. 323; 80 Am. Dec. 424; Whittacre *v.* Fuller, 5 Minn. 508; Lash *v.* Edgerton, 13 Minn. 210; Bailey *v.* Galpin, 40 Minn. 324; Terrell *v.* Andrew Co., 44 Mo. 309; Stevens *v.* Hampton, 46 Mo. 404; Bishop *v.* Schneider, 46 Mo. 472; 2 Am. Rep. 533; Gale *v.* Morris, 29 N. J. Eq. 222; 7 C. L. J. 314; Bunker *v.* Anderson, 32 N. J. Eq. 35; Westervelt *v.* Wyckoff, 32 N. J. Eq. 188; Dean *v.* Anderson, 34 N. J. Eq. 508; McPherson *v.* Rollins, 107 N. Y. 316; Peck *v.* Mallams, 10 N. Y. 519; New York L. Ins. Co. *v.* White, 17 N. Y. 469; Beekman *v.* Frost, 18 Johns. (N. Y.) 544; 9 Am. Dec. 246; Beers *v.* Waterbury, 8 Bosw. (N. Y.) 396; Ijames *v.* Gaither, 93 N. Car. 358; Brown *v.* Kirkman, 1 Ohio St. 116; Jennings *v.* Wood, 20 Ohio 261; Luch's Appeal, 44 Pa. St. 519; Speer *v.* Evans, 47 Pa. St. 141; Schell *v.* Stein, 76 Pa. St. 398; 18 Am. Rep. 416; Heister *v.* Fortner, 2 Binn. (Pa.) 40; 4 Am. Dec. 417; Lally *v.* Howland, 1 Swan (Tenn.) 396; Baldwin *v.* Marshall, 2 Humph. (Tenn.) 116; Turbeville *v.* Gibson, 5 Heisk. (Tenn.) 579; Davidson *v.* Waite, 2 Munf. (Va.) 527; Colquhoun *v.* Atkinson, 6 Munf. (Va.) 550; Bell *v.* Hammond, 2 Leigh (Va.) 416; Mundy *v.* Vawter, 3 Gratt. (Va.) 518; Sawyer *v.* Adams, 8 Vt. 172; 30 Am. Dec. 459; Sanger *v.* Craigue, 10 Vt. 555; Potter *v.* Dooley, 55 Vt. 512; Houston *v.* McCluney, 8 W. Va. 150; State *v.* Titus, 17 Wis. 241; Pringle *v.* Dunn, 37 Wis. 465. Of course, the record may sometimes be aided by extrinsic matters which will charge subsequent purchasers with notice. See NOTICE, vol. 16, p. 787.

Record of Quitclaim Deed.—So, the record of a quitclaim deed is only notice that the grantor's interest was thereby conveyed, and not that he had an interest. Wade on Notice, § 204; Marshall *v.* Roberts, 18 Minn. 405; 10 Am. Rep. 201.

1. McNeil *v.* Magee, 5 Mason (U. S.) 265; Lewis *v.* Baird, 3 McLean (U. S.) 56; Baker *v.* Washington, 5 Stew. & P. (Ala.) 142; Tatum *v.* Young, 1 Port. (Ala.) 298; Mesick *v.* Sunderland, 6 Cal. 297; Hager *v.* Spect, 52 Cal. 579; Carter *v.* Champion, 8 Conn. 549; 21 Am. Dec. 695; Choteau *v.* Jones, 11 Ill. 300; 50 Am. Dec. 460; St. John *v.* Conger, 40 Ill. 535; Brown *v.* Budd, 2 Ind. 442; Reed *v.* Coale, 4 Ind. 283; Woodbury *v.* Fisher, 20 Ind. 387; 83 Am. Dec. 325; Walter *v.* Hartwig, 106 Ind. 123; Com. *v.* Rodes, 6 B. Mon. (Ky.) 171; Johns *v.* Reardon, 3 Md. Ch. 57; Cheney *v.* Watkins, 1 Har. & J. (Md.) 527; 2 Am. Dec. 530; Wing *v.* McDowell, Walk. (Mich.) 182; Dutton *v.* Ives, 5 Mich. 515; Galpin *v.* Abbott, 6 Mich. 17; Hall *v.* Redson, 10 Mich. 21; Farmers', etc., Bank *v.* Bronson, 14 Mich. 361; Buell *v.* Irwin, 24 Mich. 145; Woods *v.* Love, 27 Mich. 308; Parret *v.* Shaubhut, 5 Minn. 323; 80 Am. Dec. 424; James *v.* Morey, 2 Cow. (N. Y.) 246; 14 Am. Dec. 475; Troup *v.* Haight, Hopk. (N. Y.) 239; Blake *v.* Graham, 6 Ohio St. 580; 67 Am. Dec. 360; Villard *v.* Robert, 1 Strobh. Eq. (S. Car.) 393; Bossard *v.* White, 9 Rich. Eq. (S. Car.) 483; Lynch *v.* Hancock, 14 S. Car. 66; Burnham *v.* Chandler, 15 Tex. 441; Holmes *v.* Jones, 56 Tex. 41; Stevens *v.* Brown, 3 Vt. 420; 23 Am. Dec. 215; Isham *v.* Bennington Iron Co., 19 Vt. 230; Pope *v.* Henry, 24 Vt. 560; Ely *v.* Wilcox, 20 Wis. 523; 91 Am. Dec. 436; Shove *v.* Larsen, 22 Wis. 142; Fallass *v.* Pierce, 30 Wis. 443; Gilbert *v.* Jess, 31 Wis. 110.

But such recording tends to rebut the idea of concealment (Bossard *v.*

is different. Here the grantee, relying on the covenants of his grantor, takes only the immediate deed to himself, and has no right to the possession of the title deeds of the estate. The general rule has, therefore, been established that, when a party relying upon a deed of conveyance is the grantee, or person entitled to the possession of it, he must produce the original, or lay a foundation in the usual manner for the production of secondary evidence, in order to be permitted to introduce in evidence the record thereof to prove its execution and contents;[1] but if the instrument is shown to be lost, or not within the power of the person wishing to produce it, the record will usually be admissible.[2] But this matter is now generally regulated by the

White, 9 Rich. Eq. (S. Car.) 483), and may, of course, sometimes become an agent in giving actual notice. Musgrove *v.* Bonser, 5 Oregon 313; 20 Am. Rep. 737.

See NOTICE, vol. 16, p. 787.

1. Fryer *v.* Dennis, 2 Ala. 144; Somerville *v.* Stephenson, 3 Stew. (Ala.) 271; Smith *v.* Armistead, 7 Ala. 698; Williams *v.* Heath, 22 Iowa 519; Ackley *v.* Sexton, 24 Iowa 320; Woodman *v.* Coolbroth, 7 Me. 181; Haydon *v.* Moore, 1 Smed. & M. (Miss.) 605; Harmon *v.* James, 7 Smed. & M. (Miss.) 111; 45 Am. Dec. 296; Anderson *v.* Walker, Mart. & Y. (Tenn.) 201; Sanders *v.* Harris, 5 Humph. (Tenn.) 345.

But in *Maryland* the record of an instrument is admissible in all cases. Dick *v.* Balch, 8 Pet. (U. S.) 30; Cole *v.* O'Neill, 3 Md. Ch. 174; Warner *v.* Hardy, 6 Md. 525; Morrill *v.* Gelston, 34 Md. 413.

2. Trammel *v.* Thurmond, 17 Ark. 203; Phelps *v.* Foot, 1 Conn. 387; Bolton *v.* Cummings, 25 Conn. 410; Pardee *v.* Lindley, 31 Ill. 174; 83 Am. Dec. 219; Eaton *v.* Campbell, 7 Pick. (Mass.) 10; Burghart *v.* Turner, 12 Pick. (Mass.) 534; Scanlan *v.* Wright, 13 Pick. (Mass.) 523; 25 Am. Dec. 344; Ward *v.* Fuller, 15 Pick. (Mass.) 185; Pierce *v.* Gray, 7 Gray (Mass.) 67; Barnard *v.* Crosby, 6 Allen (Mass.) 327; Thacher *v.* Phinney, 7 Allen (Mass.) 146; Perkins *v.* Richardson, 11 Allen (Mass.) 538; Pollard *v.* Melvin, 10 N. H. 554; Little *v.* Paddleford, 13 N. H. 167; Pendexter *v.* Carlton, 16 N. H. 482; Andrews *v.* Davidson, 17 N. H. 413; 43 Am. Dec. 606; Johnson *v.* Brown, 31 N. H. 405; Stevens *v.* Reed, 37 N. H. 49; Fellows *v.* Fellows, 37 N. H. 75; Pratt *v.* Battles, 34 Vt. 391. But see Peck *v.* Clark, 18 Tex. 239.

In a *New Hampshire* case, Pollard *v.* Melvin, 10 N. H. 554, the rule is stated as follows: that where various deeds are used in a chain of title under which the parties to the suit set up their claim, the execution only of the last and original deed in the hands of the party is required to be proved, and office copies of the previous deeds are received as competent evidence. But in a later case, in the same State, this mode of proof was limited to conveyances in the chain of title under which the party claimed; it was held that office copies of deeds which form no part of the chain of title of the party producing them, cannot be produced in evidence if the originals are to be had. Smyth *v.* Carlisle, 16 N. H. 404.

The statutes of some States contain provisions similar to the rule stated in the text. See Stim. Am. Stat. L., § 1625 (C); Scott *v.* Rivers, 1 Stew. & P. (Ala.) 19; 21 Am. Dec. 646; Bestor *v.* Powell, 7 Ill. 119; Irwing *v.* Brownell, 11 Ill. 402; Newsom *v.* Luster, 13 Ill. 175; Knetzer *v.* Bradstreet, 3 Greene (Iowa) 487; Haydon *v.* Moore, 1 Smed. & M. (Miss.) 605; Walker *v.* Newhouse, 14 Mo. 373; Bosworth *v.* Bryan, 14 Mo. 575; Gilbert *v.* Boyd, 25 Mo. 27; Purvis *v.* Robinson, 1 Bay (S. Car.) 493; Dingle *v.* Bowman, 1 McCord (S. Car.) 178.

Where, in a deed of land, reference was made to another deed as recorded in a particular book and page of the registry, for a description, a copy of the record of that deed was held admissible in evidence, in connection with the deed in which the reference was made. Farrar *v.* Fessenden, 39 N. H. 269.

terms of the statutes.[1] When the record of an instrument is admissible in evidence, either in pursuance of common-law principles or under these statutes, the methods of proof, etc., will be governed by the rules that control in the case of other public records.[2] The record of an instrument which either the law does not require or authorize to be recorded, or which is not authorized to be recorded by reason of a failure to observe the prescribed prerequisites to recordation, will not be received in evidence in lieu of the original.[3]

VII. Inspection of Record.—See RECORD.

VIII. Destruction of Record.—A grantee in an instrument evidencing a conveyance to him, who has complied with the requirements of the law in effecting the record of the instrument, cannot lose the effect given to such recordation by a subsequent destruction of the record, as by fire or other cause, and he is not obliged to record the instrument a second time, or do any other act to notify purchasers, in order to protect his rights acquired thereunder.[4] In such case, when it becomes material to prove the execution of the instrument, this may, of course, be done by

1. The statutes of some States provide that the record of a conveyance or a certified copy thereof, may be read in evidence with like force and effect as the original conveyance. See Stim. Am. Stat. L., § 1625(B). But in most States such record or a copy thereof, is not conclusive, but only *prima facie* evidence. See Stim. Am. Stat. L., § 1625.

2. See RECORD.

Thus, the office copy of a deed in another State is such a "record" as may and must be authenticated, under the act of Congress, to make it evidence. Pennel *v.* Weyant, 2 Harr. (Del.) 502; Drummond *v.* Magruder, 9 Cranch (U. S.) 122; Petermans *v.* Laws, 6 Leigh (Va.) 523. See AUTHENTICATION, vol. 1, p. 1022.

3. Olcott *v.* Bynum, 17 Wall. (U. S.) 44; McEwen *v.* Den, 24 How. (U. S.) 242; Brown *v.* Hicks, 1 Ark. 232; Trammell *v.* Thurmond, 17 Ark. 203; Papot *v.* Gibson, 7 Ga. 530; Beverly *v.* Burke, 9 Ga. 440; 54 Am. Dec. 351; Sanders *v.* Pepoon, 4 Fla. 465; Smith *v.* Lawrence, 12 Mich. 431; Meighen *v.* Strong, 6 Minn. 177, 80 Am. Dec. 441; Fitler *v.* Shotwell, 7 W. & S. (Pa.) 14. But it would seem that such record could be introduced as secondary evidence. Harper *v.* Tapley, 35 Miss. 506. See SECONDARY EVIDENCE.

4. Shannon *v.* Hall, 72 Ill. 354; 22 Am. Rep. 146; Steele *v.* Boone, 75 Ill. 457; Gammon *v.* Hodges, 73 Ill. 140; Heaton *v.* Prather, 84 Ill. 330; Curyea *v.* Berry, 84 Ill. 600; Hall *v.* Shannon, 85 Ill. 473; Hyatt *v.* Cochran, 69 Ind. 436; Myers *v.* Buchanan, 46 Miss. 397; Fitch *v.* Boyer, 51 Tex. 336; Houston *v.* Blythe, 71 Tex. 719; Armentrout *v.* Gibbons, 30 Gratt. (Va.) 632. See LIS PENDENS, vol. 13, p. 896, n. 5.

So, where an instrument has been duly recorded, a subsequent marring or alteration of the record cannot affect the rights of the persons holding under the instrument, who had nothing to do with the making of the alteration. Merrick *v.* Wallace, 19 Ill. 486; Dodd *v.* Doty, 98 Ill. 393; Reck *v.* Clapp, 98 Pa. St. 581. Likewise, where an instrument was illegally withdrawn from the records by some unauthorized person, even when the person who deposited the writing knew of the subsequent withdrawal. Snider *v.* Methvin, 60 Tex. 487. See Hine *v.* Robbins, 8 Conn. 342.

The cancellation of a mortgage on the records by the recorder on the presentation of a false certificate that the note secured by the mortgage had been paid, will not impair the rights of the mortgagee, although an innocent vendee has bought the property on the faith of the certificate that there was no mortgage on the property. De St. Romes *v.* Blanc, 20 La. Ann. 424; 96 Am. Dec. 415.

he production of the instrument itself. That it was recorded nay be proved by the recorder's certificate thereon to that effect.[1]

RECORDUM.—A record; a judicial record. It is used in the hrase, *Prout patet per recordum*, which is a formula employed in leading for reference to a record, signifying, "as it appears by he record.[2]

"'Once of record always of record,' nay be declared a maxim of the law of egistration. Records of a public nature re designed to be of a permanent charcter, and the law which provides them ontemplates supplying their place by enewal or duplication, should this om any cause become necessary; and nerefore this duty is not obligatory on ne persons originally having the ecords made, or subsequently having n interest in the property. Therefore, here a conveyance has been recorded, r duly filed, a subsequent burning or ther destruction of the record will not npair any rights that may have acrued thereunder, nor affect the conructive notice afforded by such filing r recording. Where the records have een destroyed, a person owning real state affected by the record, or having n interest therein, may, if he sees roper, again record his title papers, or estore the record in any manner proided by law in such cases, but he is nder no legal obligation to do so." Vebb on Rec. of Tit., § 187.

1. Alvis *v.* Morrison, 63 Ill. 181; 14 m. Rep. 117; Beverley *v.* Ellis, 1 and. (Va.) 106. But the clerk's cerficate of record may generally be ontradicted. Johnson *v.* Burden, 40 Vt. 7; 94 Am. Dec. 436. In *Ohio* it is, by atute, made conclusive evidence of the ct of record. *Ohio* Rev. Stats., § 4143.

When Both Instrument and Record Are estroyed.—When the instrument has een lost and its record destroyed the ourts have been liberal toward the erson on whom rested the burden to stablish the execution and record of the strument, in their requirement as to e amount of proof which must be aduced. Steele *v.* Boone, 75 Ill. 457; eacock *v.* Lubuke, 107 Ill. 396; Alston Alston, 4 S. Car. 116; Harrison *v.* cMurry, 71 Tex. 122. See LOST APERS, vol. 13, p. 1059.

"Where the record has been deroyed and it becomes material to ove the execution of the deed, it may proved, in most instances, by the oduction of the deed itself, and hence tle difficulty will generally be experienced. But when the record has been destroyed and the deed lost, its execution must be proven like that of any other lost paper, by secondary evidence. What evidence will suffice to prove this fact is a matter to be determined by the court or jury, and of course it is impossible to lay down a universal rule as to the amount of evidence that will be required to establish this fact. It has been decided, however, where a deed and its record had both been destroyed by fire, that its execution is sufficiently proven by the testimony of a clerk of an abstract firm, that the deed had been filed for record and that the day after its execution he had made a minute of it which he produced, and the testimony of a partner of the person claiming to be grantee that the deed was, in his opinion, executed in his office and was taken away for the purpose of acknowledgment. Such testimony will prevail against the positive denials of the grantors that they at any time had executed such a deed." Dev. on Deeds, § 691, *citing* Heacock *v.* Lubuke, 107 Ill. 396.

Statutes Relating to Lost Records.—See LOST PAPERS, vol. 13, pp. 1160, 1161.

Under statutes requiring the re-record of an instrument within a certain time after the destruction of its record, such record must be made within the prescribed time in order to retain the effect of the first recordation. O'Neal *v.* Pettus, 79 Tex. 254; Salmon *v.* Huff (Tex. 1891), 15 S. W. Rep. 257.

Authorities.—The following authorities have been consulted in the preparation of this article: Webb on Record of Title; Wade on Notice; Jones on Mortgages; Devlin on Deeds; Minor's Institutes; Pingrey on Chattel Mortgages.

2. Anderson's Dict. L; 1 Chit. Pl. 385; Philpot *v.* McArthur, 10 Me. 127. See PLEADING, vol. 18, p. 509

All writings admitted in evidence or rejected to which an exception is taken should appear in the bill of exceptions with a *prout.* Wilson *v.* Horner, 59 Pa. St. 155.

RECOUPMENT.—See SET-OFF AND COUNTERCLAIM.

RECOURSE.—See WITHOUT RECOURSE.

RECOVER, RECOVERY.—To recover in law is to recover anything, or the value thereof, by judgment; as if a man sue for any land or other thing, movable or immovable, and have a verdict or judgment for him.[1] To recover is to obtain by course of law.[2]

"Recovery" is the obtaining of a thing by the judgment of a court, as a result of an action brought for the purpose.[3] The obtaining of anything by judgment or trial at law.[4]

1. Jacobs' L. Dict. *followed* in Norton *v.* Winter, 1 Oregon 47; 12 Am. Dec. 297.

2. Burrill's L. Dict. *followed* in Keiny *v.* Ingraham, 66 Barb. (N. Y.) 257.

3. Burrill's L. Dict. *followed* in Keiny *v.* Ingraham, 66 Barb. (N. Y.) 257.

4. **Recover; Recovery.**—Hoover *v.* Clark, 3 Murph. (N. Car.) 171.

"Recovery" in its general use, means a recovery had by process and course of law. Jones *v.* Walker, 2 Paine (U. S.) 688. And the word was held to have been used in this sense in Pol. Code of *California*, § 3386 (which provides that "the fines, forfeitures and penalties incurred by a violation of any of the provisions of this title must be paid into the treasury of the county where the person against whom the recovery is had, resides") as referring only to those forfeitures and penalties to be recovered by action under the statute, and not to the interest of 2 per cent. per month on delinquent taxes, which was obtained by the ordinary method of collection without suit. People *v.* Reis, 76 Cal. 269.

The assignor of a bond agreed to pay the amount of the bond, with all charges accruing thereon to the assignee, "in case the same cannot be recovered of the within-bound William Sharman." In an action upon this agreement, the court by Bell, J., said: "One of the technical definitions of the word 'recovery' is the actual possession of anything or its value, by judgment of a legal tribunal; and it is not to be doubted that this is the sense in which the word was used in this covenant. Strochecker *v.* Farmers' Bank, 6 Pa. St. 41.

"The word 'recover' has a technical meaning in law whereby it signifies, to recover by action and by the judgment of the court. But it is said that there are cases which may be found in which the word has been held to be used in the larger and more popular sense of recover by any legal means, which would include, *e. g.*, a distress." Stroud's Jud. Dict., *quoting* Haines *v.* Welch, L. R., 4 C. P. 91. In that case it was held that the word in § 1, 14 & 15, V. C. 25, includes the right to distrain.

Whether Money Obtained by the Compromise of a Suit Is "Recovered?"—The *Virginia* Code of 1873, ch. 149, § 9, provides that the amount "recovered" in an action by an administrator for the killing of his intestate shall be paid to the wife, husband, parent and child in such proportion as the jury may direct; or, if they do not direct, according to the statute distributions. In Powell *v.* Powell, 84 Va. 415, the intestate's wife brought suit as administratrix against the railroad company for the death of her husband. The action never came to trial, but was compromised, the company paying to the administratrix the sum of $5,000. The father of the decedent claimed to be entitled as distributee to half of this sum, which claim being denied, suit was instituted by him, against the administratrix. It was claimed that no money was "recovered," of the company; that is to say, that there was no formal judgment against the company. The court by Lewis, P., said: "And in support of this view, we are told that the legal definition of the term 'recover' is 'to be successful in a suit; to obtain a final judgment in a suit.' But manifestly the term was not used in the statute in this restricted and technical sense, but in the more comprehensive sense of 'receive.' In other words, it embraces all moneys received by the plaintiff on account of the action or claim." Accordingly it

was held that the father was entitled to recover.

But in Lapham *v.* Almy, 13 Allen (Mass.) 301, upon the construction of a revenue statute, giving one-fourth of the forfeiture or fine "recovered" from smugglers to the informer, the court came to a different conclusion as to the meaning of the word "recovery." The statute in question (Act of Congress of 1799, ch. 22) by § 89 provides that "all penalties accruing by any breach of this act shall be sued for and recovered with costs of suit in the name of the United States of America." And by § 91 "all fines, penalties, and forfeitures recovered by virtue of this act, and not otherwise appropriated, shall, after deducting charges, be disposed of as follows:" One moiety for the use of the United States, and another moiety to be divided between the collector and other revenue officers; "provided, nevertheless, that in all cases where such penalties, fines and forfeitures shall be recovered in pursuance of information given to such collector by any person other than the naval officer or surveyor of a district, the one-half of such moiety shall be given to such informer," and the other half to the officers of the revenue. The plaintiff in the above-named suit had given information to the defendant, a collector of customs, which caused him to file a libel against a certain vessel for smuggling. The suit was compromised, and the libel dismissed upon the payment by the principal owner of the vessel of a certain sum to the defendant. Plaintiff brought his action as informer under the above statute, for his share of the sum thus paid the defendant. The court by Gray, J., said: "It, therefore, becomes necessary for this court to determine whether the money received by the defendant, without any decree for its payment, was 'recovered,' within the meaning of the act of Congress of 1799; and the sections already quoted clearly show that it was not. All their provisions look to a recovery by judgment of court, and not otherwise. By § 89 penalties are to 'be sued for and recovered, with costs of suit, in the name of the United States;' the collector is directed to cause suit for forfeitures to be 'prosecuted to effect,' which ordinarily means to final judgment; the money which he is to receive and distribute is defined as 'the sum or sums so recovered,' that is, by suit in the name of the United States, prosecuted to final judgment; and all proper charges are to be first 'allowed by said court' and deducted. And in § 91 the amount to be distributed is described as 'fines, penalties and forfeitures recovered by virtue of this act,' 'after deducting all proper costs and charges.' Whether any fine, penalty or forfeiture has been incurred can only be ascertained by the decree of the court in which the suit is brought. Gelston *v.* Hoyt, 3 Wheat. (U. S.) 313. Fines, penalties or forfeitures cannot be imposed, or the amount of costs and charges fixed, except by judgment of court. A sum of money paid by agreement, and not pursuant to any judgment, is not a fine, penalty or forfeiture, nor recovered in the manner pointed out in the act."

"The counsel for the plaintiff referred to the act of Congress of 1797, ch. 13 (made perpetual by the act of 1890, ch. 6; 2 U.S. Sts. at Large, 7), by which, upon a petition to the judge of the district court for the mitigation or remission of the fine, penalty or forfeiture incurred under the revenue laws, and a statement of the facts of the case by the judge after notice to the persons claiming the same and to the district attorney, the Secretary of the Treasury may mitigate or remit such fine, forfeiture or penalty, or any part thereof, if in his opinion incurred without willful negligence or intention of fraud, and 'direct the prosecution, if any shall have been instituted for the recovery thereof, to cease and be discontinued, upon such terms or conditions as he may deem reasonable and just.' 1 U. S. Sts. at Large 506. But there is nothing in the words of this act to show that a sum of money can be held to be 'recovered,' within the meaning of the revenue laws, without a judicial decree in favor of the party suing for it. And the decisions of the courts of the United States upon the construction and effect of the act of 1797 seems to be conclusive upon the point that the money must be adjudged to the United States, and received by the marshal or other officer of the court, before it can be said to be recovered under the act of 1799. In U. S. *v.* Morris, 1 Paine (U. S.) 209; 10 Wheat. (U. S.) 246, it was held that the Secretary's power of remission did not cease upon a final decree of condemnation so long as the money still remained in the custody of the court. 'Nothing,' said Mr. Justice Livingston, in the circuit court

(adopting the definition of Mr. Pinkney in Jones *v.* Shore, 1 Wheat. (U. S.) 468), 'is recovered within the meaning of this law, until it is adjudged and received.' 1 Paine (U. S.) 230. Mr. Justice Thompson, in delivering the opinion of the Supreme Court, also recognized a final decree of condemnation and payment of the money to the collector for distribution as both necessary to make the rights of revenue officers and informers absolute; and added: 'If any prosecution has been instituted, the Secretary has authority to direct it to cease and be discontinued, and upon such terms as he may deem reasonable and just. This enables him to do ample justice to the custom-house officers, not only by reimbursing all costs and expenses incurred, but rewarding them for their vigilance, and encouraging them in the active and diligent discharge of their duty in the execution of the revenue laws.' 'No vested rights of informers or custom-house officers are violated in either case. These rights are conditional, and subordinate to the power of remission, and to be provided for in the terms and conditions upon which the remission is granted.' U. S. *v.* Morris, 10 Wheat. (U. S.) 290. In M'Lane *v.* U. S., 6 Pet. (U. S.) 404, it was indeed held that the officers of the customs were entitled to share in a sum of money paid in accordance with a reservation by the Secretary of the Treasury upon remitting a forfeiture, under a similar statute, after a final decree of condemnation; but in that case, there having been a judgment for the forfeiture, the money reserved and paid was 'recovered,' within the rule of the previous case."

"The record of the suit in the district court of the United States, which is made part of the report in this case, does not show any notice or statement by the judge, or remission by the Secretary, as provided for in the act of 1797. Nor is there any evidence of a compliance with the act of Congress of 1863, ch. 76, § 10, which authorizes the Secretary to compromise any claim of the United States, upon the report and recommendation of the attorney of the United States, showing in detail the condition of the claim and the terms upon which the same may be compromised. 12 U. S. Sts. at Large 740. But it is immaterial in this case to inquire whether the approval by the Secretary of the compromise and settlement on which the libel was discontinued was in accordance with the acts of Congress, or assented to by the plaintiff in such a manner as to bind him. If, as was argued for the plaintiff, 'it must be presumed that the judge, the attorney and the marshal of the United States, the collector of customs, and the Secretary of the Treasury, when they took the money and dismissed the libel, proceeded according to law,' then no informer had the right to claim anything not reserved to him in the terms and conditions of the remission or compromise. If, on the other hand, the settlement and discontinuance of the suit in the district court of the United States were unauthorized by law, and not assented to by the plaintiff, his remedy, if any, was by application or suit in that court, treating the settlement as invalid. U. S. *v.* Lancaster, 4 Wash. (U. S.) 64; M'Lane *v.* U. S., 6 Pet. (U. S.) 404. The Palo Alto, Davies (U. S.) 348. Raynham *v.* Rounseville, 9 Pick. (Mass.) 44. Wheeler *v.* Goulding, 13 Gray (Mass.) 539. But whether the libel has or has not been legally and effectually discontinued, it has not been prosecuted to judgment, and nothing has been recovered, within the meaning of the acts of Congress upon which alone the plaintiff relies to maintain his action."

"This view being decisive of the case, it is unnecessary to determine whether the facts detailed in the report show such a giving of information by the plaintiff to the defendant as is contemplated by the acts of 1799."

Judgment for a Penalty.—It is provided by a *New Jersey* act that "if in any suit commenced in the supreme court, the plaintiff shall not recover above $200 exclusive of costs, then such plaintiff shall not be entitled to costs." In State *v.* Arnold, 43 N. J. L. 144, an action was brought upon a bond with penalty, and judgment was given for the penalty of $500, but the jury assessed the damages of the plaintiff at $36. It was contended that the former sum was the amount "recovered" within the meaning of the above statute, and that the plaintiff was entitled to costs. The court held that "the word 'recovery' should have its ordinary significance, and in that sense the plaintiff cannot be said to recover more than he obtains by his suit. He gets less than $200," and therefore is not entitled to costs. In support of this the court cited Johnson *v.* Harris, 15 C. B. 357; 80 E.

RECRIMINATION.—See DIVORCE, vol. 5, p. 824.

RECTIFY.—(See also DISTILL, vol. 5. p. 705.) See note 1.

REDDENDUM.—See DEEDS, vol. 5, p. 457.

REDEEM—(See also REDEMPTION).—To redeem is to purchase back; to regain, as mortgaged property by paying what is due; to receive back by paying the obligation.[2]

C L. 356; Gowens *v.* Moore, 3 H. & N. 536; Roll *v.* Maxwell, 5 N. J. L. 568.

In a Statute Regulating Costs.—A *New York* statute provided that if the "plaintiff shall not recover above the sum of fifty dollars besides costs, he shall not recover any costs, but shall pay costs to the defendant." In Van Horne *v.* Petrie, 2 Cai. (N. Y.) 213, it was held, "that the recovery here spoken of, means the damages assessed by the jury *eo nomine*, exclusive of the costs which they arbitrarily find;" and, where the jury found for the plaintiff a verdict of fifty dollars with six cents cost, that the plaintiff had not recovered more than fifty dollars, and was not entitled to costs. See also Seaman *v.* Bailey, 2 Cai. (N. Y.) 214.

The Word Applies as well to a Judgment Obtained by a Defendant, as to one Obtained by a Plaintiff.—A *Maine* statute provides that in a suit by one town against another for the support of a pauper, a "recovery" shall bar the town, against which it was had from disputing the settlement of the same pauper with the prevailing town in any future action brought for his support. In Oxford *v.* Paris, 33 Me. 180, plaintiffs had been defeated in an earlier action against the defendants, involving the settlement of the pauper whose support was in question. It was contended for the plaintiffs that a "recovery, in order to operate as a bar in a subsequent suit for supporting paupers, is one had, not against a plaintiff party, but against a defendant party." The court by Shepley, J., said: "To recover in legal proceedings, is to be successful in a suit. It is to obtain a favorable judgment. The word 'recovery' as used in the statute means the obtaining of a final judgment in such suit. When a defendant has obtained a judgment against a plaintiff in a suit, he, in legal language, is said to have recovered in that suit."

Recoverable.—In an undertaking by a solicitor to his client that "should the damages or costs not be recoverable in this action, I shall charge you costs out of purse only," it was held that the result of the action, and not the solvency of the defendant therein, is referred to. *In re* Stretton, 15 L. J. Ex. 16; 14 M. & W. 806.

1. **Rectifying.**—In Com. *v.* Giltinan, 64 Pa. St. 100, it was held that spirits manufactured in another State and rectified in *Pennsylvania* were not within the inspection laws as "domestic distilled spirits." In that case, the court by Thompson, C. J., said: "It was argued, but not strenuously, that rectified liquors, without regard to where made, if rectified within this commonwealth, were liable to inspection and seizure if not inspected and branded. The act is penal and must be construed strictly, and this is not within its words. The rectifying process is not a manufacturing process. Webster says it means correcting; amending; refining by distillation; sublimation; adjusting.' Rectifying distilled spirits, therefore, made in another State, does not constitute it spirituous liquors manufactured within this commonwealth. The spirits were not manufactured here, they were only corrected or refined in this commonwealth."

Rectifier, as used in the internal revenue laws, means not merely a person who runs spirits through charcoal. Any one who rectifies or purifies spirits in any manner whatever, or who makes any mixture of spirits with anything else, and sells it under any name, is a rectifier. Quantity of Distilled Spirits, 3 Ben. (U. S.) 70.

2. Miller *v.* Ratterman, 47 Ohio St. 141. "The word 'redeem' means 'repurchase.' The words are synonymous, and the first has come into use with lawyers, to describe the right of a mortgagor of lands, by reason of the old practice which prevailed in *England* of making absolute conveyances of land by way of mortgage, with a covenant to reconvey upon the payment of the debt, an actual reconveyance being made." Pace *v.* Bartles, 47 N. J.

REDEMPTION—(See PLEDGE, vol. 18, p. 585; TAXATION).

I. **Redemption from Mortgage** (See CHATTEL MORTGAGES, vol. 3, p. 175; FORECLOSURE OF MORTGAGES, vol. 8, p. 185; MORTGAGES, vol. 15, p. 725; TRUST DEEDS AND POWER-OF-SALE MORTGAGES), 608.
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I. **REDEMPTION FROM MORTGAGE—1. Definition.**—The right of redemption from a mortgage is, before breach of condition, a legal right—after breach of condition, an equitable right. The term equity of redemption, properly speaking, applies to the equitable right only, though it is used, frequently, but incorrectly, without discrimination.[1] The right of redemption is the right of the mortgagor to satisfy the conditions of the mortgage, and to resume his estate discharged therefrom.[2]

Eq. 170. See also Robinson *v.* Cropsey, 2 Edw. Ch. (N. Y. 138.

1. The statutes of *North Carolina* and *Florida* recognize this distinction.

2. The above definition, taken, in sub-

2. Nature of the Right; Waiver.—Equity will not recognize an agreement to waive the right of redemption, where such agreement is made simultaneously with the execution of the mortgage.[1]

tance, from Bouvier's Dict., is supported by all the authorities, and is elementary.

See MORTGAGES, vol. 15, p. 725, for an account of the origin and history of mortgages and the development of the equitable right of redemption.

1. In Howard *v.* Harris, 1 Vern. 191 (1683), it was held that no agreement in a mortgage can make it irredeemable, either after the death of the mortgagor or upon failure of issue male of his body.

In East India Co. *v.* Atkyns, 1 Com. R. 349 (1721), the court said: "A mortgage is in its nature redeemable, and therefore a covenant not to redeem is unlawful. . . . . If a man makes a mortgage and covenants not to bring a bill to redeem, may, if he goes so far as to take an oath that he will not redeem, yet he may redeem."

See also Casborne *v.* Scarfe, 1 Atk. 603; Jason *v.* Eyres, 2 Ch. Cas. 33; Newcomb *v.* Bonham, 2 Vent. 364; Seton *v.* Slade, 7 Ves. 273; Floyer *v.* Lavington, 1 P. Wms. 268; Goodman *v.* Grierane, 2 Ball. & B. 278.

"The right of redemption is considered in equity as inseparably incident to every contract founded on a mortgage, and can no more be restrained than the power of a tenant in fee simple to alien generally, or of tenant in tail to suffer a recovery; it being a maxim that the same estate or interest cannot at one time be a mortgage and at another time cease to be so." 1 Powell, Mort. 128.

In Peugh *v.* Davis, 96 U. S. 337, the court by Field, J., said: "It is an established doctrine that an equity of redemption is inseparably connected with a mortgage; that is to say, so long as the instrument is one of security the borrower has in a court of equity the right to redeem the property upon payment of the loan. This right cannot be waived or abandoned by any stipulation of the parties made at the time, even if embodied in the mortgage. This is a doctrine from which a court of equity never deviates. Its maintenance is deemed essential to the protection of the debtor, who, under pressing circumstances will often submit to ruinous conditions, expecting or hoping to be able to repay the loan at its maturity and thus prevent the condition from being enforced and the property sacrificed."

In Waters *v.* Randall, 6 Met. (Mass.) 479, the court by Hubbard, J., said: "I believe no case can be found in which it has been determined that the mortgagee can by force of any agreement, made at the time of creating the mortgage, entitle himself, at his own election, to hold the estate free from condition, and cutting off the right in equity of the mortgagor to redeem. Such an agreement would not be enforced as against a mortgagor; nor is it to be confounded with a sale upon condition."

See also Davis *v.* Demming, 12 W. Va. 246; Chapman *v.* Turner, Call (Va.) 280; 1 Am. Dec. 514; King *v.* Newman, 2 Munf. (Va.) 40 (and cases there cited); Thompson *v.* Davenport, 1 Wash. (Va.) 125; Pennington *v.* Hanby, 4 Munf. (Va.) 140; Bennet *v.* Holt, 2 Yerg. (Tenn.) 6; Baxter *v.* Child, 39 Me. 112; Clark *v.* Henry, 2 Cow. (N. Y.) 324; Heister *v.* Maderia, 3 W. & S. (Pa.) 384; Wilson *v.* Drumrite, 21 Mo. 325; Jackson *v.* Lawrence, 117 U. S. 679.

Hughes *v.* Edwards, 9 Wheat. (U. S.) 489; Wharf *v.* Howell, 5 Binn. (Pa.) 499; Cooper *v.* Whitney, 3 Hill (N. Y.) 95; Palmer *v.* Gurnsey, 7 Wend. (N. Y.) 248; Nugent *v.* Riley, 1 Met. (Mass.) 117; 35 Am. Dec. 355; Skinner *v.* Miller, 5 Litt. (Ky.) 84; Knowlton *v.* Walker, 13 Wis. 264; Orton *v.* Knab, 3 Wis. 576; Plato *v.* Roe, 14 Wis. 453; Pritchard *v.* Elton, 38 Conn. 434; Rankin *v.* Mortimere, 7 Watts (Pa.) 372; Hauser *v.* Lamont, 55 Pa. St. 311; Jaques *v.* Weeks, 7 Watts (Pa.) 277; Heister *v.* Fortner, 2 Binn. (Pa.) 43; Wheeland *v.* Swartz, 1 Yeates (Pa.) 584; Willetts *v.* Burgess, 34 Ill. 494; Cherry *v.* Bowen, 4 Sneed (Tenn.) 415; Burrow *v.* Henson, 2 Sneed (Tenn.) 658; Linnell *v.* Lyford, 72 Me. 280; Bearss *v.* Ford, 108 Ill. 16; Workman *v.* Greening, 115 Ill. 477; Fields *v.* Helms, 82 Ala. 449; Parmer *v.* Parmer, 74 Ala. 285.

And see further, on the subject, MORTGAGES, vol. 15, p. 827, and cases cited in note 2.

It may be otherwise in the case of a subsequent agreement made fairly and for a valuable consideration.[1]

1. **Subsequent Release of Right of Redemption to Mortgagee.**—In Peugh *v.* Davis. 96 U. S. 332, the court by Field, J., said: "A subsequent release of the equity of redemption may undoubtedly be made to the mortgagee. There is nothing in the policy of the law which forbids the transfer to him of the debtor's interest. The transaction will, however, be closely scrutinized so as to prevent any oppression of the debtor. Especially is this necessary when the creditor has shown himself ready and skillful to take advantage of the necessities of the borrower. Without citing the authorities it may be stated as conclusions from them, that a release to the mortgagee will not be inferred from equivocal circumstances and loose expressions. It must appear by a writing in terms a transfer of the mortgagor interest, or such facts must be shown as will operate to estop him from asserting any interest in the premises. The release must also be for an adequate consideration; that is to say, it must be for a consideration which would be deemed reasonable if the transaction were between other parties dealing in similar property in its vicinity. Any marked undervaluation of the property in the price paid will vitiate the proceeding."

A deed absolute on its face having been given, the grantor claimed that it was a mortgage. It was held competent to show that, although originally a mortgage, the equity of redemption had been released by a parol agreement. Shaw *v.* Walbridge, 33 Ohio St. 1.

An absolute deed of land was given, accompanied by a simultaneous instrument not recorded, operating by way of defeasance. The parties afterwards by mutual stipulations agreed that defeasance should be surrendered and canceled without intent to vest the estate unconditionally in the grantee. *Held*, a valid transaction, if conducted with fairness between all parties and rights of third persons had not intervened. Trull *v.* Skinner, 17 Pick. (Mass.) 213.

See McNees *v.* Swaney, 50 Mo. 388.

Where the relation of mortgagor and mortgagee existed and the latter purchased from the former his equity of redemption worth $2,000 or $2,500 for $1,600, it was held not such an inadequacy of price as to induce a court of equity, in absence of corroborative proof, to impeach the sale as unfair. Hicks *v.* Hicks, 5 Gill & J. (Md.) 75.

A being indebted to B executed to him an absolute deed to his farm, taking back a written defeasance. A received further advances from B until the sum amounted to $600. They then agreed that B should have the farm for $800. B gave his note to A for the difference, and A surrendered up his writing of defeasance; but it was agreed verbally between them that B should sell the farm and A to have what he received over $800 after paying B for his time and trouble. *Held*, that contract must, in equity, be still considered as a mortgage with a power of sale, and that A should be allowed to redeem the premises upon a bill brought for that purpose. Hyndman *v.* Hyndman, 19 Vt. 10, 46 Am. Dec. 171.

In Batty *v.* Snook, 5 Mich. 231, the court by Manning, J., said: "To allow the equity of redemption to be cut off by a forfeiture of it in a separate contract would be a revival of the common law doctrine, using for the purpose two instruments, instead of one, to effect the object."

When the relation of mortgagor and mortgagee is once established, though the equity of redemption may be sold or disposed of to the mortgagee, yet, unless the transaction appears to be fair, and unmixed with any advantage taken by the mortgagee of the necessitous circumstances of the mortgagor, equity will hold the parties to their original relation of debtor and creditor. Dougherty *v.* McColgan, 6 Gill & J. (Md.) 275; Sheckel *v.* Hopkins, 2 Md. Ch. 89; Russell *v.* Southard, 12 How. (U. S.) 139; Morris *v.* Nixon, 1 How. (U. S.) 126; Mills *v.* Mills, 26 Conn. 213; Baugher *v.* Merryman, 32 Md. 185; Remsen *v.* Hay, 2 Edw. Ch. (N. Y.) 535; Wynkoop *v.* Cowing, 21 Ill. 570; McKinstry *v.* Conly, 12 Ala. 678; Linnell *v.* Lyford, 72 Me. 280; Rogan *v.* Walker, 1 Wis. 527; Stoutz *v.* Rouse, 84 Ala. 309.

In Holdridge *v.* Gillespie, 2 Johns. Ch. (N. Y.) 34, the court by Kent, Ch., said: "The fairness and value must distinctly appear." See also

3. Who May Redeem—*a*. IN GENERAL.—The right to redeem can be enforced only by one having the mortgagor's title or some subsisting interest under it. In general, any one who has an interest in the land, and would be a loser by foreclosure, may redeem.[1]

Villa *v.* Rodriguez, 12 Wall. (U. S.) 323.

See further on this subject, MORTGAGES, vol. 15, pp. 827, 828, and cases there cited.

1. 2 Jones on Mort. (4th ed.), § 1055; Hilliard on Mort. (4th ed.) 389; 3 Pom. Eq. Jur. (1883) 208; 2 Story Eq. Jur. (13th ed.) 326; 2 Wash. Real Prop. (4th ed.) 173.

Who May Redeem.—"Any person who holds a legal estate in the mortgaged premises or in any part thereof, derived through, under, or in privity with the mortgagor, and any person, holding either a legal or equitable lien on the premises, or any part thereof, under, or in privity with, the mortgagor's estate, may also in like manner redeem from a prior mortgage." Pom. Eq. Jur. 280. This is the principle generally established, and was recognized as early as 1683 in Lomax *v.* Bird, 1 Vern. 182; in which it was held: "He that comes to redeem a mortgage must show a title to the equity of redemption."

In James *v.* Biou, 3 Swanst. 237 (1818), Lord Eldon said: "It is extremely clear that a mortgagee may retain possession of the estate until he is paid, and that no one has a right to make a tender of the money due except the party entitled to the equity of redemption; against all other persons the estate is the property of the mortgagee."

In Grant *v.* Duane, 9 Johns. (N. Y.) 511, the court by Thompson, J., said: "No person can come into a court of equity for a redemption of a mortgage but he who is entitled to the legal estate of the mortgagor or claims a subsisting interest under him. . . . If the respondents have shown no interest in themselves, or a right to redeem the mortgage, on their own account, or on account of others, with whom some connection is shown and whose interest they have a right to represent, their claims cannot be supported, notwithstanding some other person might have a right to enforce the same claim. It cannot be allowed to them to speculate on the claims of others, and redeem at their peril, and then litigate with those who may have the right."

It has been held that a right to redeem property may be reserved to a stranger to the contract, but then it must be an express reservation. Purvis *v.* Brown, 4 Ired. Eq. (N. Car.) 413. In Smith *v.* Austin, 9 Mich. 475, the court by Christiancy, J., said: "Any person who may have acquired any interest in the premises legal or equitable, by operation of law or otherwise, in privity of title with the mortagor, may redeem and protect such interest in the land. But it must be an interest in the land, and it must be derived in some way, mediate or immediate, from or through, or in the right of the mortgagor; so as, in effect, to constitute a part of the mortgagor's original right of redemption. Otherwise it cannot be affected by the mortgage, and needs no redemption." Also see Millard *v.* Truax, 50 Mich. 343.

In *Mississippi* it is held that a purchaser of mortgaged property under execution against the mortgagor, before forfeiture of the mortgage, or payment of the mortgaged debt, having by his purchase acquired no interest in or lien of the mortgaged property, has no right to redeem it. But it would be otherwise if by the purchase he acquired any right. Boarman *v.* Catlett, 21 Miss. 149.

The rule is a general one, that a mere volunteer has no right to make redemption from a mortgage or any other lien. Skinner *v.* Young, 80 Iowa 234; Eaton *v.* North, 25 Wis. 514; Cousins *v.* Allen, 28 Wis. 232; Beach *v.* Shaw, 57 Ill. 17; Byington *v.* Buckwalter, 7 Iowa 512; Harwood *v.* Underwood, 28 Mich. 427; Meehan *v.* Forrester, 52 N. Y. 277; Rogers *v.* Meyers, 68 Ill. 92; Penn *v.* Clemans, 19 Iowa 372; Rapier *v.* Gulf City Paper Co., 64 Ala. 330; Butts *v.* Broughton, 72 Ala. 294.

And see MORTGAGES, vol. 15, p. 828.

Powers *v.* Golden Lumber Co., 43 Mich. 468; Moore *v.* Beasom, 44 N. H. 215; Union Mut. L. Ins. Co. *v.* White, 106 Ill. 67.

An *annuitant* has been held not to have an interest sufficient to entitle him to redeem. White *v.* Parnther, 1 Knapp 266.

b. THOSE HAVING PARTIAL INTERESTS—(1) *In General.*—To entitle one to redeem, it is not necessary that he should be interested in the whole of the mortgaged premises: if he owns the equity of redemption in a portion of them only he may redeem the entire premises.[1]

Neither has the obligee on a bond to convey a mortgaged estate the right to redeem the same. McDougald *v.* Capron, 7 Gray (Mass.) 278.

The grantor by an absolute deed which is merely security for a debt, and therefore a mortgage, has the same right to redeem as a mortgagor in a formal mortgage, so long as the grantee retains the property; and redemption may be had also against the assignee of the grantee, in case he had notice that the delivery of the defeasance was evaded by fraud or otherwise, or that the transaction was in fact a mortgage. Vanderhaise *v.* Hugues, 13 N. J. Eq. 410; Ballard *v.* Jones, 6 Humph. (Tenn.) 455; Still *v.* Buzzell, 60 Vt. 478; Daniels *v.* Alvord, 2 Root (Conn.) 195; Belton *v.* Avery, 2 Root (Conn.) 279; 1 Am. Dec. 70.

1. Redemption by Part Owner.—A mortgaged certain lands to B. By a subsequent indenture he mortgaged the same land to C. Some time afterwards A and C entered into an agreement with D for the sale to him of part of the land, the title to which he accepted subject to the confirmation of the purchase by certain persons appearing to be beneficially interested therein. While matters were in this position, the three mortgages above mentioned were transferred to E. Then E gave notice to A, the mortgagor, of his intention to sell the property under the power of sale in the mortgages, within a fortnight or earlier if so advised. Thereupon D, the grantee of a portion of the premises, tendered to E the amount demanded by him for principal, interest and costs, which E accepted. D then requested E to convey to him the legal estate in the mortgaged property, and deliver up the title-deeds, but E declined to do so, alleging that he was trustee thereof for the mortgagor and his assigns. *Held*, that E should so convey and deliver title-deeds to D. Pearce *v.* Morris, L. R., 8 Eq. 217. This decision was later modified to the effect that the conveyance should reserve the equities of the persons interested. Pearce *v.* Morris, L. R., 5 Ch. App. 227.

A conveyed a certain piece of land to B, taking back a mortgage for part of the purchase money. Subsequently B conveyed an equal undivided half of the premises to C and three-twentieths thereof to B. Later on, B conveyed the other seven-twentieths to C. Soon after this C also acquired D's interest. After these transactions E became the grantee of certain parcels of the land and B became grantee of other parcels. Other persons also acquired interests in portions of the land. A foreclosed the mortgage he had taken from B by a suit in equity, to which B and wife and one other person, were the only parties defendants. Under a decree in that suit the entire mortgaged premises were purchased by A, and he obtained the master's deed and entered into possession and made valuable improvements. E, one of the grantees not made party, brings an action to redeem. *Held*, that he was entitled to redeem the entire mortgaged premises upon paying to A the balance due the latter on the B mortgage, with costs, A being charged with the rents and profits, less the amount allowed for expenditures; but that A might, if he should so elect, retain that portion of the premises the title to which was in B at the time of the foreclosure, upon his releasing and discharging the residue of the land from the mortgage, and delivering possession thereof to the respective owners and paying the costs of the action. Bogut *v.* Coburn, 27 Barb. (N. Y.) 230.

In a case in *New York* (1830) the attorney-general sold a certain piece of land mortgaged to the State by one Seth Holmes. Willard, the relator, became the purchaser and paid as much as was required of him, and subsequently tenderd a bond and mortgage for the residue of the purchase money, and demanded a conveyance of the attorney-general. The conveyance was refused, because, in the mean time, and within the time allowed by statute, the owner of a part of the lands sold had paid into the treasury of the State all that was due to the State charged on the mortgaged premises and all that was neces-

But if he redeems at all, he must redeem completely. Redemp-on must be made of the entire mortgage, not by parcels. He ıust pay the whole debt, and he will then stand in the place of ıe party whose interest in the estate he discharges.[1]

(2) *Tenants in Common.*—One tenant in common of an equity f redemption may redeem in order to protect his interest. He cquires thereby an indefeasible estate in his share, but is not ıtitled to the whole estate to the exclusion of his co-tenants. 'he redemption inures to the benefit of the others so far as to ıve a forfeiture, but neither can redeem the whole and keep the thers from sharing in the redemption.[2]

ry to be paid to entitle the owner of e mortgaged premises to redeem. pplication was made for *mandamus* to mpel the attorney-general to execute conveyance to Willard. But the urt held that the redemption by a part ner was good, and that *mandamus* ould be refused. *In re* Willard, 5 end. (N. Y.) 94.

A railroad company owning a rail-ad lying in two different States, mort-ged the whole road and franchise; eir right to redeem in one State was ld on execution. *Held*, that the pur-aser of the equity is entitled to re-em the whole road from the mort-ge. Wood *v.* Goodwin, 49 Me. 260; Am. Dec. 259.

1. **Redemption Must be of Entire Debt.** 4 Kent's Com. (Lacy's ed.)163; Jones Mort., § 1063. A part owner must leem the lands altogether or not at . He must pay off the whole sum d put himself completely in their ad. Palk *v.* Clinton, 12 Ves. 59; lkins *v.* Munsel, 2 Root (Conn.) ; 7 Cush. (Mass.) 220; Taylor *v.* ssett, 3 N. H. 294; Gibson *v.* Cre-re, 5 Pick. (Mass.) 152.

'he whole debt must be paid, though whole or a portion of it has been arated from the mortgage, and wned by a different person. John-*v.* Candage, 31 Me. 28.

'his same principle applies where holder of the mortgage is himself t owner of the equity of redemp-ı in common with the mortgagor. is not bound to receive a part of mortgage debt. Merritt *v.* Hos-r, 11 Gray (Mass.) 276.

Redemption by Tenants in Common. ı Young *v.* Williams, 17 Conn. 393, court laid down the principle that one tenant in common is compelled ay off the whole incumbrance, and s to himself a transfer of the legal title, the share of the mortgage which belonged to him to pay becomes ex-tinguished; his title to his portion of the property is perfected; and as to the residue of the first mortgage, he becomes subrogated to the right of the first mortgage, and has a right to call upon his co-tenant to pay him that share, or be foreclosed of his right to redeem. Young *v.* Williams, 17 Conn. 398.

A distinction is made between the effect of payment of the debt before and after foreclosure. It is held that where tenants in common have mort-gaged the land for their joint debt, either of them, on paying the mortgage debt before a sale on foreclosure, has a claim against his co-tenant for con-tribution, capable of being enforced in a personal action and a lien to secure the same upon his co-tenant's interest in the land. But after sale on fore-closure for the full amount due, if one tenant redeems from the sale he still has an equitable lien upon his co-tenant's interest for that portion of the redemption money, properly charge-able thereon, but no personal claim against his co-tenant or against his estate after his decease. McLaughlin *v.* Curts, 27 Wis. 644.

Where one tenant in common of real estate conveyed to two has paid his half of the purchase money and joined with his co-tenant in a note and mort-gage to secure the payment of the other half, and afterwards released his interest in the land to the mortgagee, his co-tenant, or any one claiming un-der him with notice of the facts, can-not redeem the estate without paying the whole amount of the mortgage. Crafts *v.* Crafts, 13 Gray (Mass.) 360; Laylin *v.* Knox, 41 Mich. 40.

See Seymour *v.* Davis, 35 Conn. 264; Kingsbury *v.* Buckner, 70 Ill. 514.

(3) *Junior Incumbrancers.*—A junior incumbrancer, or subsequent mortgagee, may redeem from a prior mortgagee, though he is under no obligation to do so, or to do any act to prevent the first mortgagee from foreclosing.[1]

Wynne *v.* Styan, 2 Phill. Ch. 306; Lyon *v.* Robbins, 45 Conn. 513; Carithers *v.* Stuart, 87 Ind. 424.

1. **Right of Subsequent Mortgagee to Redeem.**—The right of a junior mortagee to pay off prior mortagees, and become subrogated to the rights of prior mortgagees, seems to be recognized everywhere and enforced under various restrictions.

In *England* the subsequent mortgagee may redeem by paying the whole debt, and is entitled to a decree for the redemption of the first mortgage. But he has no right to compel the first mortagee to transfer to him his first mortgage, on payment of what is due, or to call on the mortgagor to join in such transfer. Ramsbottom *v.* Wallis, 5 L. J., N. S. Ch. 92; Palk *v.* Clinton, 12 Ves. 59. But it is held that the first mortgagee ought, without a judicial proceeding, to accept payment from a second mortgagee and thereupon convey to him the mortgaged estate, with or without the concurrence of the mortgagor. Smith *v.* Green, 1 Collyer 555.

In *Alabama*, where a debtor executes two or more mortgages on the same tract of land at different times to different persons, and for security for different debts, the junior mortgagee has a right to redeem from the senior mortagee by paying his debt with interest and costs. This right is held to be independent of the statutory right given to judgment creditors; it applies generally to deed of trust to secure the payment of debts, and to mortgages proper. Wiley *v.* Ewing, 47 Ala. 418.

But the statutory right of redemption after sale given by *Alabama* Code 1886, is confined to the persons upon whom it is expressly conferred. Junior mortgagees and assignees are not included and cannot assert that right. Commercial Real Estate etc. Assoc. *v.* Parker, 84 Ala. 298; Aiken *v.* Bridgeford, 84 Ala. 295; Powers *v.* Andrews, 84 Ala. 289 (*overruling* Bailey *v.* Timberlake, 74 Ala. 221).

In *California*, a junior mortgagee, not made party to a suit for foreclosure of a prior mortgage, has the statutory right of redemption within six months from a sale made under a decree in such suit, and retains also the general equitable right of redemption which exists independent of the statute. If made a party to the foreclosure suit, his equitable right of redemption is barred, but he is still a redemptioner under the statute. Frink *v.* Murphy, 21 Cal. 108; Kirkham *v.* Dupont, 14 Cal. 559; Gamble *v.* Voll, 15 Cal. 507; Tuolumne Redemption Co. *v.* Sedgwick, 15 Cal. 516; Horn *v.* Jones, 28 Cal. 194; Black *v.* Gerichten, 58 Cal. 58.

In *Illinois*, where a prior mortgagee takes a conveyance of the mortgagor's equity of redemption, after the execution of a second mortgage by the latter, the junior mortgagee may, on a bill properly framed, redeem from the first mortgage, and have the property sold on foreclosure regardless of the conveyance. Rogers *v.* Herron, 92 Ill. 583. And where there has been a foreclosure proceeding by the prior mortgagee and the subsequent mortgagee has not been served with process, he is entitled to redeem from the sale foreclosing the first mortgage, and the purchaser under such a sale takes the premises subject to the junior mortgagee's right of redemption. Hodgen *v.* Guttery, 58 Ill. 431. See also Morse *v.* Smith, 83 Ill. 396.

In *Indiana*, the holder of a junior mortgage who has foreclosed his mortgage in a suit without making the senior mortgagee a party, and who has bought in the premises in a sheriff's sale on the decree, has a right to redeem the mortgaged premises from the senior mortgagee, though the senior mortgagee may have foreclosed his mortgage previously, without making the holder of the junior mortgage a party to the suit, and though the premises have been sold by the sheriff on the decree and bought in by the senior mortgagee, and though the assignment of the junior mortgage to the holder thereof was not placed on record. Hasselman *v.* McKernan, 50 Ind. 441. See Catterlin *v.* Armstrong, 79 Ind. 514.

In *Iowa* a junior mortgagee is held not barred of his right of redemp-

tion by a decree foreclosing a senior mortgage rendered in a proceeding to which he was not a party; but in redeeming a portion of the property sold on the foreclosure of a senior mortgage, must tender the amount of the entire senior mortgage debt. Knowles *v.* Rablin, 20 Iowa 101; White *v.* Hampton, 13 Iowa 259. See also Heimstreet *v.* Winnie, 10 Iowa 430; Street *v.* Beal, 16 Iowa 68; 85 Am. Dec. 504; Smith *v.* Shay, 62 Iowa 119.

In *Kentucky* the holder of a junior mortgage or incumbrance, or of the equity of redemption, is not bound by a decree of foreclosure to which he was not a party and will be allowed to redeem the estate, although the senior mortgagee had no notice of such claim. But if made a party to the bill, and fails to defend he will be barred. Cooper *v.* Martin, 1 Dana (Ky.) 24.

In *Michigan*, the right of the holder of a subsequent mortgage to redeem from a prior mortgage is not cut off or affected by a foreclosure decree and sale under the prior mortgage, where at the time of such decree and sale no party to the foreclosure suit in any way represented or had any right or interest in such subsequent mortgage. Avery *v.* Ryerson, 34 Mich. 363.

He has an absolute right at any time after a prior incumbrance comes due, to redeem from and be subrogated to it until his own mortgage as well as the former, shall be paid up and his whole claim refunded. Sager *v.* Tupper, 35 Mich. 134; Lamb *v.* Jeffrey, 41 Mich. 419.

But the right of the second mortgagee to redeem from the foreclosure of the prior mortgage is barred if he allows the foreclosure to become absolute. Gantz *v.* Toles, 40 Mich. 725.

In *Nebraska*, the right of a junior incumbrancer who was not made a party to a suit to foreclose a mortgage is to redeem the senior incumbrances, not to redeem the land. The owner of a fee redeems the land itself. The junior incumbrancer is not entitled to the estate, but to an assignment of the securities. Renard *v.* Brown, 7 Neb. 449.

In *New Jersey*, where the first mortgagee purchased the mortgaged premises at a sheriff's sale, took possession and received the rents and profits, the second mortgagee was allowed to redeem, upon paying the principal and interest of the first mortgage, together with the costs incurred in obtaining possession, and deducting therefrom the rents and profits received, or what with reasonable diligence might have been received by the first mortgagee while in possession. Hill *v.* White, 1 N. J. Eq. 435. Any subsequent mortgagee may redeem the first mortgage and bring all the land to a sale under the same decree; but he cannot require an intermediate mortgagee to take any steps toward doing so. Lambertville Nat. Bank *v.* McCready Bag and Paper Co., 15 Atk. 388.

In *New York*, a junior mortgagee may file a bill in equity against the holder of a senior mortgage, to redeem and compel an assignment of a senior mortgage, after tendering the amount due thereon and demanding an assignment, where a satisfaction of the senior mortgage would not be as beneficial to him as the assignment of it. Pardee *v.* Van Auken, 3 Barb. (N. Y.) 534. He may compel an assignment, upon tender of the amount, although he does not occupy the position of surety. Twombly *v.* Cassidy, 82 N. Y. 155. And when compelled to redeem for the protection of his own lien, he is entitled to subrogation to the rights of the senior mortgagee. But the right to subrogation does not necessarily follow from the right of redemption. It may depend on the relation of the parties or other circumstances. Jenkins *v.* Continental Ins. Co., 12 How. Pr. (N. Y.) 66.

A tender by the junior mortgagee will have the effect of payment of the prior mortgage if made in unmistakable terms, so that there can be no doubt of the intent to satisfy and discharge the senior mortgage, not to redeem and have a transfer of it. Frost *v.* Yonkers Sav. Bank, 70 N. Y. 553; Benton *v.* Hatch, 122 N. Y. 329; Clark *v.* Mackin, 95 N. Y. 351.

When the prior mortgagee has foreclosed without making the subsequent mortgagee a party, the latter may redeem, and need not pay costs of foreclosure. Gage *v.* Brewster, 31 N. Y. 218.

In *Oregon*, it is provided by the code that subsequent incumbrancers must be made parties, and that the decree in a suit to enforce the lien shall ascertain the amount and privity of the liens of all such parties, and direct that the premises be sold and the proceeds applied to the satis-

(4) *Judgment and Attachment Creditors.*—A judgment creditor of the mortgagor, or a creditor having an attachment on the mortgaged premises, may enforce a right to redeem; but not a general creditor whose claim is not a charge upon the mortgaged estate.[1]

faction of the debts secured thereby in the order specified therein. *Oregon* Civil Code, §§ 410, 414; Lauriat *v.* Stratton, 6 Sawy. (U. S.) 339; Chavener *v.* Wood, 2 Oregon 182; Hovenden *v.* Knott, 12 Oregon 267.

In *Vermont*, a subsequent mortgagee of the equity of redemption, who permits the grantor of the mortgagor to remain in possession, has no greater claim than he would have had if the mortgagor had remained in possession, and must stand upon his rights under his own mortgage.

A gave a mortgage to B, and a subsequent mortgage of the same premises to C; B foreclosed without making C a party; before the time of redemption expired, A conveyed his equity of redemption to D, who paid the decree. *Held*, that D stood on his rights as grantee of A and only acquired the rights of B to strengthen his other title and save his estate; and that C was not entitled to a decree of foreclosure of his mortgage without redeeming the prior mortgage. Walker *v.* King, 44 Vt. 601; Downer *v.* Wilson, 33 Vt. 1.

As between several persons entitled to redeem, redemption will be redeemed according to priority of claimants. The incumbrances are to be paid in the order in which the respective liens attach. Haines *v.* Beach, 3 Johns. Ch. (N. Y.) 459; Moore *v.* Beasom, 44 N. H. 215; Brewer *v.* Hyndman, 18 N. H. 9.

See also Kalscheuer *v.* Upton (Dak. 1889), 43 N. W. Rep. 816; Bigelow *v.* Stringfellow, 25 Fla. 366; Spurgen *v.* Adamson, 62 Iowa 661; Rogers *v.* Herron, 92 Ill. 583; Dickerman *v.* Lust, 66 Iowa 444.

1. Redemption by Judgment Creditors.—See Mildred *v.* Austin, L. R., 8 Eq. 220; Neate *v.* Marlborough, 3 Myl. & C. 407; Brainard *v.* Cooper, 10 N. Y. 356; Belden *v.* Slade, 26 Hun (N. Y.) 638; Mallalieu *v.* Wickham, 42 N. J. Eq. 297; White *v.* Bond, 16 Mass. 400; Jackson *v.* Lawrence, 117 U. S. 679; U. S. *v.* Sturges, 1 Paine (U. S.) 525; Lance *v.* Gorman, 136 Pa. St. 200; Berryhill *v.* Potter, 42 Minn. 279; Lamb *v.* Richards, 43 Ill. 312; Grob *v.* Cushman, 45 Ill. 119; Connecticut Mut. L. Ins. Co. *v.* Crawford, 21 Fed. Rep. 281.

The principle that a judgment creditor may redeem was recognized by Lord Hardwicke in 1693. Stonehewer *v.* Thompson, 2 Atk. 440.

In Stainback *v.* Geddy, 1 Dev. & B. (N. Car.), the court by Ruffin, Ch. J., said: "The relief sought is to every judgment creditor, as such in the way of whose satisfaction at law an incumbrance stands. He has a right to redeem or to have the incumbrance satisfied out of the property; and it is no favor to him, but mere justice to decree it for him in this court."

Any judgment creditor has a right to file a bill against the mortgagor and mortgagee, and redeem the mortgaged property, by paying what is actually due on the mortgage. Hill *v.* Holliday, 2 Litt. (Ky.) 332.

The amount which a judgment creditor is bound to pay to redeem mortgaged premises, after a statute foreclosure, is the sum actually due upon the mortgage, and not the sum bid by the purchaser. Benedict *v.* Gilman, 4 Paige (N. Y.) 58.

He will be permitted to redeem premises in the hands of heirs or personal representatives of the mortgagee on payment of the amount justly due. Van Buren *v.* Olmstead, 5 Paige (N. Y.) 9.

A creditor whose judgment is a lien on an equity of redemption, on coming to redeem, has a right to an assignment of the mortgage; but not always as a matter of course. He may, in some cases, be called upon to show affirmatively and clearly that such assignment is necessary to protect his interest. Niagara Bank *v.* Rosevelt, 9 Cow. (N.Y.) 409; Dauchy *v.* Bennett, 7 How. Pr. (N Y.) 375.

It has been held that he must take out an execution first. Quin *v.* Brittian, Hoffm. Ch. (N.Y.) 353

Under § 229 of the Practice Act of *California*, a subsequent judgment creditor, having a lien, has a right to redeem real estate sold by foreclosure of a previous mortgage, in the hands of the purchaser. The statute is held to

(5) *Sureties.*—A surety for a debt secured by a junior mortgage may become subrogated to the rights of such mortgagee upon payment of the debt, and may redeem from a prior mortgagee.[1] This, on the ground that it is always the right of a surety to avail himself of securities held by the creditor, after satisfying the debt. But he is under no obligation to redeem unless he has agreed to do so, expressly or by implication.[2]

(6) *Guardians and Administrators.*—A guardian may redeem the lands of his ward.[3] An administrator may have such an interest as to entitle him to redeem.[4]

(7) *Contribution on Redemption.*[5]

e remedial and therefore beneficially onstrued. Kent *v.* Laffan, 2 Cal. 595. ee Wilkins *v.* Wilson, 51 Cal. 212.

By Attachment Creditors.—The right an attachment creditor to redeem ems to be generally recognized. The tachment creates a lien and vests in e attaching creditor a right in equity redeem the land, even before judgent and levy, from a prior incumrance, in order to make his own claim eneficial, or available to himself. He entitled to the same right of redempon as a mortgagee has; and, if not ined as a party in a suit of foreclosure on the same land, his right to reem is not affected by the decree. is payment of the prior mortgage inmbrance is not regarded as a voltary payment, but the exercise of an uitable right. Chandler *v.* Dyer, 37 t. 345. To the same effect, a dirced woman who has an attachment the land of her former husband to cure his payment of alimony to her, s the same right of redemption as y attachment creditor. Briggs *v.* avis, 108 Mass. 322.

1. Redemption by Sureties.—Green *v.* ynn, L. R., 4 Ch. 204; Wade *v.* ope, 2 Sim. 155; Mayhew *v.* Cricket, Swanst. 185; Wright *v.* Morley, Ves. 21; *Ex parte* Crisp, 1 Atk. 133; erill *v.* Taylor, 8 N. Y. 44.

2. Redemption by Assignee.—Paulling Barron, 32 Ala. 9; Skinner *v.* iller, 5 Litt. (Ky.) 84; Wilkins *v.* ench, 20 Me. 111; Powers *v.* Anews, 84 Ala. 289; Gilbert *v.* Husn, 76 Iowa 241; Beach *v.* Shaw, 57 . 17; Hepburn *v.* Kerr, 9 Humph. enn.) 726; Phyfe *v.* Riley, 15 Wend. . Y.) 248; 30 Am. Dec. 55.

In 3 Atk. 314 (1746) Lord Hardwicke d: "In the case of an assignee of equity of redemption, if there are cumstances which would induce the court to decree a redemption in favor of the representatives of the mortgagor, the assignee who stands in his place will have the benefit of it."

In Scott *v.* Henry, 13 Ark. 127, the court, by Walker, J., said: "It is true, as a general rule, that no person can come into a court of equity for a redemption of a mortgage but he who is entitled to the legal estate of the mortgagor, or claims a subsisting interest under him. But it is equally well settled that an assignment of a mortgage vests in the assignee the right to redeem; or one to whom a *bona fide* transfer of the mortgagor's estate is made may redeem the property; and the same rule extends to persons having any substantial interest in the property."

3. Marvin *v.* Schilling, 12 Mich. 356; Pardee *v.* Van Auken, 3 Barb. (N. Y.) 534.

4. Enos *v.* Sutherland, 11 Mich. 538; Merriam *v.* Barton, 14 Vt. 501; Hill's Anno. Laws, *Oregon* (1887) 734.

5. See CONTRIBUTION, vol. 4, p. 1; MORTGAGES, vol. 15, p. 830.

A gave a mortgage to B, which was assigned by B to C to secure a debt, upon condition that if B should pay the debt the assignment would be determined and become void, and the assigned premises should revest in B. *Held*, that a purchaser of both A's and B's interests in the premises might maintain a bill in equity against C to redeem the mortgage, upon paying the amount due from B to C. Farnum *v.* Metcalf, 8 Cush. (Mass.) 46.

The assignee of a second mortgage may maintain a bill for redemption against the assignee of a first mortgage, or he may, in a bill of foreclosure make the assignee of the first mortgage a party and obtain the usual

c. THOSE ACQUIRING REDEMPTIONER'S INTEREST—(1) *Assignees and Grantees.*—An assignee or grantee of one entitled to redeem acquires the right of his grantor, whether he holds under a voluntary assignment or by an assignment in law.

(2) *Devisees and Legatees.*—If the mortgagor or owner of the equity of redemption has devised his right of redemption upon his death the devisee is the proper person to redeem.[1]

A legatee, whose legacy is made a charge on the estate may redeem.[2]

(3) *Heirs.*—Upon the death of the mortgagor, or owner of the equity of redemption, without having assigned or devised his right of redemption, it becomes vested in his heirs.[3]

d. THOSE HAVING INTEREST LESS THAN FEE—(1) *Tenants for Years, for Life, etc.*—It is not necessary, to entitle one to redeem, that he have an interest in fee; the right may be exercised by a tenant for life,[4] or in tail,[5] a remainderman or reversioner,[6] a lessee or tenant for years,[7] or by one holding

decree of redemption against him. Farwell *v.* Murphy, 2 Wis. 533.

An assignee of a right of redemption, in a petition to redeem, may show a want or failure of consideration, as the mortgagor himself might have done under a similar petition. Brewer *v.* Hyndman, 18 N. H. 10.

In *North Carolina*, if the suit is brought against both mortgagor and mortgagee by one claiming to be an assignee of the mortgagor, for the purpose of setting up the assignment and redeeming, it is necessary to prove that the assignment was for a valuable consideration. But if the suit is against the mortgagor alone, it is sufficient to prove the assignment, without proving any consideration. Medley *v.* Mask, 4 Ired. Eq. (N. Car.) 339.

A subsequent purchaser of land with notice of a prior mortgage, and his grantees, can only be deprived of the right to redeem therefrom by foreclosure, or its bar in some of the modes known to the law. He is not affected by a decree of foreclosure in a suit to which he is not made a party. Dunlap *v.* Wilson, 32 Ill. 518; Hurd *v.* Case, 32 Ill. 45; 83 Am. Dec. 249; Jackson *v.* Warren, 32 Ill. 335; Ohling *v.* Lintzens, 32 Ill. 24.

If he has bought subject to the mortgage without assuming it, or if he has purchased the equity of redemption at an execution sale, he may redeem if he so elects, but is not compelled to do so. Rogers *v.* Meyers, 68 Ill. 92.

Mortgages for Support.—As to redemption, by the assignee of a mortgage conditioned for the support of the mortgagee, see Austin *v.* Austin, 9 Vt. 420; Bryant *v.* Erskine, 55 Me. 153; Bryant *v.* Jackson, 59 Me. 165.

1. Finch *v.* Newnham, 2 Vern. 216; Faulker *v.* Daniels, 3 Hare 199; Stokes *v.* Solomans, 9 Hare 75; 2 Wash. Real Prop. (4th ed.) 173; Denton *v.* Nanney, 8 Barb. (N. Y.) 618.

2. 2 Jones on Mort. § 1062; Batcheler *v.* Middleton, 6 Hare 75.

3. **Heirs May Redeem.**—Pym *v.* Bowerman, 3 Swanst. 241, n.; Sheldon *v.* Bird, 2 Root (Conn.) 509; Lloyd *v.* Wait, 1 Phill. 61; Zaegel *v.* Kuster, 51 Wis. 31; Hunter *v.* Dennis, 112 Ill. 568; Butts *v.* Broughton, 72 Ala. 294; Chew *v.* Hyman, 10 Biss. (U. S.) 240; Stover *v.* Bounds, 1 Ohio St. 108.

4. Lamson *v.* Drake, 105 Mass. 564; Wicks *v.* Scribens, 1 John. & H. 215; Evans *v.* Jones, Kay 29; Aynsly *v.* Reed, 1 Dick. 249.

5. Playford *v.* Playford, 4 Hare 546.

6. Raffety *v.* King, 1 Keen 601; Ravald *v.* Russell, Younge 9; Davies *v.* Wetherell, 13 Allen (Mass.) 60; 90 Am. Dec. 177.

7. Arnold *v.* Green, 116 N. Y. 572; Welling *v.* Ryerson, 94 N. Y. 103; Averill *v.* Taylor, 8 N. Y. 44; Bacon *v.* Bowdoin, 22 Pick. (Mass.) 401; 2 Met. (Mass.) 591; McDermott *v.* Burke, 16 Cal. 580; Keech *v.* Hall, Doug. 21.

"A tenant for years who offers to pay off a mortgage debt has a right to

simply an easement in the land.[1] A person in possession of land under contract to buy it is also held to have a right to redeem.[2] So is the holder of a homestead estate.[3]

(2) *Tenants in Dower and by Curtesy.*—A dowress may redeem; nor does it matter that she has released her dower in the mortgage.[4] She may redeem though an assignment of her dower has not been made to her;[5] and, even though her right to dower is only inchoate.[6] Her right to redeem exists whether the mortgage was executed before or after the marriage.[7] She must pay the whole mortgage debt if she would redeem.[8] Her right to redeem is not barred by a foreclosure, had in her husband's lifetime, to which she was not made a party.[9] So a tenant by the curtesy may redeem.[10]

4. When Redemption May Be Made—*a.* IN GENERAL.—The right of redemption cannot be enforced until the mortgage debt is due; even if the mortgagor tenders the interest for the whole period the mortgage has to run.[11]

redeem. He has not, perhaps, strictly the right to demand a written assignment of the bond and mortgage, but he stands by redemption in place of the mortgagee, and will be subrogated to his rights against the mortgagor and reversioner. He has the right to have the bond and mortgage delivered to him uncanceled, which, in such case, is in equity, and may be at law, a complete assignment." Hamilton *v.* Dobbs, 19 N. J. Eq. 227.

1. Bacon *v.* Bowdoin, 22 Pick. (Mass.) 405.

2. In Lawry *v.* Tew, 3 Barb. Ch. (N. Y.) 414, the court by Walworth, J., said: "It is true a party who has gone into possession of premises under an agreement to purchase the same is, at law, a tenant at will to the holder of the legal title. But if he is in under a written agreement, made by the owner, to sell and convey the premises to him, or under a parol agreement which has been so far consummated as to entitle him to a specific performance, he is in equity considered as the owner of that title for which he contracted, and which the vendor is to give him. And if that is an equity of redemption he has the same claim to redeem, except as to *bona fide* purchasers without notice of his equitable rights, as if the equity of redemption had been conveyed to him at the time his equitable rights accrued to him under the contract."

3. Casborne *v.* English, 1 Atk. 606; Butts *v.* Broughton, 72 Ala. 294; Kirby *v.* Reese, 69 Ga. 452; Erwin *v.* Blanks, 60 Tex. 583.

4. Bell *v.* Mayor etc. of N. Y., 10 Paige (N. Y.) 49; Eaton *v.* Simonds, 14 Pick. (Mass.) 98.

5. Gibson *v.* Crehore, 5 Pick. (Mass.) 146; Peabody *v.* Patten, 2 Pick. (Mass.) 519; Henry's Case, 4 Cush. (Mass.) 257.

6. Davis *v.* Wetherell, 13 Allen (Mass.) 60; 90 Am. Dec. 177; Wilkins *v.* French, 20 Me. 111; Lamb *v.* Montague, 112 Mass. 352; Gatewood *v.* Gatewood, 75 Va. 407.

7. Denton *v.* Nanny, 8 Barb. (N. Y.) 618; Opdyke *v.* Barttes, 11 N. J. Eq. 133.

8. McCabe *v.* Bellows, 7 Gray (Mass.) 148; 66 Am. Dec. 467; Rossiter *v.* Cossit, 15 N. H. 38.

9. Wheeler *v.* Morris, 2 Bosw. (N. Y.) 524; Mutual L. Ins. Co. *v.* Shipman, 119 N. Y. 331; Mills *v.* Van Voorhies, 20 N. Y. 412; 10 Abb. Pr. (N. Y.) 152; Denton *v.* Nanny, 8 Barb. (N. Y.) 619; McArthur *v.* Franklin, 16 Ohio St. 193; 15 Ohio 485.

10. Casborne *v.* English, 2 J. & W. 194. And see Swannock *v.* Lyford, Ambl. 6.

11. **No Redemption Until Debt Is Due.**—Brown *v.* Cole, 14 Sim. 426; Kingman *v.* Pierce, 17 Mass. 247; Saunders *v.* Frost, 5 Pick. (Mass.) 267; 16 Am. Dec. 394; Abbe *v.* Goodwin, 7 Conn. 377; Moore *v.* Cord, 14 Wis. 213.

In Brown *v.* Cole, 14 L. J., N. S., Ch. 168, Shadwell, V. Ch., said: "If mortgagors were allowed to pay off their mortgage money at any time after the execution of the mortgage it might be attended with extreme inconvenience

b. WHEN TIME EXTENDED BY AGREEMENT.—The parties, by express agreement, may extend the time beyond the period when, but for the agreement, the right to redeem would be barred. The extension may be for a definite period, or for a reasonable time. If the promise to extend is made after the time limited for redemption has passed, the promise must be supported by a new consideration.[1]

c. AFTER FORECLOSURE—(See *infra*, this title, *Statutory Provisions*).—The time within which redemption may be made has been variously designated by statutes. In some States a certain time must elapse after default before foreclosure proceedings may be commenced; in others a certain time is given, after proceedings have been commenced, within which redemption may be made. In other States no sale can be made until one year after decree; in some, a certain time is given to redeem after sale; while, in many cases, the sale, when properly made and confirmed by the court, vests the absolute title in the purchaser so that no redemption can be made afterwards.[2]

5. How Redemption Is Effected—*a.* AMOUNT PAYABLE TO EFFECT REDEMPTION—(1) *In General.*—In order to redeem, all sums due under the mortgage must be paid, and all other conditions performed.[3] If the mortgagee has paid a prior incumbrance to

to mortgagees, who generally advance their money as an investment."

But if payable at or before a certain day, it may be paid immediately, and therefore redemption may be had at any time. *In re* John, etc., Streets, 19 Wend. (N. Y.) 660.

1. Chase *v.* McLellan, 49 Me. 375; Smalley *v.* Hickok, 12 Vt. 153; McNew *v.* Booth, 42 Mo. 189; Nickels *v.* Otto, 132 Ill. 91.

Court Cannot Extend Time.—Although the parties may make such an arrangement after foreclosure, whereby the time before strict forfeiture shall take place shall be extended, yet a court of equity has no power to extend the time for redemption on a statutory foreclosure, even where the redemption within the time allowed by statute has been prevented by accident and misfortune, or by an unavoidable mental and physical disorder. Cameron *v.* Adams, 31 Mich. 426; Dodge *v.* Brewer, 31 Mich. 227.

2. See *infra*, this title, *Statutory Provisions*, for a summary of the statute law of the different States.

See Jones on Mort. (4th ed.), § 1051; Newman *v.* Locke, 66 Mich. 27; McHugh *v.* Wells, 39 Mich. 175; Maver *v.* Farmers' Bank, 44 Iowa 212; Gargon *v.* Grimes, 47 Iowa 180; Carroll *v.* Rossiter, 10 Minn. 174; Howard *v.* Bugbee, 24 How. (U. S.) 461; Brine *v.* Hartford F. Ins. Co., 96 U. S. 627; Irvis *v.* Powell, 98 U. S. 176; Swift *v.* Smith, 102 U. S. 442; Ailis *v.* Northwestern Mut. L. Ins. Co., 97 U. S. 144; Burley *v.* Flint, 105 U. S. 247; Blair *v.* Chicago etc. R. Co., 12 Fed. Rep. 750; Mason *v.* Northwestern Mut. Ins. Co., 106 U. S. 163; Suitterlin *v.* Connecticut Mut. L. Ins. Co., 90 Ill. 483.

3. Amount Payable to Effect Redemption.—A mortgagee in possession has the right to require full payment of the amount due, before he can be called upon to surrender the right or possession to any extent; he can in no case be divested of that possession until his claim under the mortgage is fully satisfied. Fogal *v.* Pirro, 17 Abb. Pr. (N. Y.) 113; Bell *v.* Mayor etc. of N. Y., 10 Paige (N. Y.) 49; Wood *v.* Holland, 53 Ark. 69; Rodriguez *v.* Hayes, 76 Tex. 225.

It was held, in a proceeding to redeem brought by a grantee of a mortgagor, that it was incumbent on him to perform the condition of the mortgage by payment of the amount paid; although the mortgagor and obligor of the bond mentioned in the condition had been discharged under a bankrupt act. Childs *v.* Childs, 10 Ohio St. 339; 75 Am. Dec. 512.

protect his title, he is entitled to be allowed for the sum so paid.[1] Money paid for taxes, or other valid assessments for public improvements, must be refunded to the mortgagee, although the mortgage may not so provide.[2]

The debt must be paid in full, and the mortgage redeemed as a whole. The mortgagee cannot be compelled to divide the debt and security.[3] But if the mortgage is foreclosed without making

A grantee of an estate upon condition, who mortgages to his grantor, will be allowed to redeem only upon removing all incumbrances specified in the mortgage and performing the condition annexed in his deed. Stone *v.* Ellis, 9 Cush. (Mass.) 95; Cowles *v.* Marble, 37 Mich. 158.

1. Davis *v.* Winn, 2 Allen (Mass.) 111; Page *v.* Foster, 7 N. H. 392; Weld *v.* Sabin, 20 N. H. 533; 51 Am. Dec. 240; Jenness *v.* Robinson, 10 N. H. 215; Arnold *v.* Foot, 7 B. Mon. (Ky.) 66; Silver Lake Bank *v.* North, 4 Johns. Ch. (N. Y.) 370; Robinson *v.* Ryan, 25 N. Y. 320; Lyman *v.* Little, 15 Vt. 576; Harper *v.* Ely, 70 Ill. 581; Harrigan *v.* Welmuth, 77 Mo. 542; Johnson *v.* Payne, 11 Neb. 269; Griggs *v.* Banks, 59 Ala. 311; Grant *v.* Parsons, 67 Iowa 31.

2. **Taxes and Assessments.**—Faure *v.* Winans, Hopk. (N. Y.) 283; 14 Am. Dec. 545; Eagle F. Ins. Co. *v.* Pell, 2 Edw. Ch. (N. Y.) 631; Kortright *v.* Cady, 23 Barb. (N. Y.) 490; Dale *v.* M'Evers, 2 Cow. (N. Y.) 118; Manning *v.* Tuthill, 30 N. J. Eq. 29; Strong *v.* Burdick, 52 Iowa 630; Brevoort *v.* Randolph, 7 How. Pr. (N. Y.) 398; Burr *v.* Veeder, 3 Wend. (N. Y.) 412; Rapelye *v.* Prince, 4 Hill (N. Y.) 119; 40 Am. Dec. 267; Weed *v.* Hornby, 35 Hun (N. Y.) 582; Fleishauer *v.* Doellner, 9 Abb., N. Cas. (N. Y.) 372; Williams *v.* Hilton, 35 Me. 547; 58 Am. Dec. 729; Goldbeck's Appeal (Pa. 1887), 8 Atl. Rep. 29; Nopson *v.* Horton, 20 Minn. 268.

It has been held that money paid by the mortgagee to redeem the premises from a tax sale becomes a part of the mortgage debt in equity. Willard Eq. Jur. 446; Sidenburg *v.* Ely, 90 N. Y. 257; Shoenheit *v.* Nelson, 16 Neb. 237.

But the better opinion seems to be that the mortgagee cannot add to the mortgage debt the amount paid by him in purchasing at a tax sale. Such a purchase is not a payment of taxes, but a purchase of a new lien upon the estate independent of the mortgage. Jones Mort. (4th ed.), § 1080; Williams *v.* Townsend, 31 N. Y. 411; Brown *v.* Simons, 44 N. H. 475; Vincent *v.* Moore, 51 Mich. 618.

Other Charges on the Land.—As to the right of the mortgagee to require payment of other charges, see Benedict *v.* Gilman, 4 Paige (N. Y.) 58; Madison Ave. Baptist Church *v.* Oliver Street Baptist Church, 73 N. Y. 95; Morrison *v.* Robinson, 31 Pa. St. 459; Harper's Appeal, 64 Pa. St. 315; McSorley *v.* Larissa, 100 Mass. 270; Sandon *v.* Hooper, 6 Beav. 246; Ross *v.* Watson, 10 H. L. Cases, 672; Hosford *v.* Johnson, 74 Ind. 479; Dayton *v.* Dayton, 68 Mich. 437.

But the mortgagee cannot require the payment of any other debt, not a charge upon the premises, as a condition of redemption. Burnet *v.* Denniston, 5 Johns. Ch. (N. Y.) 35; Cleveland *v.* Clark, Brayt. (Vt.) 165; McKinstry *v.* Mervin, *cited* in 3 Johns. Ch. (N. Y.) 466. See also Green *v.* Tanner, 8 Met. (Mass.) 411; Palmer *v.* Fowley, 5 Gray (Mass.) 545.

A contrary rule has been laid down in some cases, where it is held that, inasmuch as the mortgagor goes into equity to redeem, he must do equity, and therefore pay not only the mortgage debt, but all collateral debts due from him to the mortgagee as well. Scripture *v.* Johnson, 3 Conn. 211; Anthony *v.* Anthony, 23 Ark. 479; Bank of South Carolina *v.* Rose, 1 Strobh. Eq. (S. Car.) 257; Walling *v.* Aiken, 1 McMull. Eq. (S. Car.) 1. This rule was probably based on the old English system of "tacking," now abolished.

3. **Must be Paid in Full.**—See *supra*, this title, *Parties Having Partial Interest — Junior Incumbrancers.*—Seymour *v.* Davis, 35 Conn. 264; Gliddon *v.* Andrew, 14 Ala. 733; Dooley *v.* Potter, 146 Mass. 148; McCabe *v.* Bellows, 7 Gray (Mass.) 148; 66 Am. Dec. 467; Fletcher *v.* Chase, 16 N. H. 42; Kezer *v.* Clifford, 59 N. H. 208; Lamb *v.* Montague, 112 Mass. 352;

all the several owners of the land parties to the suit, and the mortgagee becomes the purchaser at the sale, he thereby voluntarily severs his right, and an owner not made a party may redeem the portion owned by him on paying that part of the mortgage debt, bearing such a proportion to the whole as the value of his land bears to that of the whole mortgaged premises.[1]

A reservation of usurious interest on the mortgage debt may be set up in the bill to redeem, and the mortgagor is entitled to the statute penalty for usury in reduction of the sum payable on the mortgage; but no reduction can be made for usurious interest already paid by a former owner.[2]

(2) *After Foreclosure.*—When one is entitled to redeem after foreclosure sale, he can do so, as a general rule, only upon payment of the whole amount of the mortgage, although the land may have brought less at the sale.[3] If he has allowed a purchaser

Spurgin *v.* Adamson, 62 Iowa 661; Meacham *v.* Steele, 93 Ill 135; Andreas *v.* Hubbard, 50 Conn. 351; Merritt *v.* Hosmer, 11 Gray (Mass.) 276; Smith *v.* Kelley, 27 Me. 237; Douglass *v.* Bishop, 27 Iowa 216; People *v.* Fralick, 12 Mich. 235; Johnson *v.* Johnson, Walk. (Mich.) 331; Franklin *v.* Gorham, 2 Day (Conn.) 42.

In ascertaining the amount due, a conditional judgment on a writ of entry to foreclose a mortgage is conclusive evidence of the amount due on the mortgage in a subsequent suit in equity to redeem. Sparhawk *v.* Wills, 5 Gray (Mass.) 423.

1. Green *v.* Dixon, 9 Wis. 532. In this case A sold land to B, who gave a mortgage for the purchase money. B sold half of the land to C, and the other half to C's husband. A afterwards foreclosed, without making C a party to the suit, and bid in the whole land at the sale. It was held that C had a right to redeem the half deeded to her.

2. Hart *v.* Goldsmith, 1 Allen (Mass.) 145; Smith *v.* Robinson, 10 Allen (Mass.) 130; Minot *v.* Sawyer, 8 Allen (Mass.) 78; Gerrish *v.* Black, 104 Mass. 400; 122 Mass. 76; Adams *v.* McKenzie, 18 Ala. 698; Perrine *v.* Poulson, 53 Mo. 309; Kirkpatrick *v.* Smith, 55 Mo. 389.

3. **After Foreclosure.**—In Collins *v.* Riggs, 14 Wall. (U. S.) 493, the court by Bradley, J., said: "To redeem property which has been sold under a mortgage for less than the mortgage debt, it is not sufficient to tender the amount of the sale. The whole mortgage debt must be tendered or paid into court. The party offering to redeem proceeds upon the hypothesis that, as to him, the mortgage has never been in force and is still in existence. Therefore he can only lift it by paying it. The money will be subject to distribution between the mortgagee and the purchaser, in equitable proportions, so as to reimburse the latter his purchase money and pay the former the balance of his debt."

A, the holder of the first of five mortgages on a piece of land, took proceedings in chancery to enforce it, making all the subsequent mortgagees parties, except D the last. Decree for sale was obtained and sale made, at which B, who was administrator of C, the second mortgagee then deceased, became purchaser for a few dollars over the amount of the first mortgage. B bought in his own name, but stated at the time that he bought to protect the C estate. D sought to redeem by paying the amount of B's bid with interest. The mortgaged premises were shown to be worth at least the amount of the A and C mortgages. *Held*, that D could not be permitted to redeem without paying the amount of these mortgages. Baker *v.* Pierson, 6 Mich. 522.

It has been held, however, that a railway company, in redeeming a prior mortgage of lands over which it has a right of way need redeem only such part of the mortgage as covers the land taken for the right of way, without paying the whole mortgage debt. Dows *v.* Congdon, 16 How. Pr. (N.Y.) 571. See also Adams *v.* Brown, 7

at the sale to make improvements on the property, in good faith, supposing his title to be good, when coming to redeem he must pay for the improvements, less the rents and profits.[1]

Local statutes have designated quite generally the amount to be paid on redeeming after foreclosure.[2]

b. PROCEEDINGS TO ENFORCE THE RIGHT—(1) *The Action.*—The remedy for enforcing the right of redemption is by suit in equity, in those States where the distinction between law and equity is still maintained.[3] In the code States the proceeding is an equitable one and governed by equitable rules.[4]

Cush. (Mass.) 220; Parker *v.* Dacres, 130 U. S. 43.

When Part Only of Debt is Due.—When an entry has been made for a breach of condition in the non-payment of one of several sums secured by the mortgage, and the mortgagor wishes to redeem, the mortgagee is not obliged to accept the amounts not yet due; but the court will make a special decree, upon the payment of the sum due, that the proceedings shall stand open until a further sum shall become due. But where there are two mortgages upon the same premises, one of which is due and the other not, redemption may be had upon payment of that which is due. Jones Mort., § 1077; Saunders *v.* Frost, 5 Pick. (Mass.) 259; 16 Am. Dec. 394; Lamson *v.* Sutherland, 13 Vt. 309; Mann *v.* Richardson, 21 Pick. (Mass.) 355; Adams *v.* Brown, 7 Cush. (Mass.) 226; Deming *v.* Comings, 11 N. H. 474; Pearce *v.* Savage, 45 Me. 90; Smith *v.* Anders, 21 Ala. 782; Hocker *v.* Reas, 18 Cal. 650; Davis *v.* Langsdale, 41 Ind. 399; Preston *v.* Hodgen, 50 Ill. 56; Tierman *v.* Hinman, 16 Ill. 400; Magnusson *v.* Williams, 111 Ill. 456.

Mortgages to Secure Further Advances.—If he mortgage was given to secure advances to be made, and further advances are made under agreement that the mortgage shall secure them, such advances must be paid by the party seeking to redeem. Reed *v.* Lansdale, Hard. (Ky.) 6; Ogle *v.* Ship, 1 A. K. Marsh. (Ky.) 287; Joslyn *v.* Wyman, 5 Allen (Mass.) 62; Stone *v.* Lane, 10 Allen (Mass.) 74; Upton *v.* South Reading Bank, 120 Mass. 153; Williamson *v.* Downs, 34 Miss. 402; Yelverton *v.* Sheldon, 2 Sandf. Ch. (N. Y.) 481.

1. Bradley *v.* Snyder, 14 Ill. 263; 58 Am. Dec. 564; Cable *v.* Ellis, 120 Ill. 136; Higinbottom *v.* Benson, 24 Neb. 461.

The purchaser is not usually accountable for rents and profits, however. Gaskell *v.* Viquesney, 122 Ind. 244.

2. See *infra*, this title, *Statutory Provisions.*

3. Hill *v.* Payson, 3 Mass. 559; Parsons *v.* Welles, 17 Mass. 419; Douglas *v.* Woodworth, 51 Barb. (N. Y.) 79; Pell *v.* Ulmar, 18 N. Y. 139; Craft *v.* Bullard, 1 Smed. & M. Ch. (Miss.) 366; Pearce *v.* Savage, 45 Me. 90; Woods *v.* Woods, 66 Me. 206; Jackson *v.* Cunningham, 28 Mo. App. 354.

See *infra*, this title, *Statutory Provisions.*

"In those States where payment, or tender of payment, after condition broken, extinguishes the mortgage, and enables the mortgagor to recover the possession by an action of ejectment, no further process is needed to restore him to the complete title in the land. But where payment or tender does not have that effect—as is the case under the common law theory—the mortgagor is obliged to resort to a bill in equity to enforce a redemption and cancellation of the mortgage." Tiedeman Real Prop. (1884), § 352.

4. Jones on Mort. (4th ed.), § 1318.

And see *infra*, this title, *Statutory Provisions.*

The bill must offer to pay whatever may be found to be due. Daughdrill *v.* Sweeney, 41 Ala. 310; Fouche *v.* Swain, 80 Ala. 151; Adams *v.* Sayre, 70 Ala. 318; Lehman *v.* Collins, 69 Ala. 127; Stocks *v.* Young, 67 Ala. 341; Anson *v.* Anson, 20 Iowa 55; 89 Am. Dec. 514; Pitman *v.* Thornton, 66 Me. 469; Gerrish *v.* Black, 122 Mass. 76; Way *v.* Mullett, 143 Mass. 49; Perry *v.* Carr, 41 N. H. 371; Eastman *v.* Thayer, 60 N. H. 408; Edgerton *v.* McRea, 5 How. (Miss.) 183; Hoopes *v.* Bailey, 28 Miss. 328; Holt *v.* Rees, 46 Ill. 181; Nesbit *v.* Hanway, 87 Ind.

(2) *Parties*—(a) **Parties Plaintiff.**—The person seeking to redeem is the proper party plaintiff, whether the original mortgagor, his heir, devisee, assignee, personal representative, or other person acquiring the mortgagor's interest.[1]

(b) **Parties Defendant.**—All persons legally or beneficially interested should be made parties defendant in a bill to redeem.[2] Where there are no other outstanding interests the mortgagee only is the proper party. If the mortgage is in fee and the mortgagee is dead, the heir at law or any other person, in whom the estate is vested, by devise or otherwise, must be made a party; and in such case the personal representative also may be made a party. But if the mortgage is of a term of years or a leasehold estate, the personal representative of the mortgagee only should be made defendant, for he alone is interested.[3]

400; Beekman *v.* Frost, 18 Johns. (N. Y.) 544; 9 Am. Dec. 246; Silsbee *v.* Smith, 41 How. Pr. (N. Y.) 418; Barton *v.* May, 3 Sandf. Ch. (N. Y.) 450; Brobst *v.* Brock, 10 Wall. (U. S.) 519; Crews *v.* Treadgill, 35 Ala. 334; Harding *v.* Pingey, 10 Jur., N. S. 872; Dalton *v.* Hayter, 7 Beav. 319; Tasker *v.* Small, 3 Myl. & C. 63; Loney *v.* Courtnay, 24 Neb. 580; Kopper *v.* Dyer, 59 Vt. 477; 59 Am. Rep. 742.

It was held in Brown *v.* South Boston Sav. Bank, 148 Mass. 300, in a suit by the mortgagor's grantee, that the offer to redeem was sufficient in praying that the plaintiff be allowed to pay such sum as should be found due on the mortgage, and that it was not necessary that he should offer to pay in such distinct terms as to constitute, if accepted, an enforcible contract. If, however, the plaintiff has paid the mortgage, or the mortgagee has paid himself in rents and profits, it is enough to aver payment and demand an accounting. Catterlin *v.* Armstrong, 79 Ind. 514; Dennis *v.* Tomlinson, 49 Ark. 568.

1. **Parties Plaintiff.**—Story's Eq. Pl., §§ 182–183; Jones on Mort. (4th ed.), § 1098; Holland *v.* Baker, 3 Hare 68; Throughton *v.* Binkes, 6 Ves. 573; Anderson *v.* Stather, 2 Coll. 209; Wilton *v.* Jones, 2 Y. & C. 244 (and cases cited in note); Sutherland *v.* Rose, 47 Barb. (N. Y.) 144; Hilton *v.* Lathrop, 46 Me. 297; Wandle *v.* Turney, 5 Duer (N. Y.) 661; Putnam *v.* Putnam, 4 Pick. (Mass.) 139; Smith *v.* Manning, 9 Mass. 422; Elliot *v.* Patton, 4 Yerg. (Tenn.) 10; Dexter *v.* Arnold, 1 Sumn. (U. S.) 109.

2. **Parties Defendant.**—All the mortgagees, or assignees of a mortgage in whom the legal title is vested are necessary parties. Dias *v.* Merle, 4 Paige (N. Y.) 257; Winslow *v.* Clark, 2 Lans. (N. Y.) 381; Yelverton *v.* Shelden, 2 Sandf. (N. Y.) 481; Essley *v.* Sloan, 16 Ill. App. 63; Woodward *v.* Wood, 19 Ala. 213; Beals *v.* Cobb, 51 Me. 348; Brown *v.* Johnson, 53 Me. 246; Posten *v.* Miller, 60 Wis. 494; Rowell *v.* Jewett, 69 Me. 293; Stilwell *v.* Hamm, 97 Mo. 579; Hobart *v.* Abbott, 2 P. Wms. 643; Norrish *v.* Marshall, 5 Madd. 475.

In an action to redeem real property from a mortgage, brought after a supposed foreclosure, under which the mortgagee had bid in the property, the grantees of such mortgagee, being in possession, are necessary parties, and are to be treated as assignees of the mortgage in proportion to their interests. Davis *v.* Duffie, 18 Abb. Pr. (N. Y.) 360.

But where the mortgagee had purposely complicated the case and embarrassed the mortgagor by numerous conveyances, the court will relieve the mortgagor from the necessity of making all parties. Yates *v.* Hambly, 2 Atk. 237; Davis *v.* Duffie, 18 Abb. Pr. (N. Y.) 365.

If the mortgagee is only trustee for another, the *cestui que trust* is a necessary party to a bill to redeem, unless some reason is given why he may be dispensed with. Woodward *v.* Wood, 19 Ala. 213; Wetherell *v.* Collins, 3 Madd. 255.

3. Story's Eq. Pl., § 188; Jones Mort., § 1101; Osbourn *v.* Fallows, 1 R. & M. 141; Riley *v.* McCord, 21 Mo. 285; Copeland *v.* Yoakum, 38

(3) *Decree.*—The decree where the plaintiff prevails, is that he may redeem within a specified time,[1] upon payment of the mortgage debt and costs; that, upon his so doing, the defendant shall discharge the mortgage and deliver up the premises; and that, upon default of such payment, the bill be dismissed with costs.[2] When nothing is found due to the mortgagee, the mortgagor is also entitled to a judgment of possession and to a writ of possession.[3] A dismissal of the bill to redeem or failure to perform the decree operates, in effect, as a foreclosure.[4]

(4) *Costs.*—As a general rule the costs must be paid by the plaintiff, though he is successful.[5] But if the defendant has

Mo. 349; Haskins *v.* Hawkes, 108 Mass. 379. See Jones *v.* Richardson, 85 Ala. 463.

The rule is a general one, that all who may be affected by the decree, and those only, should be made parties to the bill; and that no one, not made a party, is affected thereby.

Linnell *v.* Lyford, 72 Me. 280; Childs *v.* Childs, 10 Ohio St. 344; 75 Am. Dec. 512; Doe *v.* McLoskey, 1 Ala. 708; Youngman *v.* Elmira etc. R. Co., 65 Pa. St. 278; Chaddick *v.* Cook, 32 Beav. 70; 9 Jur. N. S. 454.

1. **Time After Decree.**—The time within which redemption is to be made after decree rests in the discretion of the court usually. It is frequently six months. Perine *v.* Dunn, 4 Johns. Ch. (N.Y.) 140; Waller *v.* Harris, 7 Paige (N.Y.) 167; Dunham *v.* Jackson, 6 Wend. (N.Y.) 22; Decker *v.* Patton, 120 Ill. 464; 20 Ill. App. 210; Hollingsworth *v.* Koon, 117 Ill. 511.

But the circumstances of the particular case frequently regulate the time. Clark *v.* Reyburn, 8 Wall. (U. S.) 324; Decker *v.* Patton, 20 Ill. App. 210; Murphy *v.* New Hampshire Sav. Bank, 63 N. H. 362; Bremer *v.* Calumet Canal, etc., Co., 127 Ill. 464; Miles *v.* Stehle, 22 Neb. 740.

Extension of Time.—The time stated in the decree will not be extended usually to allow redemption to be made after the time has elapsed. Jenkins *v.* Eldridge, 1 Woodb. & M. (U. S.) 61; Brinckerhoff *v.* Lansing, 4 Johns. Ch. (N.Y.) 65; 8 Am. Dec. 538; Monkhouse *v.* Bedford, 2 Madd. 382; Perine *v.* Dunn, 4 Johns. Ch. (N.Y.) 140; Chicago etc. R. Co. *v.* Fosdick, 106 U. S. 70; Kolle *v.* Clausheide, 99 Ind. 100.

An extension, however, has been allowed to enable contribution to be made; or where the failure to pay was occasioned by fraud, accident, or mistake. But if the negligence of the complainant himself has contributed to such failure the extension usually will be denied. Segrest *v.* Segrest, 38 Ala. 674; Brinckerhoff *v.* Lansing, 4 Johns. Ch. (N.Y.) 65; 8 Am. Dec. 538; Cilley *v.* Huse, 40 N. H. 362; Emmons *v.* Vanzee, 78 Mich. 171; Kopper *v.* Dyer, 59 Vt. 477; 59 Am. Rep. 742.

2. Pitman *v.* Thornton, 66 Me. 469; Bremer *v.* Calumet Canal etc. Co., 127 Ill. 464.

3. Gerrish *v.* Black, 122 Mass. 76.

4. Jenkins *v.* Eldridge, 1 Woodb. & M. (U. S.) 61; Stevens *v.* Miner, 110 Mass. 57; Sherwood *v.* Hooker, 1 Barb. Ch. (N. Y.) 650; Perine *v.* Dunn, 4 Johns. Ch. (N.Y.) 140; Beach *v.* Cooke, 28 N. Y. 535; 86 Am. Dec. 260; Bolles *v.* Duff, 43 N. Y. 474; Quin *v.* Brittain, Hoffm. Ch. (N. Y.) 353; Shannon *v.* Speers, 2 A. K. Marsh. (Ky.) 311.

5. **Costs to be Paid By Plaintiff.**—In Wetherell *v.* Collins, 3 Madd. 255, the Vice-Chancellor said: "It seems at first sight a great hardship that the mortgagor is to pay the costs of persons claiming under the mortgagee, but it is the constant course of the court, and it is to be supported on this principle: that, at law, after a mortgage is forfeited, the estate is the absolute property of the mortgagee, and he may deal with it as his own; and that if the mortgagor comes for the redemption which the equity of this court gives him, it must be upon the terms of indemnifying the mortgagee from all costs arising out of his legal acts."

See Harper *v.* Ely, 70 Ill. 581; Slee *v.* Manhattan Co., 1 Paige (N. Y.) 48; Benedict *v.* Gilman, 4 Paige (N. Y.) 58; Blum *v.* Mitchell, 59 Ala. 535; Vroom *v.* Ditmas, 4 Paige (N. Y.) 526; Brockway *v.* Wells, 1 Paige (N. Y.)

refused a previous tender of a sum sufficient to cover principal, interest and costs, the plaintiff will not be compelled to pay the costs of the suit to redeem.[1] And costs of a previous foreclosure need not be paid by a junior incumbrancer not made a party to that foreclosure, and who subsequently seeks to redeem.[2]

6. How Right Is Lost or Barred—*a.* IN GENERAL.—The right of redemption is barred by a valid foreclosure to which the person claiming the right was made a party.[3]

By his own conduct, such as to raise an estoppel, one, otherwise entitled to redeem, may preclude himself from enforcing the right.[4]

b. LIMITATION; LACHES; LAPSE OF TIME.—The right to redeem may be barred by lapse of time. The Statute of Limitations is applied by analogy; whenever lapse of time will bar an entry at law, it will in like manner preclude the right of redemption in equity. Unless otherwise fixed by statute the period is

617; Phillips *v.* Hulsizer, 20 N. J. Eq. 308; Bean *v.* Brackett, 35 N. H. 88; Sessions *v.* Richmond, 1 R. I. 298; Hosford *v.* Johnson, 74 Ind. 479; Wells *v.* Van Dyke, 109 Pa. St. 330; Turner *v.* Johnson, 95 Mo. 431.

When Frivolous Defense Set Up.—If the defendant sets up an unwarranted defense, or one which wholly fails, and thereby makes unnecessary delay and expense, he may be compelled to pay costs. Davis *v.* Duffie, 18 Abb. Pr. (N. Y.) 360; Barton *v.* May, 3 Sandf. Ch. (N. Y.) 450; Still *v.* Buzzell, 60 Vt. 478; Turner *v.* Johnson, 95 Mo. 431.

1. Grugeon *v.* Gerrard, 4 Y. & C. 128; Hanner *v.* Priestly, 16 Beav. 569; Van Buren *v.* Olmstead, 5 Paige (N. Y.) 9; King *v.* Duntz, 11 Barb. (N.Y.) 191. See also Meigs *v.* M'Farlan, 72 Mich. 194.

When both parties are at fault, costs will be divided. Perdue *v.* Brooks, 85 Ala. 459; Hollingsworth *v.* Koon, 117 Ill. 511.

2. Gage *v.* Brewster, 31 N. Y. 218; Gaskell *v.* Viquesney, 122 Ind. 244. See Sanders *v.* Peck, 131 Ill. 409.

3. This proposition is elementary, and is supported by all the authorities.

Redemption may be had after foreclosure by one entitled to redeem and not made a party to the foreclosure; as to him the proceeding is a nullity. Miner *v.* Beekman, 50 N. Y. 337; Pratt *v.* Frear, 13 Wis. 462; Wiley *v.* Ewing, 47 Ala. 418; Hodgen *v.* Guttery, 58 Ill. 431; Smith *v.* Sinclair, 10 Ill. 108; Strang *v.* Allen, 44 Ill. 428; Murdock *v.* Ford, 17 Ind. 52; Nesbit *v.* Hanway, 87 Ind. 400; Bates *v.* Ruddick, 2 Iowa 423; 65 Am. Dec. 774; Johnson *v.* Harmon, 19 Iowa 56; Gower *v.* Winchester, 33 Iowa 301; Bunce *v.* West, 62 Iowa 80; Farwell *v.* Murphy, 2 Wis. 533; Murphy *v.* Farwell, 9 Wis. 102; Sellwood *v.* Gray, 11 Oregon 534.

4. Where the plaintiff, being the owner of a right in equity to redeem land under mortgage, encouraged the defendant to purchase the mortgage, saying that the land was not worth more than the sum due on the mortgage, and that he would never redeem, and thereupon the defendant purchased the mortgage and made expensive improvements on the land, it was held that the plaintiff was not entitled to the aid of a court of equity to enable him to redeem. Fay *v.* Valentine, 12 Pick. (Mass.) 40; 22 Am. Dec. 397.

In like manner if he stands idly by and does not disclose his title, he may lose his right to set up his claim to redeem. Fay *v.* Valentine, 12 Pick. (Mass.) 45; 22 Am. Dec. 397; Parkhurst *v.* Van Cortland, 14 Johns. (N. Y.) 43; 7 Am. Dec. 427; Niven *v.* Belknap, 2 Johns. (N. Y.) 573; 1 Fonblanque Eq. 161; Savage *v.* Foster, 9 Mod. R. 35.

In Niven *v.* Belknap, 2 Johns. (N. Y.) 580, the court by Thompson, Ch. J., said: "When a man has been silent, when in conscience he ought to have spoken, equity will debar him from speaking when conscience requires him to be silent."

When the mortgagor has consented

usually held to be twenty years.[1] The time has been fixed by statute in *England*,[2] and in some of the States,[3] where the statute applies, the cause of action does not accrue until the mortgagee enters, and takes actual, open and adverse possession of the mortgaged premises.[4]

to a public sale of the premises, aided and assisted in circulating notice thereof, and received the amount of the purchase money, and the purchaser has gone into possession and made large improvements, it is held that the mortgagor could not afterwards redeem. Wright *v.* Whithead, 14 Vt. 268.

1. Hughes *v.* Edwards, 9 Wheat. (U. S.) 489; Slicer *v.* Bank of Pittsburg, 16 How. (U. S.) 571; Brobst *v.* Brock, 10 Wall. (U. S.) 527; Elmendorf *v.* Taylor, 10 Wheat. (U. S.) 152; Fox *v.* Blossom, 17 Blatchf. (U. S.) 352; Amory *v.* Lawrence, 3 Cliff. (U. S.) 523; Barron *v.* Martin, 19 Ves. 327; Blake *v.* Foster, 2 Ball. & B. 402; Maury *v.* Mason, 8 Port. (Ala.) 211; Gunn *v.* Brantley, 21 Ala. 644; Coyle *v.* Wilkins, 57 Ala. 108; Byrd *v.* McDaniel, 33 Ala. 18; Guthrie *v.* Field, 21 Ark. 379; Grattan *v.* Wiggins, 23 Cal. 16; Arrington *v.* Liscom, 34 Cal. 366; 94 Am. Dec. 722; Taylor *v.* McClain, 60 Cal. 651; Bunce *v.* Wolcott, 2 Conn. 27; Jarvis *v.* Woodruff, 22 Conn. 548; Morgan *v.* Morgan, 10 Ga. 297; Davidson *v.* Lawrence, 49 Ga. 335; Hallesy *v.* Jackson, 66 Ill. 139; Locke *v.* Caldwell, 91 Ill. 419; Crawford *v.* Taylor, 42 Iowa 260; Lindsey *v.* Delano, 78 Iowa 350; Blethen *v.* Dwinal, 35 Me. 556; Roberst *v.* Littlefield, 48 Me. 61; Randall *v.* Bradley, 65 Me. 43; McPherson *v.* Hayward, 81 Me. 329; Hertle *v.* McDonald, 2 Md. Ch. 128; 3 Md. 366; Crook *v.* Glenn, 30 Md. 70; Ayers *v.* Waite, 10 Cush. (Mass.) 72; Stevens *v.* Dedham Institution etc., 129 Mass. 547; Cook *v.* Finkler, 9 Mich. 131; Reynolds *v.* Green, 10 Mich. 355; Hoffman *v.* Harrington, 33 Mich. 392; McNair *v.* Lot, 34 Mo. 285; 84 Am. Dec. 78; Tripe *v.* Marcy, 39 N. H. 439; Chapin *v.* Wright, 41 N. J. Eq. 438; Moore *v.* Cable, 1 Johns. Ch. (N. Y.) 385; Demarest *v.* Wynkoop, 3 Johns. Ch. (N. Y.) 129; 8 Am. Dec. 467; Miner *v.* Beekman, 50 N. Y. 337; Bailey *v.* Carter, 7 Ired. Eq. (N. Car.) 282; Yarborough *v.* Newell, 10 Yerg. (Tenn.) 376; Knowlton *v.* Walker, 13 Wis. 264; Ross *v.* Norvell, 1 Wash. (Va.) 14; 1 Am. Dec. 422.

In an anonymous case, 3 Atk. 313, Lord Hardwicke said: "The rule in relation to redemptions, which has been established in this court for some time, and which is analogous to the Statute of Limitations, is a very right and proper rule; after twenty years' possession of the mortgagee he should not be disturbed, otherwise it would make property very precarious, and a mortgagee would be no more than a bailiff to the mortgagor, and subject to an account which would be a great hardship."

In Dexter *v.* Arnold, 1 Sumn. (U. S.) 117, the court by Story, J., said: "Generally speaking, no lapse of time will bar the right to redeem, so long as the mortgage has been treated between the parties as a subsisting mortgage, and security only. But if the mortgagee has been in possession of the premises for twenty years, taking the profits without any account or act done, by which he admits himself to hold it as a qualified estate, the equity of redemption will be presumed to be extinguished, or abandoned by the mortgagor; and a bill to redeem will not be entertained by a court of equity. This, as a general principle, is not denied; and is too clearly established by the authorities to admit of doubt."

2. 3 & 4 Will. IV ch. 27, § 28. See Jones on Mort. (4th ed.), § 1145, note.

The plaintiff in a bill to redeem may be debarred from his right to redeem by improper delay in prosecuting his suit after it is commenced. Bancroft *v.* Sawin, 143 Mass. 144. In this case the bill was filed a few days before the expiration of the time limited, and no subpœna was taken out. It was held not to be error to dismiss the bill two years afterwards, on the defendant's motion.

3. See *infra*, this title, *Statutory Provisions.*

4. When Statute Begins to Run.—In Knowlton *v.* Walker, 13 Wis. 275, the court by Dixon, Ch. J., said: "There is no doubt in our minds that in such case the statutory period dates only from the time the mortgagee takes actual, open and notorious possession

The usual exceptions or disabilities are recognized in r
tion as in other suits where the statutory exceptions are inv
The mortgagee's acknowledgment of the right to redeem w
vent the running of the statute.[2] The acknowledgment
in writing in any form; as, by rendering an account,[3] by

of the premises. This is too well settled to admit of discussion."

See also Waldo *v.* Rice, 14 Wis. 286; Montgomery *v.* Chadwick, 7 Iowa 113; Warder *v.* Enslen, 73 Cal. 291; Frink *v.* LeRoy, 49 Cal. 314; Hubbell *v.* Sibley, 50 N. Y. 468; Anding *v.* Davis, 38 Miss. 574; 77 Am. Dec. 658; Kohlheim *v.* Harrison, 34 Miss. 457; Miner *v.* Beekman, 14 Abb. Pr., N. S. (N. Y.) 1; Green *v.* Turner, 38 Iowa 118; Crawford *v.* Taylor, 42 Iowa 260; Bailey *v.* Carter, 7 Ired. Eq. (N. Car.) 282; Babcock *v.* Wyman, 19 How. (U. S.) 289; Bird *v.* Keller, 77 Me. 270.

After Foreclosure.—When time is given after sale within which to redeem, the relation of mortgagor and mortgagee is held not to terminate, nor the statute to begin to run until the expiration of the time for redemption. Rockwell *v.* Servant, 63 Ill. 429.

1. Infancy and Coverture.—The usual time after the disability, in case of infancy or coverture, has been removed will be allowed in actions to redeem. Genner *v.* Tracey, 3 P. Wms. 389, n.; Proctor *v.* Cowper, 2 Vern. 377; Belch *v.* Harvey, 3 P. Wms. 287, n.; Beckford *v.* Wade, 17 Ves. 99; Hall *v.* Caldwell, 7 Can. L. J. 42; Demarest *v.* Wynkoop, 3 Johns. Ch. (N. Y.) 129; 8 Am. Dec. 467; Hertle *v.* McDonald, 2 Md. Ch. 128; Snavely *v.* Pickle, 29 Gratt. (Va.) 39; Auding *v.* Davis, 38 Miss. 574; 77 Am. Dec. 658; Hanford *v.* Fitch, 41 Conn. 486; Wells *v.* Morse, 11 Vt. 9; Fitzhugh *v.* Anderson, 2 Hen. & M. (Va.) 289; 3 Am. Dec. 625; Parsons *v.* McCracken, 9 Leigh (Va.) 495; Eager *v.* Com., 4 Mass. 182; Barr *v.* Vanalstine, 120 Ind. 590.

Absence From the State.—As to nonresidence or absence from the State, see Clinton Co. *v.* Cox, 37 Iowa 570; Phillips *v.* Sinclair, 20 Me. 269; Waterson *v.* Kirkwood, 17 Kan. 9; Whalley *v.* Eldridge, 24 Minn. 358; Parsons *v.* Noggle, 23 Minn. 328.

War.—The operation of the statute has been held to be suspended by war, and the right to redeem not barred by foreclosure during war. Dean *v.* Nelson, 10 Wall. (U. S.) 158; Hall *v.* Denckla, 38 Ark. 506; Rey
Baker, 6 Coldw. (Tenn.) 221.

Fraud.—As to effect of fraud
pending the operation of the
see Guinn *v.* Locke, 1 Head
110; Reynolds *v.* Baker, 6
(Tenn.) 221; Hunt *v.* Ell
Ala. 173; George *v.*
49 Ga. 441; Depew *v.* De
N. Y. 657; Acker *v.* Acker, 8
143; Kinsman *v.* Rouse, L. R.
Div. 104; Marks *v.* Pell, 1 Jo
(N. Y.) 594.

2. In Robinson *v.* Fife, 3
562, it was said: "Any delib
done, or acknowledgment by
gagee or mortgagor while in p
of the premises, evincing the
of the mortgage, will save t
of the mortgagee, on the one
foreclose, and of the mortgag
other, to redeem."

If the mortgagee does an
qualifiedly recognizing the mo
right of redemption, the sta
only from the time of that act.
v. Rice, 14 Wis. 290; Slicer *v*
Pittsburgh, 16 How. (U. S.) 5
ter *v.* Arnold, 1 Sumn. (U. S.)

3. Rendering Account.—Th
ment of an account of the am
on the mortgage debt within
years after entry destroys the
tion of title. Edsdell *v.* Buc
Ves. J. 84; Barron *v.* Martin,
327; Anonymous, 2 Atk. 333;
v. Jackson, 5 Bro. P. C. 194.

4. Letters.—In 1823 a
brought by the customary hei
redemption of copy-holds m
by his ancestors, the mortgage
entered into possession in 17
defense principally relied on
the redemption was barred by
time. To rebut this the plai
in evidence letters containing a
of the existence of the mortg
accounts treating the premi
mortgage. *Held*, that the pla
entitled to redeem. Cutler *v.*
1 L. J. Ch. 108. See Vernon *v*
2 Eden 110; Trulock *v.* Robey
402; Stanfield *v.* Hobson, 10 B
Thompson *v.* Bowyer, 9 Ju
863.

by recital in a deed,[1] will,[2] or mortgage,[3] or by any written contract or promise.[4] So the acts of the mortgagee may constitute an acknowledgment. If he makes an assignment of the mortgage,[5] or begins proceedings to enforce the lien or debt,[6] he thereby recognizes the mortgage as a subsisting lien.

The burden of proof lies with the mortgagor to show that possession for the statutory period is not a bar. The presumption is that the right of redemption is gone after the mortgagee's possession has continued for that length of time; and the *onus* is on the mortgagor to defeat the presumption.[7]

7. Statutory Provisions.—The statutes of the States all make provisions, in some form, as to the existence and exercise of the right

1. Recital in Deed.—Hansard *v.* Hardy, 18 Ves. 455; Carew *v.* Johnston, 2 Sch. & Lef. 280; Jayne *v.* Hughes, 10 Exch. 430; Lucas *v.* Dennison, 7 Jur. 1122; Cape Girardeau Co. *v.* Harbison, 58 Mo. 90. See also Biddel *v.* Brizzolara, 56 Cal. 374; 64 Cal. 354.

2. Devise by Will.—A recital in a will by which the testator directs a certain disposition of the money in case of redemption, is an acknowledgment of the right to redeem. Lake *v.* Thomas, 3 Ves. 17; Ord *v.* Smith, 2 Eq. Cas. Abr. 600.

But if the mortgagee, in possession of the mortgaged property, devises the same as his estate, it is an assertion of title adverse to the claim of mortgagor to redeem. Kohlheim *v.* Harrison, 34 Miss. 457.

3. Mortgage.—A recital in a mortgage that it is made subject to a prior one executed by the mortgagor, and existing on the same premises, is sufficient as an acknowledgment of indebtedness on the prior mortgage to take it out of the Statute of Limitations, both as to mortgagor and a subsequent grantee of the premises from him. Parlmer *v.* Butler, 36 Iowa 576.

4. Verbal Admissions.—See on this point generally, Mosely *v.* Crocket, 9 Rich. Eq. (S. Car.) 339; Kermdt *v.* Porterfield, 56 Iowa 412; Schmucker *v.* Sibert, 18 Kan. 104; Southard *v.* Pope, 9 B. Mon. (Ky.) 261; Snavely *v.* Pickle, 29 Gratt. (Va.) 27; Lyon *v.* McDonald, 51 Mich. 455; Murphy *v.* Coates, 33 N. J. Eq. 424; Hall *v.* Felton, 105 Mass. 516; Haywood *v.* Ensey, 8 Humph. (Tenn.) 460; Wells *v.* Harter, 56 Cal. 342.

Verbal Admissions.—It has been held that verbal admissions may be sufficient as a bar if sufficiently clear and unequivocal.

But it has been questioned whether parol admissions by the mortgagee will estop him. See Reeks *v.* Postlethwaite, Coop. Eq. 161; Marks *v.* Pell, 1 Johns. Ch. (N. Y.) 594; Dexter *v.* Arnold, 3 Sumn. (U. S.) 160; Shepperd *v.* Murdock, 3 Murph. (N. Car.) 218; Fenwick *v.* Macey, 1 Dana (Ky.) 276; Walthol *v.* Johnson, 2 Call (Va.) 275; Hough *v.* Bailey, 32 Conn. 288; Perry *v.* Marston, 2 Bro. (C. C.) 397; Whiting *v.* White, Coop. Eq. 1; Rayner *v.* Oastler, 6 Madd. 274.

5. Assignment.—An assignment of a mortgage as security for a debt by a mortgagee in possession, is evidence that the mortgage is redeemable. Borst *v.* Boyd, 3 Sandf. Ch. (N. Y.) 501.

6. Bill to Foreclose.—If the mortgagee commence proceedings to foreclose, he thereby recognizes the mortgage as a subsisting lien, and the mortgagor may, thereafter, within the statutory period, file a bill for redemption. "It would be wholly inconsistent for the mortgagee to claim that there is no right of redemption after he has undertaken such proceedings to bar such a right." Jones on Mort., § 1170. See also Robinson *v.* Fife, 3 Ohio St. 551; Calkins *v.* Calkins, 3 Barb. (N. Y.) 305; Conway *v.* Shrimpton, 5 Bro. P. C. 187.

An answer to a suit in equity may have the same effect. Hodle *v.* Healey, 6 Madd. 181; Goode *v.* Job, 1 El. & El. 6; Dexter *v.* Arnold, 1 Sumn. (U. S.) 109; 3 Sumn. (U. S.) 152; Stump *v.* Henry, 6 Md. 207; 61 Am. Dec. 300; Erskine *v.* North, 14 Gratt. (Va.) 60.

7. Barrow *v.* Martin, 19 Ves. 326; Robinson *v.* Fife, 3 Ohio St. 551; Reynolds *v.* Green, 10 Mich. 355.

of redemption, corresponding in some respects, and differing in others.[1]

1. *Alabama*—Code 1876, §§ 2877 *et seq.* Redemption may be made within two years after foreclosure sale. The debtor must refund the purchase money with interest at ten per cent. per annum, and all lawful charges. Payment must be made also for permanent improvements made on the premises after sale. And see Walden *v.* Speigner, 87 Ala. 390; Nelma *v.* Kennon, 88 Ala. 329; Pryor *v.* Hollinger, 88 Ala. 405.

Arkansas—Mansfield's Dig. 1884, §§ 4759–4763. Foreclosure proceedings may be stopped at any time before decree, on payment of the amount due, with interest and costs, or within one year after the sale, on payment of the price paid at the sale and interest at ten per cent. The right to redeem after sale may be waived by the mortgagor by a special clause in the mortgage. See Wood *v.* Holland, 53 Ark. 69.

California—Code Civ. Proc. 1885, §§ 346, 347. Action to redeem may be brought unless there has been a continuous and adverse possession for five years after breach of some condition of the mortgage. If there are more than one claiming the right, some of whom are not entitled to maintain the action, any one who is entitled may redeem a divided or undivided part of the premises, according to his interest, by paying his proportionate share. See Frink *v.* LeRoy, 49 Cal. 315; Hall *v.* Arnott, 80 Cal. 348; Warder *v.* Enslen, 73 Cal. 291.

Connecticut—Genl. Stat. 1875, p. 358. Foreclosure proceedings may be stopped any time before decree if the amount due, with interest and costs, be brought into court. The court may limit the time within which redemption may be made after sale; and if not made within the time so limited, the title becomes absolute in the mortgagee.

Dakota—Comp. Laws 1887, §§ 4338, 5150–5159, 5421. Every person having an interest in property subject to a lien, has a right to redeem it from the lien, at any time after the claim is due, and before his right is foreclosed. After sale on mortgage foreclosure, the parties so entitled may redeem within one year from the day of sale, in the same manner as from execution sale, by paying the purchaser the amount of the purchase money and other assessments, etc., and interest at twelve per cent. Another may likewise redeem within sixty days after the last redemption; and successive redemptions may be made within intervals of sixty days.

Delaware—Rev. Code 1874, p. 687. Foreclosure is by *scire facias.* Judgment of *levari facias* is entered, and the premises are sold on execution. After confirmation of such sale, title becomes absolute in the purchaser thereat and no redemption can be had.

Florida—Bush's Dig. Stat., p. 330. Foreclosure is made usually by petition in courts of common law, praying that mortgagor and all persons under him be barred of all equity of redemption. This being granted and execution issued, there is no redemption.

Georgia—Code 1882, §§ 1964, 3962–3968. If possession is given the mortgagee, the mortgagor may redeem at any time within ten years from the last recognition of the right of redemption by the mortgagee.

Statutes provide a mode of foreclosure at law which is usually an adequate remedy. Judgment is entered for the amount due, and the property is ordered to be sold in the manner of a sale on execution; from this there is no redemption.

Idaho—Rev. Stat. 1887, §§ 4491–4499. Code Civ. Proc., § 166, an action to redeem may be maintained, unless adverse possession of the premises shall have been held continuously for five years.

Redemption from purchaser may be had within six months after sale, on paying the amount of the purchase money, with twelve per cent., together with the amount of any assessment or taxes which the purchaser may have paid after the purchase. Successive redemptions may be made within sixty days after the preceding redemption, but not later than six months after sale, by paying the last redemptioner's amount and expenses, and four per cent. in addition.

Illinois—Starr & Curtis' Ann. Stat., ch. 77, §§ 18–26. Redemption may be made at any time within twelve months after sale by paying the amount bid with interest at eight per cent. After twelve months, and within

fifteen, judgment creditors may redeem. Purchasers of the equity of redemption have twelve months. Successive redemptions may be made within sixty days from the last redemption. See Dunn *v.* Rodgers, 43 Ill. 260; Farrell *v.* Parlier, 50 Ill. 274; Seligman *v.* Laubheimer, 58 Ill. 124; Bozarth *v.* Largent, 128 Ill. 95; Lynch *v.* Jackson, 28 Ill. App. 160.

Indiana—Rev. Stat. 1881, §§ 294. Redemption may be had by any one having an interest in the property within one year from the date of sale, by paying to the purchaser, or to the clerk of the court from which the order of sale was issued, for the use of the purchaser, the amount of the purchase money with interest at eight per cent. See Davis *v.* Langsdale, 41 Ind. 399; Vaughan *v.* Dowden, 126 Ind. 406; Paxton *v.* Sterne (Ind. 1891), 26 N. E. Rep. 557.

The statutory period of fifteen years applies to actions to redeem. Bar *v.* Vanalstine, 120 Ind. 590.

Iowa—McClain's Ann. Code 1888, §§ 4330–4353. The owner of the equity may redeem within one year from the day of sale, and is entitled to possession until then. Creditors may redeem after six months and before nine months have expired, during which time creditors may also redeem from each other. The amount of the debt, costs, and interest at ten per cent. must be paid. At the end of the year the sheriff makes a deed to the person entitled to it. The general provisions as to redemptions from execution sales apply to foreclosure sales. See Davis *v.* Spaulding, 36 Iowa 610; Barrett *v.* Blackmar, 47 Iowa 565; Stoddard *v.* Forbes, 13 Iowa 296; Johnson *v.* Harmon, 19 Iowa 56; Todd *v.* Davey, 60 Iowa 532; Hurn *v.* Hill, 70 Iowa 36; Harms *v.* Parmer, 73 Iowa 446; Lamb *v.* Feely, 71 Iowa 742; Newell *v.* Pennick, 62 Iowa 123; Lamb *v.* West, 75 Iowa 399; Lindsey *v.* Delano, 78 Iowa 350; Clayton *v.* Ellis, 50 Iowa 590; Dobbins *v.* Leesch, 53 Iowa 304; Sieben *v.* Beeker, 53 Iowa 24; Kilbride *v.* Munn, 55 Iowa 445; Rush *v.* Mitchell, 71 Iowa 333; Tharp *v.* Forrest, 76 Iowa 195; Burham *v.* Fritz, 4 McCrary (U. S.) 410.

Kansas—Gen. Stat. 1889, §§ 4495, 5468 and 7280. The general provisions as to redemption from execution sales apply. Foreclosure is by suit for the debt, whether the plaintiff asks to have the mortgaged property applied in payment or not. Judgment is a personal judgment, and no sale can be made except in pursuance of such judgment. After sale there can be no redemption. See Kirby *v.* Childs, 10 Kan. 479; Mills *v.* Ralston, 10 Kan. 160.

Kentucky—Gen. Stat. 1873, ch. 71, §§ 4, 16; Code 1867, § 403. An action to redeem a mortgage of real estate, with or without an account of rents and profits, may be maintained by the mortgagor or those claiming under him, unless the mortgagee has held adverse possession of the mortgaged premises for fifteen years. No interlocutory judgment is now necessary, and final judgment may be given in the first instance. No redemption is allowed after sale. See Chambers *v.* Keene, 1 Metc. (Ky.) 289.

Louisiana—After sale there can be no redemption. See Watson *v.* Bondurant, 21 Wall. (U. S.) 123; Walker *v.* Villavaso, 26 La. Ann. 42; Quertier *v.* Hille, 18 La. Ann. 65; Gentis *v.* Blasco, 15 La. Ann. 104; Taylor *v.* Pearce, 15 La. Ann. 564.

Maine—Rev. Stat. 1883, ch. 90, §§ 6–31. Redemption may be made within three years after commencement of foreclosure proceedings. If the mortgagee refuses a tender, suit may be brought within one year after tender. If the mortgage is fraudulent, in whole or in part, an innocent assignee of the mortgagor may bring suit without tender.

Maryland—Rev. Code 1878, art. 66, §§ 50, *et seq.* After sale the right of redemption is gone. Dorsey *v.* Dorsey, 30 Md. 522; 96 Am. Dec. 633.

Massachusetts—Pub. Stat. 1882, ch. 181, §§ 21–37. Redemption may be had at any time within three years after possession has been taken for the purpose of foreclosure. The party entitled to redeem may, at any time within the three years, and either before or after breach of condition, bring a suit for redemption without previous tender, and may therein offer to perform the conditions of the mortgage. If tender be made of the whole sum due on the mortgage within the three years limited for redemption, and it be not accepted, suit may be brought at any time within one year after tender. If the tender was insufficient, redemption, nevertheless, may be had within the three years. See Ayers *v.* Waite, 10 Cush. (Mass.) 72; Van Vronker *v.* Eastman, 7 Met. (Mass.) 157; Fuller

v. Russell, 6 Gray (Mass.) 128; Anthony *v.* Pierce, 108 Mass. 254; Brown *v.* South Boston Sav. Bank, 148 Mass. 300; Barnes *v.* Boardman, 152 Mass. 391.

Michigan—How. Ann. Stat. 1882, §§ 6701, 8507. When the foreclosure sale is effected by advertisement, redemption can be made at any time within one year after the sale by paying the amount paid at the sale, and interest as stipulated in the mortgage, not exceeding ten per cent. Culver *v.* McKeown, 43 Mich. 324; Detroit F. & M. Ins. Co. *v.* Renz, 33 Mich. 298; Canfield *v.* Shear, 49 Mich. 313; Burt *v.* Thomas, 49 Mich. 462; Lilly *v.* Gibbs, 39 Mich. 394; Gantz *v.* Toles, 40 Mich. 725; Reading *v.* Waterman, 46 Mich. 107; Bacon *v.* Northwestern Mut. L. Ins. Co., 131 U. S. 258.

Minnesota—Gen. Stat. 1878, ch. 81, §§ 13, 34. Redemption may be had within twelve months after sale by paying all sums due and costs and performing any other conditions in the mortgage. It may be made in the same way before entry for breach of condition. If the mortgagor or his privies do not redeem, a senior creditor may do so on the same terms within five days after the expiration of the year, and successive redemptions may be made within intervals of five days, provided notice of each intention is filed within the year. Laws of 1883, ch. 112, § 1. See Wilson *v.* Hayes, 40 Minn. 531; Cuilerier *v.* Brunelle, 37 Minn. 71; Lowry *v.* Mayo, 41 Minn. 388; Buchanan *v.* Reid, 43 Minn. 172. See also Stat. 1878, ch. 66, §§ 323-325. And see Abraham *v.* Holloway, 41 Minn. 156; Tice *v.* Russell, 43 Minn. 66.

Mississippi—Rev. Code 1871, § 974; Code, 1880, § 2666. If possession is given to the mortgagee, the mortgagor may redeem within two years from the time of the last recognition of the right of redemption by the mortgagee. After a foreclosure sale no redemption can be had.

Missouri—Rev. Stat. 1889, §§ 7091, 7097. Foreclosure proceedings may be stopped at any time before sale to allow redemption, but after sale, no redemption can be had. See Perrine *v.* Poulson, 53 Mo. 309; McGlothlin *v.* Hemery, 44 Mo. 350; Dawson *v.* Egger, 97 Mo. 36; Mullanphy *v.* Simpson, 4 Mo. 319; Updike *v.* Merchants' Elevator Co., 96 Mo. 160.

Montana—Comp. Stat. 1887, § 342. After sale the judgment debtor or a lien creditor may redeem within six months, on paying the amount of the purchase and two per cent. a month thereon, and all assessments, taxes, etc., together with any prior liens paid, and interest thereon. Successive redemptions may be made within intervals of sixty days.

Nebraska—Comp. Stat. 1889, p. 920. Owners of real estate, against which a decree has been rendered, may redeem before the sale is confirmed by the court, by paying the amount of the decree and interest and costs. See Swearinger *v.* Roberts, 12 Neb. 333.

Nevada—Gen'l Stat. 1885, §§ 3253-3261. Redemption may be had within six months after sale, on paying the amount of the bid, with eighteen per cent. in addition, assessments, taxes, etc., and interest thereon. Successive redemptions may be made within sixty days after the last redemption. See Zabriskie *v.* Meade, 2 Nev. 285; 90 Am. Dec. 542.

New Hampshire—Gen. Laws 1878, ch. 136, § 14. Redemption may be made within one year from the time of entry or within one year from the date specified in the notice, if the foreclosure is by advertisement.

New Jersey—Rev. Stat. 1877, "Chancery," § 78. Proceedings may be stopped to allow redemption at any time up to sale, but no redemption is allowed thereafter.

New York—Civ. Code Proc., § 379; Throop's Ann. Code Civ. Proc. 1885, §§ 1631, 1632. An action to redeem may be brought, after breach of condition, unless adverse possession shall have been held for twenty years after such breach of condition. See Throop's Ann. Civ. Code of Proc., p. 153, n.; also Moore *v.* Cable, 1 Johns. Ch. (N. Y.) 385; Slee *v.* Manhattan Co., 1 Paige (N. Y.) 48; Fogal *v.* Pirro, 17 Abb. Pr. (N. Y.) 113; Peabody *v.* Roberts, 47 Barb. (N. Y.) 91; Hubbell *v.* Sibley, 50 N. Y. 468; Miner *v.* Beekman, 50 N. Y. 337.

After a conveyance under a decree of foreclosure no redemption can be had by any party to the action duly summoned, or person claiming under him. See Doctor *v.* Smith, 16 Hun (N. Y.) 245; Emigrant etc. Sav. Bank *v.* Goldman, 75 N. Y. 127; Bache *v.* Doscher, 67 N. Y. 429; Becker *v.* Howard, 66 N. Y. 5; Brown *v.* Frost, 10 Paige (N. Y.) 243; Perine *v.* Dunn, 4 Johns. Ch. (N. Y.) 140; Waller *v.* Harris, 7 Paige (N. Y.) 167.

North Carolina—Battle's Rev. 1873, pp. 203, 391; Code, 1883, § 152. An action to redeem may be brought at any time before adverse possession has been held for ten years. Foreclosure is action in the nature of a suit in equity, and after sale no redemption can be made. See Fleming *v.* Sitton, 1 Dev. & B. Eq. (N. Car.) 621; Simmons *v.* Ballard, 102 N. Car. 105; Mulholland *v.* York, 82 N. Car. 510.

Ohio—Rev. Stat. 1889, §§ 5316, 5393. When the mortgage is foreclosed, sale is ordered made and confirmed. At any time before confirmation redemption may be made by paying the amount of the decree, costs and interest at eight per cent. After confirmation no redemption can be made. Fostick *v.* Risk, 15 Ohio 84; McArthur *v.* Franklin, 16 Ohio St. 193; Holliger *v.* Bates, 43 Ohio St. 437.

Oregon—Hill's Ann. Laws, 1887, pp. 428, 366–373. Redemption from foreclosure sale is made in the same manner as from execution. If the estate is less than a leasehold of two years' unexpired term, no redemption can be made. In all other cases redemption may be made within sixty days after confirmation of sale by paying the amount, with interest at ten per cent., and any taxes paid thereon, etc. Two days' notice must be given of intention to redeem, and proof of right to redeem must be made. Successive redemptions may likewise be made within periods of sixty days.

Pennsylvania— Brightley's Purd. Dig. 1872, pp. 482, 930, § 14. Redemption may be made within five years after breach, or within such time as is stated in the instrument, or within five years from the time when the right shall have been acknowledged in writing to exist.

Foreclosure is usually by *scire facias;* when default is made the holder may, after the expiration of twelve months, sue for the writ commanding the defendant therein to show cause why the premises should not be sold, etc. After sale, duly made, there can be no redemption. See Kennedy *v.* Ross, 25 Pa. St. 256; Black *v.* Galway, 24 Pa. St. 18.

Rhode Island—Pub. Stat. 1882, ch. 176. Any person entitled to redeem mortgaged property may prefer a bill to redeem; but redemption must be made within three years after entry or possession under process of law. Redemption of mortgages of personal property must be made within sixty days after condition broken. See Tillinghast *v.* Fry, 1 R. I. 53; Daniels *v.* Mowry, 1 R. I. 151.

South Carolina—Rev. Stat. 1873, p. 597. Foreclosure is by suit in the nature of a proceeding in equity. The court may order a sale to satisfy the judgment obtained, but may give a reasonable extension of time before sale, not to exceed six months. After sale there can be no redemption.

Tennessee — Code, §§ 2124–2155; Comp. Stat. 1871, § 4489. After foreclosure by bill in chancery and sale under the decree, redemption can be made within two years, unless the court order a sale on a credit of not less than six months nor more than two years, and that upon confirmation by the court, no redemption shall be made.

Texas—Paschal's Dig. 1873, art. 4675–4676. Judgment is rendered in foreclosure suits and execution issued as in other cases. Before the sale foreclosure may be made, but not after. See Goss *v.* Pilgrim, 28 Tex. 267; Bishop *v.* Petty, 28 Tex. 321; Kinney *v.* McCleod, 9 Tex. 78; Smithwick *v.* Kelley, 79 Tex. 564.

Utah—Code Civ. Proc. 1884, ch. 55, §§ 203, 606. An action to redeem can be maintained by the mortgagor, or those claiming under him, unless adverse possession has been held for seven years. Redemption after foreclosure can only be made as in case of real estate sold on execution. See McCormick *v.* Greenhow, 2 Utah 363.

Vermont—Rev. Laws, 1880, § 1257. The court may by decree in some cases limit the time within which redemption can be made, not to exceed one year. See Miller *v.* Hamblet, 11 Vt. 499; Blodgett *v.* Hobart, 18 Vt. 414; Wright *v.* Whithead, 14 Vt. 268; Hodgman *v.* Hitchcock, 15 Vt. 374; Gates *v.* Adams, 24 Vt. 70.

Virginia—Code 1873, p. 1122. Deeds of trust are commonly used and foreclosure is under the general jurisdiction of courts of equity. Sale may be made under provisions relating to judicial sales, but no provision is made for redemption after sale.

Washington—Code 1881, §§ 26, 372–375.

The law is like that of *Montana.* The same provisions apply to redemption from both foreclosure and execution sales. See Scott *v.* Patterson, 1 Wash. 487; Parker *v.* Dacres, 130 U. S. 43.

II. Redemption from Execution or Judicial Sales—1. In General—How Right Created.—The right to redeem from execution sales is a statutory right.[1] No matter in whose behalf or for what purpose it is invoked. The statute creates the right, prescribes the time and method of its exercise, and designates the persons entitled to exercise it. The statute, therefore, must be complied with strictly; a partial compliance will be of no effect.[2]

West Virginia—Kelly's Rev. Stat. 1878. The law is like that of *Virginia*.

Wisconsin — Sanborn & Berryman Anno. Stat. 1889, pp. 1797, 1929. When foreclosure is by action, sale is made as in case of an execution, but cannot be made until one year after judgment or order of sale; redemption may be made at any time before actual sale by paying into court the amount of the judgment, costs and interest at ten per cent. from the time of judgment. If the sale is under a power of sale the mortgagor retains possession until the purchaser's title becomes absolute. See Wylie *v.* Welch, 51 Wis. 351; Cord *v.* Hirsch, 17 Wis. 403; Hayes *v.* Frey, 64 Wis. 503.

1. Freeman on Executions, (2d ed.) § 314; Herman on Executions, § 263; Rorer on Judicial Sales (2d ed.), § 1148. See also Judicial Sales, vol. 12, p, 239; Tuolumne Redemption Co. *v.* Sedgwick, 15 Cal. 516.

2. Haskell *v.* Manlove, 14 Cal. 54; Wilcoxson *v.* Miller, 49 Cal. 193; Chiles *v.* Davis, 58 Ill. 411; Horton *v.* Moffitt, 14 Minn. 289; 100 Am. Dec. 222; Davis *v.* Seymour, 16 Minn. 210; Parke *v.* Hush, 29 Minn. 434; People *v.* Fleming, 2 N. Y. 484; Gilchrist *v.* Comfort, 34 N. Y. 235; Morss *v.* Purvis, 68 N. Y. 225; People *v.* Lynch, 68 N. Y. 473; Silliman *v.* Wing, 7 Hill (N. Y.) 159; People *v.* Covell, 18 Wend. (N. Y.) 598; People *v.* Sheriff etc., 19 Wend. (N. Y.) 87; Waller *v.* Harris, 20 Wend. (N. Y.) 555; 32 Am. Dec. 590; *Ex parte* Bank of Monroe, 7 Hill (N. Y.) 177; Lowry *v.* McGhee, 8 Yerg. (Tenn.) 242; Hill *v.* Walker, 6 Coldw. (Tenn.) 424; 98 Am. Dec. 465; Rothwell *v.* Gettys, 11 Humph. (Tenn.) 135; Porter *v.* Pierce, 120 N. Y. 221.

In Spoor *v.* Phillips, 27 Ala. 193, the court, by Rice, J., said: "The right to redeem is not perfect, and cannot be enforced in a court of chancery, until there is either a performance (by the person desiring to redeem) of all that the statute requires of him, or a valid and sufficient excuse for non-performance. And a bill which does not allege either such a performance, or such excuse for non-performance and couple such excuse with an offer in the bill to perform all that the statute requires, contains no equity."

Cases Interpreting Local Statutes.—The following cases may be referred to as bearing upon the interpretation of the statutes of the States in which the cases arose:

Alabama—Jonsen *v.* Nabring, 50 Ala. 392; Posey *v.* Pressley, 60 Ala. 243; Mobile Mut. Ins. Co. *v.* Steele, 61 Ala. 253; Richardson *v.* Dunn, 79 Ala. 167; Mack *v.* Owen, 83 Ala. 177; Aycock *v.* Adler, 87 Ala. 190.

Arkansas—Turner *v.* Watkins, 31 Ark. 429 (*overruling* Oliver *v.* McClure, 28 Ark. 555); Hare *v.* Hall, 41 Ark. 372; Fuller *v.* Evatt, 42 Ark. 230.

California—Harlan *v.* Smith, 6 Cal. 174; Simpson *v.* Castle, 52 Cal. 644; Perham *v.* Kuper, 61 Cal. 331; McMillan *v.* Richards, 9 Cal. 365; 70 Am. Dec. 655. See also Pownall *v.* Hall, 45 Cal. 189; Maina *v.* Elliott, 51 Cal. 8; Wilkins *v.* Willson, 51 Cal. 212; Eldridge *v.* Wright, 55 Cal. 531; Campbell *v.* Oaks, 68 Cal. 222.

Illinois—Karnes *v.* Lloyd, 52 Ill. 113; Tenney *v.* Hemenway, 53 Ill. 97; Chiles *v.* Davis, 58 Ill. 411; Osgood *v.* Blackmore, 59 Ill. 261; Martin *v.* Judd, 60 Ill. 78; Lucas *v.* Nichols, 66 Ill. 41; Durley *v.* Davis, 69 Ill. 133; Roan *v.* Rohrer, 72 Ill. 582; Moore *v.* Hopkins, 93 Ill. 505; Locey Coal Mines *v.* Chicago etc. Coal Co., 131 Ill. 9; Campbell *v.* Leonard, 132 Ill. 232; Cohen *v.* Menard, 31 Ill. App. 503.

Indiana—Gattling *v.* Dunn, 52 Ind. 498; Coombs *v.* Carr, 55 Ind. 303; Goddard *v.* Renner, 57 Ind. 532; Cauthorn *v.* Indianapolis etc. R. Co., 58 Ind. 14; Groves *v.* Barber, 98 Ind. 309; Ringle *v.* First Nat. Bank, 107 Ind. 425; Adams *v.* Glidden, 111 Ind. 528; Hervey *v.* Krost, 116 Ind. 268; Edwards *v.* Wray, 11 Biss. (U. S.) 251; Porter *v.* Pittsburgh Bessemer Steel Co., 122 U. S. 267.

The law in force at the time of the sale will, as a general rule, determine the right of redemption.[1]

2. Who May Exercise the Right—*a.* IN GENERAL.—The statutes usually agree in conferring the right of redemption upon three classes of persons, viz.: execution debtors and their successors in interest, judgment lien creditors, and mortgage lien creditors.[2]

b. THE EXECUTION DEBTOR.—The right of the execution debtor to redeem is universally recognized.[3] It is a personal right

Kentucky—Crittenden *v.* Beck (Ky. 1889), 10 S. W. Rep. 806; Thomas *v.* Thomas, 87 Ky. 343; Bethel *v.* Smith, 83 Ky. 84; Ferguson *v.* Smith, 7 Bush (Ky.) 76.

Michigan—Whiting *v.* Butler, 29 Mich. 122; Campan *v.* Godfrey, 18 Mich. 27; Cameron *v.* Adams, 31 Mich. 426; People *v.* Fralick, 12 Mich. 234.

New York—Van Rensselaer *v.* Witbeck, 2 Lans. (N. Y.) 498; Livingston *v.* Pettigrew, 7 Lans. (N. Y.) 405; People *v.* Clark, 37 Hun (N. Y.) 201; Elsworth *v.* Muldoon, 15 Abb. Pr., N. S. (N. Y.) 440; Livingston *v.* Arnoux, 56 N. Y. 507; Morss *v.* Purviss, 68 N. Y. 225; Porter *v.* Pierce, 120 N. Y. 217; Benton *v.* Hatch, 122 N. Y. 329; Porter *v.* Pierce, 43 Hun (N. Y.) 11.

Tennessee—McBee *v.* McBee, 1 Heisk. (Tenn.) 558; Mabry *v.* Churchwell, 6 Heisk. (Tenn.) 417; Reynolds *v.* Baker, 6 Coldw. (Tenn.) 221; Cooper *v.* Murfreesboro Sav. Bank, 5 Baxt. (Tenn.) 636; Griffin *v.* Haines, 6 Baxt. (Tenn.) 409; Rambo *v.* Donelly, 9 Baxt. (Tenn.) 418; Alexander *v.* Bailey, 2 Lea (Tenn.) 636; Lincoln Sav. Bank *v.* Ridgway, 3 Lea (Tenn.) 623; Lock *v.* Edmundson, 10 Heisk. (Tenn.) 282.

1. Law in Force at Time of Sale Governs.—Debtors are not deemed to have a vested right to have their property sold under the redemption law in force at the time the debt was created. Changes in the law may be made, and such changes will, in most States, operate upon antecedent debts or judgments. Moore *v.* Martin, 38 Cal. 428; Tuolumne Redemption Co. *v.* Sedgwick, 15 Cal. 516; Oullahan *v.* Sweeney, 79 Cal. 537; Moar *v.* Seaton, 31 Ind. 11; Edwards *v.* Johnson, 105 Ind. 594; Davis *v.* Rupe, 114 Ind. 588; Butler *v.* Palmer, 1 Hill (N. Y.) 324; Allen *v.* Parish, 3 Ohio 187; Chadwick *v.* Moore, 8 W. & S. (Pa.) 49; 42 Am. Dec. 267; Gault's Appeal, 33 Pa. St. 94; Garland *v.* Brown, 23 Gratt. (Va.) 173.

But, while the general rule is as above stated, it would seem, on principle and from analogy, that a statute shortening the period of redemption would apply to a redemption from a sale made before the enactment of the statute, provided that a reasonable time remained in the particular case wherein the application of the statute was questioned. This is Mr. Freeman's view. Freeman on Executions (2d ed.), § 315. See also Butler *v.* Palmer, 1 Hill (N. Y.) 324; Smith *v.* Packard, 12 Wis. 371; Reynolds *v.* Baker, 6 Coldw. (Tenn.) 221. *Contra*, Cargill *v.* Power, 1 Mich. 369.

It would, however, seem to be equally certain that the person from whom redemption is sought has a vested right to be secured in his title at the expiration of the time fixed by the statute in force when the sale was made, and that a subsequent statute lengthening the time for redemption would be inoperative as to him. Freeman on Executions (2d ed.), § 315; Goenen *v.* Schroeder, 8 Minn. 387; Dikeman *v.* Dikeman, 11 Paige (N. Y.) 484; Robinson *v.* Howe, 13 Wis. 341; Reynolds *v.* Baker, 6 Coldw. (Tenn.) 221; Henderson *v.* Felker, 1 Heisk. (Tenn.) 271.

2. Freeman on Executions (2d ed.) § 317; Herman on Executions 422; Rorer on Judicial Sales (2d ed.), § 264.

3. Redemption by Execution Debtor.—Gardner *v.* Sanford, 86 Ala. 508; Searcey *v.* Oates, 68 Ala. 111; Allen *v.* McGaughney, 31 Ark. 252; Vandyke *v.* Herman, 3 Cal. 295; Kelsey *v.* Abbott, 13 Cal. 609; Sharp *v.* Miller, 47 Cal. 82; Yoakum *v.* Bower, 51 Cal. 539; Merry *v.* Bostwick, 13 Ill. 398; 54 Am. Dec. 434; Trotter *v.* Smith, 59 Ill. 240; Pearson *v.* Pearson, 131 Ill. 464; Spath *v.* Hankins, 55 Ind. 155; Thomas *v.* Noel, 81 Ind. 382; Tarkington *v.* Corley, 59 Iowa 28; Howland *v.* Knox, 59 Iowa 46; Harrison *v.* Wilmering,

and does not depend upon the condition of the title to the land either at the time of redeeming or at the time of making the execution sale. The right follows the person, and he may redeem though he may have sold the land. His rights are concurrent with those of his grantee.[1]

c. THE DEBTOR'S ASSIGNEE OR GRANTEE.—The debtor's assignee, grantee, or successor in interest may redeem.[2]

d. JUDGMENT CREDITORS.—A creditor who has reduced his claim to judgment is recognized by the statutes as having the right to redeem, provided that the judgment constitutes a lien on the land from the execution sale of which redemption is sought.[3] The assignee of a judgment creditor has the same right

72 Iowa 727; Harvey *v.* Spalding, 16 Iowa 397; 85 Am. Dec. 526: Lillard *v.* Casey, 2 Bibb (Ky.) 459; Southard *v.* Pope, 9 B. Mon. (Ky.) 264; Griffen *v.* Coffey, 9 B. Mon. (Ky.) 453; 50 Am. Dec. 519; Warren *v.* Fish, 7 Minn. 432; Wallis *v.* Wilson, 34 Miss. 357; Pomeroy *v.* Bridge, 1 Neb. 462; Boyce *v.* Wight, 2 Abb. N. C. (N. Y.) 163; Livingston *v.* Arnoux, 56 N. Y. 507; Cartwright *v.* Savage, 5 Oregon 397; McClean *v.* Harris, 14 Lea (Tenn.) 510; Ewing *v.* Cook, 1 Pickle (Tenn.) 332.

It was held in Ewing *v.* Cook, 1 Pickle (Tenn.) 332, that, as the debtor's right to redeem from an execution sale of his land could not be reached and subjected to sale by another creditor, a bill filed for that purpose afforded no obstacle to a redemption by the debtor, or to an assignment by him of his right of redemption.

When a sale of land on execution has been made after a prior sale upon execution issued on another judgment, the execution defendant may redeem from both sales. Harrison *v.* Wilmering, 72 Iowa 727.

1. Rorer on Judicial Sales (2d ed.), §§ 1162, 1164. Yoakum *v.* Bower, 51 Cal. 539; Harvey *v.* Spaulding, 16 Iowa 397; 85 Am. Dec. 526; Livingston *v.* Arnoux, 56 N. Y. 514.

It is held that he need only pay the amount of the purchase with interest, and not other liens which the purchaser may have on the property. Sharp *v.* Miller, 47 Cal. 82; Warren *v.* Fish, 7 Minn. 432; Parke *v.* Hush, 29 Minn. 434.

There are *New York* cases holding that the execution debtor may redeem, although he has been compelled to transfer all of his assets to a receiver. Livingston *v.* Arnoux, 56 N. Y. 507; Elsworth *v.* Muldoon, 46 How. Pr. (N. Y.) 246.

But in Husted *v.* Dakin, 17 Abb. Pr. (N. Y.) 137, it was held that he could not redeem where his interest had been divested by a sale under an antecedent mortgage. It is difficult to reconcile this decision with the current of authority.

2. Hepburn *v.* Kerr, 9 Humph. (Tenn.) 726; 51 Am. Dec. 685; Stoddard *v.* Forbes, 13 Iowa 296; Harvey *v.* Spaulding, 16 Iowa 397; 85 Am. Dec. 526; Watson *v.* Hannum, 10 Smed. & M. (Miss.) 521; Stockett *v.* Taylor, 3 Md. Ch. 537.

It was held in Phyfe *v.* Riley, 15 Wend. (N. Y.) 248; 30 Am. Dec. 55, that the trustees of a concealed, absconding or non-resident debtor could redeem as his successors in interest.

In Lathrop *v.* Ferguson, 22 Wend. (N. Y.) 116, it was said that the transfer must be a legal, not an equitable, transfer, and that a purchaser at an execution sale, who, though entitled to a deed, had not received it, could not redeem as the execution debtor's grantee.

In *Iowa*, where the statute refuses the right of redemption to an execution debtor who has appealed, it is held that his vendee may redeem, although the defendant may have appealed. Thayer *v.* Coldren, 57 Iowa 110.

3. Freeman *v.* Jordan, 17 Ala. 500; Couthway *v.* Berghans, 25 Ala. 393; Seals *v.* Pheiffer, 77 Ala. 278; George *v.* Hart, 56 Iowa 706; Hayden *v.* Smith, 58 Iowa 285; Citizens' Sav. Bank *v.* Percival, 61 Iowa 183; Condit *v.* Wilson, 36 N. J. Eq. 370; Thal *v.* Larmon, 25 Fed. Rep. 290; People *v.* Easton, 2 Wend. (N. Y.) 297; Hill *v.* Pixley, 63 Barb. (N. Y.) 200; Russell *v.* Allen, 10 Paige (N. Y.) 249; Freeman *v.* Jordan, 17 Ala. 500.

to redeem that his assignor had.[1] A judgment creditor cannot redeem from his own sale.[2]

In *Illinois* a judgment creditor may redeem, though his judgment does not constitute a lien. Sweezey *v.* Chandler, 11 Ill. 445; Karnes *v.* Lloyd, 52 Ill. 113; Pease *v.* Ritchie, 132 Ill. 638. And see Niantic Bank *v.* Dennis, 37 Ill. 381; Meyer *v.* Mintouye, 106 Ill. 414.

So, in *Illinois*, the right to redeem is not lost by the debtor's discharge in bankruptcy, so far as land previously owned by him is concerned. Pease *v.* Ritchie, 132 Ill. 638.

A judgment creditor having a lien on a part only of the land sold has been held not entitled to redeem the whole. Huntington *v.* Forkson, 6 Hill (N. Y.) 149; Hawkins *v.* Vineyard, 14 Ill. 26; 56 Am. Dec. 487; Durley *v.* Davis, 69 Ill. 136.

As, generally speaking, the judgment must be a lien to give the holder the right of redemption, it has been held that the holder of a judgment entered by a justice of the peace in another State may not redeem. Freeman *v.* Jordan, 17 Ala. 500.

Where the statute permits only judgment creditors to redeem from an execution sale, a court of equity has no power to extend the right to simple contract creditors, although their debts are ascertained and adjudged by the decree. Seals *v.* Pheiffer, 77 Ala. 278.

In Couthway *v.* Berghans, 25 Ala. 393, it was held that the right applies alike to creditors whose judgments are rendered before or after the sale.

A judgment or mortgage creditor is not deprived of his right to redeem by the fact that his debt is secured otherwise than by the judgment or mortgage. Fletcher *v.* Holmes, 25 Ind. 458; Muir *v.* Leitch, 7 Barb. (N. Y.) 341.

When the sale is made under several judgments, one, to redeem, must be entitled to redeem against all the judgments. People *v.* Fleming, 2 N. Y. 484.

It is held in *Indiana* that a sale under the decree foreclosing a mortgage does not preclude the mortgagee from redeeming as a creditor holding a judgment for the deficiency, the sale having been for less than the amount due. Greene *v.* Doane, 57 Ind. 186; Cummings *v.* Pottinger, 83 Ind. 294.

It is held in *Iowa*, in which State a fraudulent conveyance of land transfers the legal title, that a creditor, who obtains a judgment against the fraudulent grantor after the conveyance, has not a status entitling him to redeem. Howland *v.* Knox, 59 Iowa 46.

The debtor cannot, by a sale, after a sale of his land under an execution, cut off the right of creditors to redeem from the purchaser at the execution sale. McClean *v.* Harris, 14 Lea (Tenn.) 510.

1. **Assignee or Grantee May Redeem.**—So long as the person seeking to redeem is the owner of the judgment it is immaterial whether he is the plaintiff in whose favor it was entered, or the assignee of such plaintiff. Leevers *v.* Wood, 12 Iowa 295; Stein *v.* Chambless, 18 Iowa 474; 87 Am. Dec. 411; Aylesworth *v.* Brown, 10 Barb. (N. Y.) 167; *Ex parte* Newell, 4 Hill (N. Y.) 608; *Ex parte* Raymond, 1 Den. (N. Y.) 272; Sweezey *v.* Chandler, 11 Ill. 445; Kent *v.* Laffan, 2 Cal. 595; Stockett *v.* Taylor, 3 Md. Ch. 537; Watson *v.* Hannum, 10 Smed. & M. (Miss.) 521; Prescott *v.* Everts, 4 Wis. 314.

If a judgment creditor purchases the certificate of sale while the time is yet running for redemption, he will be entitled to the redemption money as assignee, in case any other creditor redeems; and if the creditor so redeeming, redeems on a judgment which is junior to the judgment of such assignee, such junior creditor must also pay the amount of the assignee's judgment. Rorer on Judicial Sales (2d ed.), § 1169.

The one last redeeming must pay all that is due to the person from whom the redemption is made. Goode *v.* Cummings, 35 Iowa 67; Wilson *v.* Conklin, 22 Iowa 452.

After a judgment attached as a lien upon real estate, it was sold by the judgment defendant, and conveyed by a deed containing covenants against incumbrances and of warranty, after which it was sold under an execution issued upon the judgment. *Held*, that the grantee had a right to redeem as a subsequent purchaser. Harvey *v.* Spaulding, 16 Iowa 397; 85 Am. Dec. 526.

2. Even though the property sold for less than the amount of the execution,

e. MORTGAGE CREDITORS.—A mortgage creditor may redeem from an execution sale. It matters not that the mortgage debt was acquired by assignment, or exists merely for the purpose of securing a contingent liability.[1]

3. When and How Made.—The time within which redemption may be made, the manner of exercising the right, and the amount payable, are fixed by statute. As a general rule, it may be said that redemption may be made at any time before the close of the last day allowed by law for that purpose, upon payment of the amount due in money, or that which the law recognizes as legal tender.[2]

for the sale destroys the lien. Hayden *v.* Smith, 58 Iowa 285.

The statute, however, may confer the right. Freeman *v.* Jordan, 17 Ala. 500.

1. Redemption by Mortgage Creditor.—Bigelow *v.* Willson, 1 Pick. (Mass.) 485; Crossen *v.* White, 19 Iowa 109; Frink *v.* Murphy, 21 Cal. 108; 81 Am. Dec. 149; Black *v.* Gerichten, 58 Cal. 57; Gardner *v.* Emerson, 40 Ill. 296.

Freeman on Executions (2d ed.), § 317; Rorer on Judicial Sales (2d ed.), §§ 1173–1180.

Where the purchaser at a sale has permitted a redemption by a junior mortgagee, and accepted payment, the mortgagee's right to redeem cannot be questioned by others. Hervey *v.* Krast, 116 Ind. 268.

When Mortgage Not Recorded.—Where the statute makes an unrecorded mortgage void as against a judgment creditor without notice, the holder of an unrecorded mortgage cannot redeem when the judgment creditor was the purchaser. Condit *v.* Wilson, 36 N. J. Eq. 370.

Though he may lose his priority by failing to record his mortgage, yet he is held to be entitled to redeem as a creditor, but if he fails to do so he will have no relief in equity. Smith *v.* Randall, 6 Cal. 47; 65 Am. Dec. 475.

2. Time and Manner of Redemption.—See JUDICIAL SALES, vol. 12, p. 241, and, in addition to cases there cited, see Campbell *v.* Leonard, 132 Ill. 232; Cross *v.* Weare, 62 N. H. 125; Vallandingham *v.* Worthington, 85 Ky. 83; Felton *v.* Smith, 84 Ind. 485; Taggart *v.* McKinsey, 85 Ind. 392; Carver *v.* Howard, 92 Ind. 173; Scheffermeyer *v.* Schaper, 97 Ind. 70; George *v.* Hart, 56 Iowa 706.

The time for redemption does not expire until midnight of the last day allowed by statute. It is not confined to business hours. Jessup *v.* Carey, 61 Ind. 584; *Ex parte* Bank of Monroe, 7 Hill (N. Y.) 177; Feucher *v.* Hiatt, 23 Iowa 529; 92 Am. Dec. 440. If the last day falls on Sunday, redemption must be made on Saturday. People *v.* Luther, 1 Wend. (N. Y.) 42.

When the last day falls on Saturday, and the statute allows subsequent redemptions within twenty-four hours, it is held that such a subsequent redemption may be made on the following Monday. Porter *v.* Pierce, 43 Hun (N. Y.) 11.

Excuse for Not Redeeming.—As a general rule redemption must be made within the statutory period, and neither physical nor mental disability will afford an excuse for not redeeming within the time allowed. Wallace *v.* Monroe, 22 Ill. App. 602.

The time may be extended by agreement, however; and a parol agreement by the purchaser to waive redemption within the statutory period, if acted upon, is held to be upon good consideration, though nothing was paid therefor, and not within the Statute of Frauds. Rector *v.* Shirk, 92 Ind. 31.

Redemption will be allowed after the statutory period has expired if it appears that the purchaser has fraudulently induced the redemptioner to allow the time to pass. Honnihan *v.* Friedman, 13 Ill. App. 226; Trotter *v.* Smith, 59 Ill. 240.

This may be true, though no actual false representations are made. In *Massachusetts*, where the statute allows a year in which to redeem from an execution sale, land worth $10,000 was bought by the execution creditor at a sale to satisfy a claim of $200. Although no actual false representations were made to the debtor, she was, by design, lulled into security, and failed to redeem within the year. It was held,

4. **Effect.**—The exercise of the right of redemption confers no new rights. When the redemption is made by the execution debtor or his assigns or grantee, the effect is merely to terminate the sale and restore the property to its original condition.

In most of the States the sheriff's deed cannot be made until after the expiration of the time allowed to redeem, and a redemption by a judgment creditor, or his grantee, has the effect of extinguishing the rights of the purchaser and of releasing the defendant's title from the consequences of the sale.[1]

In those States where the sheriff's deed is made at once, a reconveyance becomes necessary, on redemption, in order to reinvest the debtor with the legal title. It follows that, on a refusal to reconvey or to admit the right of redemption, equity affords a remedy by compelling such reconveyance.[2]

though by a divided court, that she could maintain a suit in equity to redeem. Graffam *v.* Burgess, 117 U. S. 180.

See further, on this point generally, JUDICIAL SALES, vol. 12, p. 241, n., and illustrations there given.

Amount Payable to Effect Redemption.—See JUDICIAL SALES, vol. 12, p. 242, n. In a case in *Minnesota* execution sales were made of land, first under a junior judgment, and afterwards under the senior judgment, the judgment creditors being the purchasers. The debtor did not redeem within the year allowed therefor, and the defendant, who was the purchaser under the junior judgment, acquired by purchase and assignment the sheriff's certificate of sale under the senior judgment. Upon an attempt of a junior lien holder to redeem from the first sale, his time to redeem from the second sale not having arrived, it was held that he need only pay the amount for which the first sale was made, with interest. Abraham *v.* Holloway, 41 Minn. 156.

In *New York* it is held that a judgment creditor in redeeming from an execution sale, must pay the amount bid, although more than the amount of the execution under which sale was made, and although the holder of the execution was himself the purchaser. Youmans *v.* Terry, 32 Hun (N. Y.) 624.

Under statutes of *Iowa*, to entitle a creditor or a lien holder, junior to him, to redeem, he must pay not only the amount of the sale, but also the amount of other superior judgment liens. Goode *v.* Cummings, 35 Iowa 67.

Although the amount necessary to redeem should usually be paid in money, yet if it is paid to the proper officer in a bank draft which is accepted by the officer, the redemption is complete, though the draft is not actually collected until after the expiration of the time for redemption. It is not necessary that the payment be made in currency unless required by the officer. Buford *v.* Henzier, 8 Biss. (U. S.) 177.

Tender.—An offer of payment will frequently have the effect of payment in fulfilling the requirements of the statutes. When no time is fixed the offer to redeem must appear to have been within a reasonable time. Gillespie *v.* Stone, 70 Mo. 505.

But it is held that one need not offer to redeem from an execution sale as a prerequisite to his right of action, if his right to redeem has been constantly denied so that the offer would be in vain. Fitzgerald *v.* Kelso, 71 Iowa 731.

Where "lawful charges" must also be tendered, insurance paid by the purchaser is held not to be included. Richardson *v.* Dunn, 79 Ala. 167. See also Boyd *v.* Olvey, 82 Ind. 294; Proctor *v.* Green, 59 N. H. 350.

1. Phyfe *v.* Riley, 15 Wend. (N. Y.) 248; 30 Am. Dec. 55; Bodine *v.* Moore, 18 N. Y. 347; Livingston *v.* Arnoux, 56 N. Y. 515; Warren *v.* Fish, 7 Minn. 432; Standish *v.* Vosberg, 27 Minn. 175; Horton *v.* Moffit, 14 Minn. 293; 100 Am. Dec. 222; Boyce *v.* Wight, 2 Abb. N. Cas. (N. Y.) 163; Pearson *v.* Pearson, 131 Ill. 464; Allen *v.* McGaughey, 31 Ark. 252; Cartwright *v.* Savage, 5 Oregon 397.

2. Freeman on Executions (2d ed.) § 321; Paris *v.* Burger, 4 Humph. (Tenn.)

A redemption affects only the interest which the redemptioner was entitled to redeem.[1]

The effect of a redemption cannot be destroyed by showing that the money paid was advanced to the redemptioner by some third party.[2] The redemptioner is sometimes entitled to recover from the purchaser for rents while the latter was in possession, or for crops harvested during that period.[3]

III. REDEMPTION OF LAND SOLD FOR TAXES.—See TAXATION.

IV. REDEMPTION OF PLEDGE.—See PLEDGE.

325; Hawkins *v.* Jamison, Mart. & Y. (Tenn.) 83; Mitchell *v.* Brown, 6 Coldw. (Tenn.) 505; Pillow *v.* Langtree, 5 Humph. (Tenn.) 389; Burk *v.* Bank of Tennessee, 3 Head (Tenn.) 686.

Where a suit for reconveyance is brought, the legality of the redemption cannot be called in question where the person from whom redemption was made has accepted the redemption money. Pearson *v.* Pearson, 131 Ill. 464.

In *Oregon* the purchaser at the execution sale is entitled to the immediate possession and use of the property, which, on redemption, he must restore in its original condition, even surrendering a crop planted by the debtor. Cartwright *v.* Savage, 5 Oregon 397.

Redemption by Creditor of Execution Debtor.—Where a creditor attempts to redeem, if the sale was void, for any cause, the redemptioner acquires no title; his rights, like the purchaser's, are dependent upon a valid judgment and sale. Johnson *v.* Baker, 38 Ill. 99; Mulvey *v.* Carpenter, 78 Ill. 580; Keeling *v.* Heard, 3 Head (Tenn.) 592.

His redemption will not become inoperative by the subsequent reversal of his judgment, nor is he responsible for mere errors in proceedings. M'Lagan *v.* Brown, 11 Ill. 519; Whitman *v.* Fisher, 74 Ill. 147; Mulvey *v.* Gibbons, 87 Ill. 367; Smith *v.* Brittenham, 109 Ill. 540.

A redemption by a creditor and the acquisition of valuable property thereby do not impair the judgment or other obligation by virtue of which he was entitled to redeem. Emmet *v.* Bradstreet, 20 Wend. (N. Y.) 50; Van Horne *v.* McLaren, 8 Paige (N. Y.) 285.

1. Redemption by part owner does not release the interest of the other part owners, though the party redeeming has been compelled to pay the full amount of the purchaser's bid. Neilson *v.* Neilson, 5 Barb. (N. Y.) 565; Quinn *v.* Kenney, 47 Cal. 147. See also Eldridge *v.* Wright, 55 Cal. 231.

2. Searle *v.* Doane, 17 Cal. 476.

3. **Rents and Profits of Land Sold.**—As a general rule the purchaser at the sale is not entitled to the possession of the property, nor to participate in the rents and profits thereof, until his title has become absolute by a failure to redeem within the statutory period. Freeman on Executions, § 349.

In some States, however, the statutes have given to the purchaser the right to the rents and profits of the real estate sold from the date of the sale. See Stayton *v.* Morris, 4 Harr. (Del.) 224; Walker *v.* McCusker, 71 Cal. 596; Frink *v.* Roe, 70 Cal. 305; Emerson *v.* Lansome, 41 Cal. 552; Webster *v.* Cook, 38 Cal. 423; Kline *v.* Chase, 17 Cal. 596; Whitney *v.* Allen, 21 Cal. 233; Borrell *v.* Dewart, 37 Pa. St. 136; Burk *v.* Bank of Tennessee, 3 Head (Tenn.) 686; Miller *v.* Buchanan, 2 Baxt. (Tenn.) 390; Kannon *v.* Pillow, 7 Humph. (Tenn.) 281; Odonnell *v.* McMurdie, 6 Humph. (Tenn.) 134.

Crops Upon Lands Redeemed.—Where the execution debtor sows a crop which he knows cannot mature until after the year allowed for redemption has expired, he cannot, after a failure to redeem, remove such crop. Thomas *v.* Noel, 81 Ind. 382.

But in *Oregon* it is held that he may recover the value of a crop growing upon the land at the time of the sale, and harvested by the purchaser while in possession. Cartwright *v.* Savage, 5 Oregon 597.

It has been held, however, that when a judgment debtor, whose lands have been sold under execution, seeks to redeem from the purchaser, he is not entitled to the growing crops as against a tenant by the year of the purchaser at the execution sale. Gardner *v.* Lanford, 86 Ala. 508.

RED TAPE is order carried to fastidious excess—system run out into trivial extremes.[1]

REDUNDANCY.—See PLEADING, vol. 18, p. 503.

RE-ENACT.—See STATUTES.

RE-EXAMINATION.—See EVIDENCE, vol. 7, p. 108; WITNESSES.

RE-EXCHANGE.—(See also BILLS AND NOTES, vol. 2, p. 313; CONFLICT OF LAWS, vol. 3, pp. 585-597.)

I. Definition, 641.
II. Drawer's Liability for Re-exchange and Damages, 642.
III. Indorser's Liability, 645.
IV. Acceptor's Liability, 646.
V. Statutory Provisions Covering Re-exchange and Damages, 648.
VI. Re-exchange and Damages on Promissory Notes, 659.

1. **DEFINITION.**—Re-exchange means the loss resulting from the dishonor of a bill of exchange in a country different from that in which it was drawn or indorsed,[2] and is the amount for which a bill may be purchased in the country where the original bill is payable, drawn upon the drawer in the country where he resides, which will give the holder a sum exactly equal to the amount of the original bill at the time when it ought to be paid, or when he is able to draw the re-exchange bill, together with expenses and interest; for that is precisely the sum which the holder is entitled to receive, and which will indemnify him for its non-payment.[3] The amount of it depends on the course of the exchange between the countries through which the bill has been negotiated.[4]

Exchange means the market value in one country of money to

1. Webster *v.* Thompson, 55 Ga. 43.
2. Benj. Chal. on Bills 224.
3. 2 Daniel on Neg. Inst., § 1445 (4th ed.).
4. Chitty on Bills 544. See also Willans *v.* Ayers, L. R., 3 App. Cas. 146; Bangor Bank *v.* Hook, 5 Me. 174.

"The re-exchange is ascertained by proof of the sum for which a sight bill (drawn at the time and place of dishonor, at the then rate of exchange on the place where the drawer or indorser sought to be charged resides) must be drawn, in order to realize at the place of dishonor the amount of the dishonored bill, and the expenses consequent on its dishonor.

"The holder may recoup himself by drawing a sight bill for such sum on either the drawer or one of the indorsers. Such bill is called a 'Re-draft.' The indorser who pays a re-draft may, in like manner, draw upon an antecedent party." Benj. Chal. on Bills 224; Mellish *v.* Simeon, 2 H. Bl. 378; Suse *v.* Pompe, 8 C. B., N. S. 538; 98 E. C. L. 537.

Upon the dishonor of a bill in a foreign country by the law-merchant, the holder may demand of the drawer of the bill to make good such payment by drawing a bill of re-exchange upon him. Although the actual drawing of a cross-bill or bill of re-exchange is seldom resorted to, the right to do so has never been doubted. Randolph on Com. Paper, § 1714; Byles on Bills 418; Benj. Chal. on Bills, art. 221; 1 Parsons N. & B. 648; Story on Bills, § 400.

The subject of re-exchange is carefully considered in *German* Exchange Law, arts. 49-54; *French* Code, arts. 177-186; Nouguier, §§ 1336-1366.

The term re-exchange is used to signify (1) the amount of a re-draft; (2) the loss on a particular transaction occasioned by the exchange being adverse; (3) the course of exchange itself; or (4) the right to the sum which

be delivered in another.[1] Exchange is not the mere cost of transportation but the actual market price of the bill at the place where it is payable.[2]

II. Drawer's Liability for Re-exchange and Damages.—The drawer of a foreign bill of exchange, when the same is duly protested for non-acceptance or non-payment, is in general primarily liable, not only for the sum specified in the bill, but for interest and all damages including re-exchange consequent upon the dishonor of the bill. His contract is, that the drawee will accept the bill, when duly presented for acceptance, and pay the same when it becomes due, at the place where it is made payable, and if the drawee, through his failure to accept the bill, or, after accepting it, fails to make payment, then the drawer at once becomes liable to the holder for payment of the bill,[3] not at the

would be secured by a re-draft; so the context must always be looked to.

When *English* law governs, the right to re-exchange arises on dishonor by non-acceptance, as well as on non-payment. Under the Continental Codes it arises on dishonor by non-payment. Benj. Chal. on Bills 225. See also Suse *v.* Pompe, 8 C. B., N. S. 566, 98 E. C. L. 537; Whitehead *v.* Walker, 9 M. & W. 506.

1. 3 Rand. on Com. Paper, § 1714.

2. In Balch *v.* Colman, 2 McLean (U. S.) 85, action was brought on a bill payable in Indiana with the rate of exchange between the place of payment and the city of New York. The court observes: "The rate of exchange is clearly not to be ascertained by what would be the expense of transporting specie from the place of payment to the city of New York. This, undoubtedly, enters into the general calculation on the subject, and has great influence in fixing the rate; but there are other ingredients which must be looked to in making an estimate. specie is not transported at the same rate as other merchantable commodities. There is the risk, the insurance, the delays, and other contingencies, which are taken into account; and, not unfrequently, the scarcity or abundance of specie at the place of remittance has an important effect on the price of exchange. The only correct rule, therefore, is to ascertain the ordinary rate of exchange between the two places; to be established by evidence, the same as the value of any other thing. The inquiry of the jury should be, What was the current price of drafts, in specie, or its equivalent, on New York, at Lafayette, Indiana, at the time the note became payable?" See also Warder *v.* Araell, 2 Wash. (Va.) 282.

Rate of Exchange at Common Law.—The rate of exchange may vary between the time of the drawing of the bill and the time of recovery upon it. The common-law rule is to allow the rate of exchange at the time of the recovery. Auriol *v.* Thomas, 2 T. R. 52; Hendricks *v.* Franklin, 4 Johns. (N. Y.) 119.

3. Chitty on Bills 214; 1 Parsons N. & B 651; Gantt *v.* Mackenzie, 3 Camp. 51; Ballingalls *v.* Gloster, 3 East 481.

Measure of Damages.—"The engagement of the drawer and indorser of every bill is, that it shall be paid at the proper time and place; and if it be not, the holder is entitled to indemnity for the loss arising from this breach of contract. The general law-merchant of Europe authorizes the holder of a protested bill immediately to redraw from the place where the bill was payable, and in the same direct or circuitous way, as the case may be or require, on the drawer or indorser, in order to reimburse himself for the principal of the bill protested, the contingent expenses attending it, and the new exchange which he pays. His indemnity requires him to draw for such an amount as will make good the face of the bill together with interest from the time it ought to have been paid, and the necessary charges of protest, postage and broker's commission, and the current rate of exchange at the place where the bill was to be demanded or payable, on the place where it was drawn or

negotiated. The law does not insist upon an actual redrawing, but it enables the holder to recover what would be the price of another new bill, at the place where the bill was dishonored, or the loss on the re-exchange; and this it does by giving him the face of the protested bill with interest according to the law of the place where the bill was drawn, and the necessary expenses, including the amount or price of the re-exchange." 3 Kent's Com., Lect. 44, p. 115.

Illustration.—"The drawer, having ten thousand dollars due to him in London, draws his bill on his debtor, and sells it to a party who owes, or is to owe, that sum at that place. The bill is remitted by the purchaser to his creditor or to his agent, as funds to pay his creditor, and it is dishonored. The remitter must now be indemnified. And this may happen in either of two ways. The remitter may draw a new bill for such sum as will put his creditor in possession of the sum due, with legal interest and expenses of protest, etc. and, as he must pay for this new bill whatever rate of exchange it is worth, and may claim of the drawer whatever it costs him, in this way the drawer pays to him the re-exchange; or the receiver of the bill in London may, on its dishonor there, draw a bill on the remitter for such sum as will enable him to sell the bill there for the amount which he ought to have received on the first bill, clear of all cost. Of course he must include in the bill the rate of exchange which will bring the market value of the bill in London up to this point. The remitter must pay this bill (including as it does this re-exchange), and then he has his claim against the drawer for all that it costs him." 1 Parsons on N. & B. 649.

In U. S. Bank *v.* U. S., 2 How. (U. S.) 711, the court held that the government, as the drawer of a foreign bill of exchange, was liable for statutory damages. But in U. S. *v.* Bank of U. S., 5 How. (U. S.) 382, the court held that the *Maryland* Statute of 1785, in its terms, does not embrace a bill of exchange drawn on a foreign government; and that a bill of exchange in form drawn by one government on another is not and cannot be governed by the law-merchant, and that, therefore, it is not subject to protest and consequential damages.

In Milford *v.* Meyor, Dougl. 54, which was an action by the indorser against the drawer of a bill, which the drawee had refused to accept, the court held that if a bill of exchange is not accepted, an action on the bill will lie immediately against the drawer, because his undertaking that the drawee shall give him credit, is not performed.

In *France*, it seems that a drawer or indorser is not, upon non-acceptance, liable to be immediately sued, though he must find security for the ultimate payment (1 Pardessus 344). So, Pothier considers the drawer as merely liable to indemnify the holder against the more probable non-payment at maturity. Chitty on Bills 215. See also Mellish *v.* Simeon, 2 H. Bl. 379; Touting *v.* Hubbard, 3 Bos. & Pul. 291.

An indorser, it seems, cannot recover of the drawer damages arising from the non-acceptance of a bill, except in cases where the indorser has paid damages or is liable for them. Kingston *v.* Wilson, 4 Wash. (U. S.) 310; Bank of U. S. *v.* U. S., 2 How. (U. S.) 711.

Inland Bills.—The drawer is liable for statutory damages on protested inland bills in many of the States. Evans *v.* Gee, 11 Pet. (U. S.) 80.

Agent's Liability for Re-exchange.—As to agent's liability for re-exchange or statutory damages when drawing a bill for his principal's account, see Greene *v.* Goddard, 9 Met. (Mass.) 212, where authorities are reviewed in opinion of Hubbard, J.

Where an indorser's agent has taken up a bill he cannot recover the damages allowed by statute against his principal. Thompson *v.* Robertson, 4 Johns. (N. Y.) 27; Kenworthy *v.* Hopkins, 1 Johns. Cas. (N. Y.) 107.

Joint Drawer's Liability to Co-drawer.—Where a joint drawer of a bill of exchange upon protest for non-acceptance, voluntarily paid damages, the court held that he could not recover contribution for same from his co-drawer when the bill was subsequently protested for non-payment. Morris *v.* Tarin, 1 Dall. (Pa.) 147; 1 Am. Dec. 233.

In Hazelhurst *v.* Kean, 4 Yeates (Pa.) 191, the court held that damages could not be recovered against the drawer of a protested foreign bill of exchange where such bill was only given as an additional security to a bottomry bond.

When a bill is made payable in a foreign country, merely in order that it may be negotiated in the place where it was drawn so as to put the holder in funds there, he, the holder, will not be entitled to recover exchange on it

place where it was to have been paid by the drawee, but where the contract was made, or where the bill was drawn, and, in like manner, he is governed as to interest, damages and cost, by the law of the country where the bill was drawn, and not of the country where it was dishonored.[1] Where a bill of exchange has passed through numerous hands, the damages by way of re-exchange between the different places, by reason of the circuitous route, may be greatly increased, but the drawer is liable for these successive re-exchanges in the same degree and manner as where the route is direct between the place where the bill is drawn and where it is made payable.[2] The drawer may, however, limit the amount of re-exchange and expenses by reserving in the bill, that in case of dishonor by non-acceptance or non-payment, the re-exchange and expenses shall be so much, or shall

against the drawer. Willans *v.* Ayers L. R., 3 App. Cas. 133. See 3 Rand. on Com. Paper, § 1714.

1. Allen *v.* Kemble, 6 Moore P.C. 314; Price *v.* Page, 24 Mo. 65; Page *v.* Page, 21 Mo. 595; Cullum *v.* Casey, 9 Port. (Ala.) 131; Crawford *v.* Bank, 6 Ala. 12; Fiske *v.* Foster, 10 Met. (Mass.) 597; Freese *v.* Brownell, 35 N. J. L. 285; Andrews *v.* Pond, 13 Pet. (U. S.) 65; *In re* State F. Ins. Co., 32 L. J. Ch. 300; Butt *v.* Hoge, 2 Hilt. (N. Y.) 81.

See generally CONFLICT OF LAWS, vol. 3, pp. 591–597.

"It has long been established in the case of negotiable paper of every kind, that it is construed and governed, as to the obligation of the drawer or maker, by the law of the country where it was drawn, or made; as to that of the acceptor, by the law of the country where he accepts; and as to that of the indorser, by the law of the country where he indorsed." Lennig *v.* Ralston, 23 Pa. St. 137; Hazlehurst *v.* Kean, 4 Yeates (Pa.) 20; Allen *v.* Union Bank, 5 Whart. (Pa.) 425.

And that law governs which was in force at the time the bill was drawn. Lennig *v.* Ralston, 23 Pa. St. 137.

But there may be an exception in the case of an accommodation acceptor bringing suit against the drawer. In such cases it has been held that the drawer's liability for damages will be governed by the law of the place of payment, provided, the damages allowed are not in excess of those allowed by the law of the place where the bill was drawn. Cooper *v.* Sandford, 4 Yerg. (Tenn.) 452; 26 Am. Dec. 239.

2. De Tastet *v.* Baring, 11 East 265; Crawford *v.* Branch Bank, 6 Ala. 15; Pollard *v.* Herrus, 3 B. & P. 335.

In Mellish *v.* Simeon, 2 H. Bl. 379, a bill was drawn in *England* by Simeon on Boyd & Co. in Paris, and negotiated through Amsterdam, in Holland, and upon protest was sent first to the indorser at Amsterdam, and then to the drawer in England. EYRE, C. J., observes in his opinion: "I see no distinction between this case and the common one of a bill being refused payment. The drawer must pay for all the consequences of the non-payment, and the loss on the re-exchange seems to me to be part of the damages arising from the contract not being performed. I thought, indeed, at the trial, that it might be a question whether the drawer was liable for the re-exchange occasioned by the circuitous mode of returning the bill through Amsterdam, but the jury decided."

Some text writers on the subject have maintained that re-exchange consequent upon a circuitous route, through different countries, should not be imposed upon the drawer, where there is a direct commercial intercourse between the country where the bill was drawn and that where it was accepted and made payable, except in cases where the direct route is not available. See Story on Bills 402. In *Scotland*, see Forbes 151; Glen 274.

In Thompson on Bills, p. 445, the author observes: "It has been said that the drawer ought not to be liable for any but the direct re-exchange between the place of drawing and the place of payment, unless he has given permission to negotiate the bill in other places. But such a permission is implied by the drawer issuing a negotiable document, since the holder for the time is entitled to indorse it to any

not exceed a specified sum.[1] It has been held that the drawer of a foreign bill of exchange is liable for damages to one who takes up the bill *supra protest* for the drawer's honor.[2]

III. **Indorser's Liability.**—The indorser's liability is in most respects similar to that of the drawer. In other words, an indorser of a bill of exchange is a new drawer, and the holder of a dishonored bill may redraw upon an indorser in the same manner as he would upon the drawer. And he is liable for re-exchange between the country where the bill was payable and that where it was indorsed. He, of course, upon payment, has recourse against any prior indorser or the drawer for the whole amount he has paid, together with the re-exchange between the place of his indorsement and the place where the prior indorsement was made, or the bill was drawn, as the case may be.[3] The holder or indorsee is not entitled to any accumulation of re-exchange against several distinct indorsers or against the drawer and an indorser; he can only avail himself of one satisfaction by re-exchange. Nor will the drawer or indorser be liable for re-exchange if it is not allowed by the laws of the country where the bill was drawn or the indorsement was made,[4] for the indorser is liable for damages according to the law of the country where he indorses as the drawer is liable according to the law of the place where the bill is drawn.[5]

person he pleases; and, on the other hand, the last holder, being entitled, in case of its dishonor, to redraw on any previous indorser, in order to make good his recourse against such indorser, who again has the right to do the same with any prior indorser, the drawer, as he is liable for all the consequences of dishonor, must be liable for the accumulated re-exchange arising on the successive redrafts, because that results from the negotiability of the document which he has issued."

See 2 Daniel on Neg. Inst., § 1448, note.

1. Chitty on Bills, 190; 1 Parsons N. & B. 653; 2 Daniel Neg. Inst. (4th ed.), § 1447.

2. In Pratalongo *v.* Larco, 47 Cal. 378, the court by Crockett, J., observes: "On the payment *supra protest*, by M. & Co. of London, of the bill in question, for the honor of the defendant, they became thereby the holder of the bill, with the same rights as against the drawer, as though they had been indorsees. A payment *supra protest* transfers the holder's rights to the party paying, unless the party by his own act limits and narrows his rights. (Chitty on Bills 509; Bank of U. S. *v.* U. S., 2 How. (U. S.) 766.) It is clear, therefore, that on paying the bill *supra protest* M. & Co. became the holders of it, and they, if any one, were entitled to the statutory damages from the drawer."

3. Daniel on Neg. Inst. (4th ed.), § 1448; Chitty on Bills, 767; Edwards on Bills 732; 1 Parsons N. & B. 652; De Tastet *v.* Baring, 11 East 265; Mellish *v.* Simeon, 2 H. Bl. 379.

4. Story on Bills, § 403.

5. In Story on Bills, § 153, the author gives the following illustration: "Suppose a negotiable bill of exchange is drawn in Massachusetts on England. and is indorsed in New York, and again by the first indorsee in Pennsylvania, and by the second in Maryland, and the bill is dishonored; what damages will the holder be entitled to? The law, as to damages, in these States is different. . . . What rule, then, is to govern? The answer is, that, in each case, the *lex loci contractus*. The drawer is liable on the bill according to the law of the place where the bill was drawn; and the successive indorsers are liable according to the law of the place of their respective indorsements, every indorsement being treated as a new and substantive contract. The consequence

IV. ACCEPTOR'S LIABILITY.—Conflict of opinion exists as to whether or not the acceptor is liable for re-exchange. It is sometimes held that he is not, on the ground that his agreement is simply to pay the bill at the place of payment, and not at the place of drawing, and that his contract cannot be carried further than to pay the sum specified in the bill, and interest according to the legal rate of interest where it is due.[1] Other authorities hold that the liability extends as well to the acceptor as to the drawer and indorsers;[2] while others state that his liability rests upon

is, that the indorser may render himself liable, upon a dishonor of the bill, for a much higher rate of damages than he can recover from the drawer. But this results from his own voluntary contract; and not from any collision of rights, arising from the nature of the original contract. It has sometimes been suggested that this doctrine is a departure from the rule that the law of the place of payment is to govern. (Story on Conflict of Laws, § 315; 2 Kent Com. Lect. 39, p. 459; Chitty on Bills, p. 191 to 194.) But, correctly considered, it is entirely in conformity to the rule. The drawer and indorsers do not contract to pay the money in the foreign place, on which the bill is drawn; but only to guarantee its acceptance and payment in that place by the drawee; and, in default of such payment, they agree, upon due notice, to reimburse the holder, in principal and damages, at the place where they, respectively, entered into the contract."

See also Story on Conflict of Laws, § 307, 317; Powers *v.* Lynch, 3 Mass. 77; Prentiss *v.* Savage, 13 Mass. 20; Slacum *v.* Pomery, 6 Cranch (U. S.) 221; Depau *v.* Humphreys, 10 Mart. (La.) 1; Hicks *v.* Brown, 12 Johns. (N. Y.) 142; Rothschild *v.* Currie, 1 A. & E., N. S. 43; Potter *v.* Brown, 5 East 123; Gibbs *v.* Freemont, 9 Exch. 25; Allen *v.* Kemble, 6 Moore P. C. 321; Aymar *v.* Sheldon, 12 Wend. (N. Y.) 439; 27 Am. Dec. 137.

1. Chitty on Bills 668; Chitty, Jr., on Bills 41; Byles on Bills (Sharswood's ed.) 588; 3 Kent. Com. Lect. 44; Edwards on Bills 733; 3 Daniel on Neg. Inst., § 1449. 3 Rand. on Com. Paper, § 1714; Napier *v.* Schneider, 12 East 420; Woolsey *v.* Crawford, 2 Camp. 445. See also Bowen *v.* Stoddard, 10 Met. (Mass.) 375; Hanrick *v.* Farmers' Bank, 8 Port. (Ala.) 539; Newman *v.* Goza, 2 La. Ann. 642.

In Watt *v.* Riddle, 8 Watts. (Pa.) 545, the court held that by the English law-merchant, the acceptor of a foreign bill of exchange is not liable for re-exchange or any charge but interest, according to the rate established at the place of payment; and the statute of *Pennsylvania*, which gives liquidated damages as a substitute, has regard only to drawers and indorsers.

In Dawson *v.* Morgan, 9 B. & C. 618; 17 E. C. L. 457, Lord Tenterden, C. J., observes: "The custom does not give a right to an indorser (against the acceptor) to recover re-exchange."

In Hanrick *v.* Farmers' Bank, 8 Port. (Ala.) 539, the court by Ormond, J., observes: "Damages, other than interest, which may accrue, are never, by the law-merchant, given against an acceptor of a bill, as such merely; though cases may exist in which he might be liable to the drawer, in damages on some special agreement, to accept the bill. But, as a general proposition, it may be asserted that he is not liable. His undertaking is absolute to pay the money to the holder of the bill. Damages given to the holder, to compensate for the loss and disappointment in not receiving his money at the place appointed, arises out of the contract of drawing or indorsing the bill."

See also Manning *v.* Kohn, 44 Ala. 343; Dickinson *v.* Branch Bank, 12 Ala. 54; Fiske *v.* Foster, 10 Met. (Mass.) 597.

In Trammell *v.* Hudmon, 56 Ala. 235, the court by Brickell, C. J., observes: "An acceptor's promise is to pay the bill, at maturity, at the place at which it is payable; and interest compensates fully for his failure to pay. The drawer promises to pay at the place at which the bill is drawn, and the indorser at the place of indorsement, if the acceptor fails."

2. Thompson on Bills (Wilson's ed.) 446; 1 Parsons N. & B. 650; Bayley on Bills 306, note; 3 Daniel on Neg.

his agreement with the drawer or indorser, for a valuable consideration, to pay the bill, and upon his failure to do so, compels the drawer or indorser to pay the re-exchange.[1] It has been held that in cases where drawers have been obliged to take up bills and pay damages, because the acceptors suffered them to be protested, when they had funds of the drawers in their hands, and were, as between themselves and the drawers, bound to accept, they may recover such damages of the acceptors; because the loss is occasioned by their default and neglect. It is said, however, that this doctrine rests entirely on the relations existing between them and not on the ground that an acceptor, as such, is liable to pay damages by reason of his acceptance.[2]

Inst., § 1450; Francis *v.* Rucker, Amb. 672; Walker *v.* Hamilton, 1 De G. F. & J. 602; Rolin *v.* Steward, 14 C. B. 595; 78 E. C. L., 593; Prehn *v.* Royal Bank, L. R., 5 Ex. 92; Riggs *v.* Lindsay, 7 Cranch (U. S.) 501; Grimshaw *v.* Bender, 6 Mass. 157.

By the continental law the acceptor is liable for re-exchange, as the drawer is liable, and the acceptor by his acceptance becomes a party to the drawer's obligation. Pothier de Change, N. 115-117, ch. 6, art. 4, § 1.

In Riggs *v.* Lindsay, 7 Cranch (U. S.) 500, the defendants ordered the plaintiff to purchase salt for them, and to draw on them for the amount, and he having so purchased and drawn, the court held that they (the defendants) were bound to accept and pay his bills; and if they did not, he might recover from them the amount of the bill and damages and costs of protest (if he has paid the same) upon a count for money paid, laid out and expended, and the bills of exchange may be given in evidence on that count.

In *In re* General South American Co., L. R., 7 Ch. Div. 637, Malins, V. C., observes: "I cannot accede to the argument that a drawer is under greater liability than an acceptor. I am of opinion that the primary liability is in the acceptor. The liability of the drawer is secondary, and if the drawer is liable so must the acceptor be."

1. 3 Daniel on Neg. Inst., § 1449; Story on Bills, § 398; Sedgwick on Damages 271.

"Although an acceptor, as such, may not be liable to the holder for re-exchange, it is clear that the drawee, by accepting, cannot alter or escape from his special contract with the drawer; and this may be the ground of his liability for re-exchange, when sued by the drawer." Benj. Chal. Bills, art. 209, p. 211, note.

One test of the acceptor's liability, gathered from the authorities, seems to be that, if he has expressly or impliedly agreed with the drawer or indorser, for a valuable consideration, to pay the bill at its maturity, he is liable for a breach of his contract; and if he has funds of the drawer in his hands, he would perhaps be bound to accept. Parsons on N. & B., 651, note. See City Bank *v.* Girard Bank, 10 La. 562.

2. In Bowen *v.* Stoddard, 10 Met. (Mass.) 378, the court by Hubbard, J., observes: "Damages upon a bill of exchange are the indemnity which the law-merchant provides for parties who are injured by the dishonor of the bill, and are intended to cover the expense and loss occasioned by the necessity of protesting and re-drawing for reimbursement. But the rates of exchange proving, from unseen causes, so fluctuating and uncertain, liquidated damages have long since been substituted in this commonwealth, as furnishing a more just measure of indemnity to the suffering party; varying, however, as to their amount, according to the distance or difficulty of communication between the places where the bill is drawn and where payable. But the liability to make good the loss arising from the dishonor of the bill, and the promise to indemnify, are the risk and undertaking of the persons who draw, and of those who negotiate the bill, because it is received by the holder on the faith of the undertaking that it will be accepted and paid by the drawee. But the drawee is not a party to this agreement; and if he does not accept the bill, the holder has no claim upon him. If, however,

One authority says: "Where a drawer has been obliged to pay statutory damages by way of re-exchange, according to the law of his place of contract, he may recover such damages against the acceptor, or prove them against his estate in bankruptcy."[1] After considering all the authorities on the subject of an acceptor's liability for re-exchange, the better view seems to be that, if the drawer authorizes the bill to be drawn, or if he accepts it when the bill is presented for acceptance, he becomes liable for all damages including re-exchange resulting from the dishonor of the bill. If the drawer is obliged to pay the amount of a dishonored bill together with the damages resulting therefrom, he certainly has a claim against his acceptor, by whose default the bill was dishonored, for reimbursement.[2]

V. Statutory Provisions Covering Re-exchange and Damages.—In the *United States*, re-exchange and damages on all foreign bills of exchange protested for non-acceptance or non-payment, are now regulated by statutory enactments. It is to be regretted that these statutes are by no means uniform, for, while they have very much simplified the matter of calculating re-exchange, there seems to be no apparent reason why the rate per cent. on dishonored foreign bills should not be the same in all the States. Prior to the enactment of these statutes, the subject of re-exchange was regulated by the law-merchant, and in *England*, and other foreign countries, the calculation of re-exchange was based on the rate of exchange between the countries where the bill was drawn, and where it was made payable, as regards the drawer, and, as to the indorsers, the rate between the place of

the bill is accepted, no other agreement exists between the holder and the acceptor than a simple engagement by the acceptor to pay the face of the bill at maturity. And if he fails to perform his engagement, he is liable, in an action, for the amount of the bill and interest, and the costs of protest for non-payment. But he is not liable for damages. It is no part of his contract to pay them; and the bill, when satisfied by him, is paid at the place where it was made payable, and the party does not require, nor is he, in such case, entitled to the damages for the re-exchange. The holder, on protest for non-payment, may pursue his remedy against the acceptor, drawer and indorsers; but if he follows the acceptor to judgment, he cannot charge him with damages. We know of no case where such a rule has been laid down, nor do we perceive a reason for now establishing one. Nor are we aware that any such practice has prevailed among merchants. In cases where drawers have been obliged to take up bills and pay the damages, because the acceptors suffered them to be protested, when they had funds of the drawers in their hands, and were, as between themselves and the drawers, bound to accept, they may recover such damages of the acceptors; because the loss is occasioned by their default and neglect. This rests, however, on the relations existing between them, and not on the ground that an acceptor, as such, is liable to pay damages by reason of his acceptance." See Riggs *v.* Lindsay, 7 Cranch (U. S.) 500.

1. 3 Rand. on Com. Paper, § 1714.

2. 2 Daniel on Neg. Inst., § 1450.

Withdrawal of an Agreement to Accept Bill for the Drawer's Accommodation.—An offer to accept a draft may be withdrawn by a letter received by the drawer before the draft has been actually presented for acceptance by him or his agent. The measure of damages for non-performance of an agreement to accept a draft for the drawer's accommodation, which is still in his hands, is the inconvenience and loss

indorsement and the place of payment.[1] Instances, however, of a fixed rate in lieu of re-exchange are to be found in English commerce,[2] and in *Massachusetts* and *New York*, mercantile custom at an early date fixed the rate of damages in lieu of re-exchange between these States and *England* at ten per cent. on bills drawn in the former, and twenty per cent. on bills drawn on the latter.[3] The first statute providing for a fixed rate in lieu

thereby occasioned to him, and not the amount of the draft. Ilsley *v.* Jones, 12 Gray (Mass.) 260.

1. Story on Bills 405.

2. As to a fixed rate per cent. between *England* and *India* in lieu of re-exchange, see Auriol *v.* Thomas, 2 T. R. 52.

But there should be an agreement, expressed or implied, between the parties, as to a fixed rate in lieu of re-exchange. Willans *v.* Ayers, L. R., 3 App Cas. 82.

3. **Early Rule in Massachusetts.**—In Grimshaw *v.* Bender, 6 Mass. 157, the court by Parsons, C. J., observes: "The rule of damages, established by the law-merchant, is, in our opinion, absolutely controlled by the immemorial usage in this State. Here the usage is to allow the holder of the bill the money for which it was drawn, reduced to our currency at par, and also the charges of protest, with American interest on those sums from the time when the bill should have been paid; and the further sum of one-tenth of the money for which the bill was drawn, with interest upon it from the time of payment of the dishonored bill was demanded of the drawer. But nothing has been allowed for re-exchange, whether it is below or at par. This usage is so ancient, that we cannot trace its origin; and it forms a part of the law-merchant of the commonwealth. Courts of law have always recognized it, and juries have been instructed to govern themselves by it in finding their verdicts. This usage also governs the indorsers of foreign bills."

See also Barclay *v.* Minchin, 6 Mass. 162; Wood *v.* Watson, 53 Me. 300.

In Hendricks *v.* Franklin, 4 Johns. (N. Y.) 119, the court by Spencer, J., observes: "In this case the question is, What damages the plaintiff, who is the indorsee of a foreign bill of exchange, of which the defendant is the drawer, and which was returned protested for non-acceptance and non-payment, is entitled to recover; the plaintiff contending that he has a right to recover, as well the principal and interest as also twenty per cent. damages, and an additional two per cent. as the difference of exchange between the time of negotiating the bill and notice of non-payment to the defendant, by way of re-exchange.

The payment of this two per cent. the defendant resists. The right to recover twenty per cent. damages on the protest of a foreign bill of exchange, rests with us on immemorial commercial usage, sanctioned by a long course of judicial decisions. In *Great Britain* there is no such usage, and hence, there, the difference of exchange is always taken into consideration, and their courts of justice allow for the usual rate of re-exchange upon the protest of a foreign bill.

In *Pennsylvania*, as early as the year 1700, the legislature enacted, that if any person within that province should draw or indorse any bill of exchange upon any person in *England* or other parts of *Europe*, and the same be returned back unpaid, with a legal protest, the drawer and all concerned should pay the contents of the bill, together with twenty per cent. advance for the damage thereof, in the same specie as the bill was drawn, or current money of that province, equivalent to that which was first paid to the drawer or indorser. It is presumed, that our rule to allow twenty per cent. on the protest of a foreign bill, was originally coextensive with the rule thus established in *Pennsylvania*, and that the same reasons induced both rules. The twenty per cent. was in lieu of damages, in case of re-exchange, and because there was no course of exchange from *London* to *New York*, and to avoid the constant uncertainty and fluctuation of exchange. If these were not the inducements to the allowance of such very heavy damages, as

of re-exchange was passed in the Colony of *Pennsylvania* in 1700 allowing twenty per cent. damages on all bills drawn upon *England* or any part of *Europe*. This fixed rate was not in the nature of a penalty imposed by the statutes in consequence of dishonor, but was intended as a just compensation for the loss incurred in lieu of damages, the calculation of which was rendered extremely difficult, and in many cases doubtful, by reason of the frequent fluctuations of exchange and re-exchange and the difficulty of ascertaining the true rate, and in many instances whether it should be direct or circuitous.[1] Various States sooner or later followed this example, and statutory enactments will now be found in all of them regulating the re-exchange and damages on all protested foreign bills and in some instances on

twenty per cent., I confess myself unable to discover them. It certainly could not be intended merely as a mulct, nor with any other view than to remunerate the party for all his damages in being disappointed in the honoring of his bill. It is not pretended that this claim for a re-exchange, or, more properly, for the difference in the price of bills at one time and another, has ever been recognized in this State by any judicial decision. The Chamber of Commerce, it seems, provide in their regulations for this difference in the price of bills, between the time a bill has been purchased and notice of its dishonor; and I understand that merchants regulate themselves by the rules of the Chamber of Commerce. This, however, cannot make the law; the usage is too recent, and too unsupported by judicial countenance, to produce the consequences contended for. I understand that it has invariably been the practice of the clerk of this court, in assessing damages on protested bills, to give the principal, interest, and twenty per cent. damages, and no more. In my opinion the twenty per cent. is in lieu of all claim for damages in such cases, and the claim for the difference in the price of the bills cannot be supported, and, therefore, it must be deducted in this case." See also Francis *v.* Rucker, Amb. 672; Brown *v.* Van Braam, 3 Dall. (U. S.) 344.

In the subsequent case of Graves *v.* Dash, 12 Johns. (N. Y.) 17, the court of errors attend the rule laid down in Hendricks *v.* Franklin, 4 Johns. (N. Y.) 119, by holding that the holder of a bill of exchange drawn in *New York* on *England* and returned protested, is entitled to recover the contents of the bill, at the rate of exchange or price of bills on *England*, at the time of the return of the dishonored bill and notice thereof to the drawer, together with twenty per cent. damages and interest.

1. Lennig *v.* Ralston, 23 Pa. St. 137; Allen *v.* Union Bank, 5 Whart (Pa.) 425; Lloyd *v.* McGarr, 3 Pa. St. 474; Bangor Bank *v.* Hook, 5 Me. 174.

In Lennig *v.* Ralston, 23 Pa. St. 137, the court by Lewis, J., observes: "No one can foresee the extent of the injury which the holder of a foreign bill of exchange may suffer from its dishonor. It is not like a domestic obligation, the breach of which can, in general, be repaired by the presence and credit of the holder. But the dishonor of foreign bills may occur, and usually does occur, at points where the holders cannot supervise the result, and where they have neither means nor credit to provide against the injury. These instruments are generally procured at a premium by the holders, for the purpose of making their purchases in the country where the bills are payable, or as the means of pursuing their travels, or maintaining their credit abroad. The great distance between the residence of the drawers and that of the acceptors must necessarily cause great delay in procuring indemnity from the former. In the mean time the loss to the holders if they rely exclusively upon the bills to maintain their credit and carry on their business, might be irreparable. Under such circumstances, the recovery of the face of the bill only, with the usual interest, re-exchange, and costs, would be but a cold and inadequate remedy for so great an injury.

inland bills. These statutory provisions are collected in the notes.[1]

1. **Statutory Enactments.**—*Arkansas* Dig. of Statutes 1883, p. 246, §§ 466-7. On every bill of exchange expressed to be for value received drawn or negotiated within this State, payable after date to order, or bearer, which shall be duly presented for acceptance or payment, and protested for non-acceptance or non-payment shall be subject to damages as follows: For a bill drawn on any person at any place within this State at the rate of two per cent. on principal sum, etc.; for bill payable in *Alabama*, *Louisiana*, *Mississippi*, *Tennessee*, *Kentucky*, *Ohio*, *Indiana*, *Illinois*, *Missouri* or any point on the Ohio River, at four per cent. on the principal sum. For any other place within the limits of the United States not hereinbefore expressed, at the rate of five per cent.; for bills payable beyond the limits of the United States, at the rate of ten per cent.

The acceptor of a bill of exchange is liable to holder where the bill is protested for non-payment as follows: Within this State two per cent.; any place without this State but within the limits of the United States, six per cent.; beyond the limits of the United States, ten per cent. See Craig *v.* Price, 23 Ark. 633.

Arizona, Rev. St. 1887, par. 131, p. 70. The holder of any protested draft or bill of exchange drawn by any merchant within the limits of this territory upon his agent or factor living beyond the limits of this territory shall, after having fixed the liabilities of the drawer or indorser of any such draft or bill of exchange, be entitled to recover and receive ten per cent. on the amount of such draft or bill as damages, together with interest and costs of suit thereon accruing.

Alabama, Code 1886, vol. 1, §§ 1771-2-3-4-5. The damages on bills of exchange, inland or foreign, protested for non-acceptance or non-payment, are five per cent. on the sum drawn for.

See Leigh *v.* Lightfoot, 11 Ala. 935; McKenzie *v.* Clauton, 33 Ala. 528; Trammell *v.* Hudmon, 56 Ala. 235; Knott *v.* Venable, 42 Ala. 186.

Such damages are in lieu of all charges except costs of protest incurred previous to and at the time of giving notice of non-payment; and interest on principal sum specified in bill and of the damages thereon from the time at which payment of principal sum has been demanded. Where the bill is payable in United States currency damages cover the exchange. Where payable in foreign currency, then the amount due exclusive of damages payable thereon must be ascertained and determined by the right of exchange or the value of such foreign currency at the time of the demand of payment. When a bill of exchange is protested, for non-acceptance, the same rate of damages is allowed as in case of protest for non-payment. And such damages are in the place of all charges except costs of protests incurred previous to and at the time of giving notice of non-acceptance, but the holder is entitled to recover legal interest exclusive of damages upon the amount of the principal sum from the time when same would have become payable if accepted, interest on the damages from the demand of acceptance and costs of protest.

California, Codes and Sts. 1885 (2 Deerings), p. 564-5, §§ 32-34-5-7-8. Damages are allowed as full compensation for interest accrued before notice of dishonor, re-exchange, expenses and all other damages in favor of holders, for value only upon bills of exchange drawn or negotiated within this State and protested for non-acceptance or non-payment as follows: If drawn upon any person in this State two per cent.; without the State, but in any of the other States west of the Rocky Mountains, five per cent.; in any State east of the Rocky Mountains, ten per cent.; in any foreign country, fifteen per cent. If the amount of a protested bill of exchange is expressed in money of the United States, damages are estimated upon such amount without regard to the rate of exchange; if expressed in foreign money, damages are estimated upon the value of a similar bill at the time of protest in the place nearest to the place where the bill was negotiated, and where such bills are currently sold. See Page *v.* Warner, 4 Cal. 395.

Colorado, G. S. 1883, p. 142, §§ 102-2. Ten per cent. damages besides charges of protest on all foreign bills and on all bills drawn on persons without the State and within the United States.

Connecticut, G. S. 1888, p. 104, §

1864. Damages on bills of exchange protested for non-payment in lieu of interest and all charges before notice of dishonor are as follows: When bill is drawn on any person in the city of New York, two per cent. If upon any person in the States of *New Hampshire*, *Vermont*, *Massachusetts*, *Maine*, *Rhode Island*, *New York* (except city of New York), *New Jersey*, *Delaware*, *Pennsylvania*, *Maryland* or *Virginia*, or in *District of Columbia*, three per cent. In *North Carolina*, *South Carolina*, *Ohio*, *Indiana*, *Illinois*, *Michigan*, *Kentucky*, or *Georgia*, five per cent. In any other State, Territory or district of the United States, eight per cent. And such damages shall be determined without reference to the rate of exchange existing at the time of such notice and demand of payment.

Dakota, Comp. Laws, 1887, §§ 4559–60–61. Damages allowed as full compensation for interest accrued before notice of dishonor, re-exchange, expenses and all other damages in favor of holders for value only, upon bills of exchange drawn within this territory, and protested for non-acceptance or non-payment, are as follows: If drawn on any person in this territory, two per cent; in *Nebraska*, *Iowa*, *Minnesota*, *Wisconsin*, *Illinois*, *Missouri*, or *Montana*, three per cent.; in all other States and Territories, five per cent.; on all foreign bills without the United States, ten per cent. If the amount of protested bill is expressed in money of the United States, damages are estimated without regard to the rate of exchange; if expressed in foreign money, damages are estimated upon the value of a similar bill at the time of protest in the place nearest where the bill was negotiated and where such bills are currently sold.

Delaware, Laws of Del. 1874, ch. 63, p. 356, § 3. The damages on bills of exchange drawn on any person, beyond the seas and returned unpaid with legal protest, shall, as to the drawer, indorser and all concerned, be at the rate of twenty per cent. on the contents of such bills in addition thereto.

Florida Laws 1881 (McClelland's Dig.), p. 839, § 123. Damages on all foreign bills of exchange shall be at the rate of five per cent.

Georgia Code, 1882, p. 700, §§ 2792–3. If any bill of exchange, draft or order is made payable at any place out of this State and within the United States, and protested for non-acceptance or non-payment, the holder thereof shall be entitled to recover of the drawer and indorsers in the first case, and the acceptor also in the latter case, in addition to the principal, interest and protest fees, five per cent. on the principal as damages for non-acceptance or non-payment. If such bill, draft or order is payable at a place without the limits of the United States, the holder may recover ten per cent. damages as above for non-acceptance or non-payment.

Idado Rev. Sts. 1887, §§ 3561-2. The statutory provisions in this Territory are the same as those of *California*.

Illinois Rev. Sts. 1891, ch. 98, §§ 1, 2. On bills of exchange drawn or indorsed within this State and payable without the limits of the United States, etc., ten per cent. damages together with costs and charges of protest. See Montelius *v.* Charles, 76 Ill. 303; North *v.* Campbell, 72 Ill. 380; Nowak *v.* Excelsior Stone Co., 78 Ill. 307; Garvin *v.* Wiswell, 83 Ill. 215; Peoria etc. R. Co. *v.* Neill, 16 Ill. 269; Thayer *v.* Peck, 84 Ill. 74; Eddy *v.* Peterson, 22 Ill. 536; Allen *v.* Kramer, 2 Ill. App. 205. If any bill of exchange drawn upon any person, etc., out of this State, but within the United States, shall be duly presented for acceptance or payment and protested for non-acceptance or non-payment, the drawer or indorser thereof, due notice being given of such non-acceptance or non-payment, shall pay said bill with legal interest, from the time such bill ought to have been paid, until paid, together with costs and charges of protest; and in case suit be brought on such bill of exchange, five per cent. damages in addition. See Montelius *v.* Charles, 76 Ill. 303; Sturges *v.* Fourth Nat. Bank, 75 Ill. 595; Hall *v.* Steel, 68 Ill. 231; Stevens *v.* Park, 73 Ill. 387; Fourth Nat. Bank *v.* City Nat. Bank, 68 Ill. 398; Cook *v.* Renich, 19 Ill. 598; Eddy *v.* Peterson, 22 Ill. 536; Cronise *v.* Kellogg, 20 Ill. 13; Halbrook *v.* Vibbard, 3 Ill. 465; Wood *v.* Price, 46 Ill. 435; Walker *v.* Rogers, 40 Ill. 279; 89 Am. Dec. 348; Mason *v.* Dousay, 35 Ill. 424; 85 Am. Dec. 368; Jones *v.* State Bank, 34 Ill. 313; Ault *v.* Rawson, 14 Ill. 485; Nelson *v.* First Nat. Bank, 48 Ill. 36; 95 Am. Dec. 510; Phelps *v.* Northrop, 56 Ill. 156; 8 Am. Rep. 681; Chumasero *v.* Gilbert, 24

Ill. 293; Deem *v.* Crume, 46 Ill. 73; Gillian *v.* Myers, 31 Ill. 525; Curtiss *v.* Martin, 20 Ill. 577; Bower *v.* Rupert, 24 Ill. 183; McAllister *v.* Smith, 17 Ill. 333; 65 Am. Dec. 651; Rounds *v.* Smith, 42 Ill. 245; Brown *v.* Lechie, 43 Ill.500; Thayer *v.* Peck, 84 Ill. 74; Wood *v.* Surrells, 89 Ill. 107; Givens *v.* Merchants' National Bank, 85 Ill. 442.

Indiana, 2 Rev. Stats. 1888, §§ 5507–9–10–11. Damages on protested bills out of the State, but within the United States, five per cent., without the United States, ten per cent. As to any such bills payable within the United States, the rate of exchange shall not be taken into account. No damages beyond cost of protest shall be chargeable against drawer or indorser if upon notice of protest and demand of the principal sum, the same is paid. No holder of a bill of exchange shall recover damages thereon, if he had not given for same or for some interest therein, a valuable consideration. See State Bank *v.* Bowers, 8 Blackf. (Ind.) 72; State Bank *v.* Rodgers, 3 Ind. 53; May *v.* State Bank, 9 Ind. 233.

Iowa, Rev. Code, 1888, p. 771, § 2096. Five per cent. damages where bill is drawn on a person at a place out of the United States, or in *California*, *Oregon*, *Nevada*, or any of the Territories. In all other places in the United States, other than in this State, three per cent. This section of the code relates to foreign and not to inland bills. First Nat. Bank *v.* Owen, 23 Iowa 185.

Kansas, Gen. Sts., 1889, vol. 1, ch. 14, p. 187, § 490. Damages are six per cent. when bill drawn upon any person, etc., outside of this State, and within or without the United States. No person, etc., within the State shall be liable for protest damages. See Noyes *v.* White, 9 Kan. 640; German *v.* Ritchie, 9 Kan. 106; Knowles *v.* Armstrong, 15 Kan. 371; Woolley *v.* Van Volkenburgh, 16 Kan. 20; Cramer *v.* Eagle Mfg. Co., 23 Kan. 399.

Kentucky, Gen. Sts., 1888, ch. 22, p. 306, § 10. Bills of exchange drawn on any person out of the United States, protested for non-payment or non-acceptance, shall bear ten per cent. interest from day of protest not longer than eighteen months, unless payment be sooner demanded from the party, to be charged or unless by the contract a rate greater than six per cent. is stipulated for. Damages on all other bills are disallowed. See Wood *v.* Farmers' etc. Bank, 7 T. B. Mon. (Ky.) 281.

Maine, Rev. Sts., 1884, p. 700, § 2. Damages on the protest of bills of exchange of a hundred dollars or more, payable by the acceptor, drawer or indorser of a bill in this State, are, if payable at a place seventy-five miles distant, one per cent. If payable in the State of New York or in any State northerly of it, and not in this State, three per cent.; if payable in any Atlantic State or Territory, southerly of New York and northerly of Florida, six per cent., and in any other State or Territory nine per cent.

Maryland, Pub. Gen. Laws, 1888, vol. 1, p. 113, article 13, § 1. The owner or holder of every bill of exchange drawn in this State on any person, etc., in any foreign country and regularly protested, shall have a right to recover so much current money as will purchase a good bill of exchange of the same time of payment, and upon the same place at the current exchange of such bill, and also fifteen per cent. damages, etc. See Bryden *v.* Taylor, 2 Har. & J. (Md.) 396; 3 Am. Dec. 554; Bank of U. S. *v.* U. S., 2 How. (U. S.) 737; U. S. *v.* Bank of U. S., 5 How. (U. S.) 382.

If any indorser of any such bill shall pay to the owner or holder thereof the value of the principal, and the damages and interest aforesaid, he may recover the sum paid with legal interest, etc., from drawer, etc., liable to such indorser upon such bill of exchange.

Massachusetts, Pub. Stat. 1882, ch. 77, p. 428, §§ 1820–21. Damages on bills of exchange payable beyond the limits of the United States and duly protested, are the principal sum at current rates of exchange at the time of demand, and damages at the rate of five per cent., etc. On bills payable out of the commonwealth, but within the United States, as follows: *Maine*, *New Hampshire*, *Vermont*, *Rhode Island*, *Connecticut*, or *New York*, two per cent. In *New Jersey*, *Pennsylvania*, *Maryland* or *Delaware*, three per cent. In *Virginia*, *West Virginia*, *North Carolina*, *South Carolina*, *Georgia* or *District of Columbia*, four per cent. And in any other of the United States, five per cent. The rate of damages within the State, on sums of money not less than $100 and payable not less than seventy-five miles distant from the place, where they were drawn or indorsed, one per cent.

1864. Damages on bills of exchange protested for non-payment in lieu of interest and all charges before notice of dishonor are as follows: When bill is drawn on any person in the city of New York, two per cent. If upon any person in the States of *New Hampshire*, *Vermont*, *Massachusetts*, *Maine*, *Rhode Island*, *New York* (except city of New York), *New Jersey*, *Delaware*, *Pennsylvania*, *Maryland* or *Virginia*, or in *District of Columbia*, three per cent. In *North Carolina*, *South Carolina*, *Ohio*, *Indiana*, *Illinois*, *Michigan*, *Kentucky*, or *Georgia*, five per cent. In any other State, Territory or district of the United States, eight per cent. And such damages shall be determined without reference to the rate of exchange existing at the time of such notice and demand of payment.

Dakota, Comp. Laws, 1887, §§ 4559–60–61. Damages allowed as full compensation for interest accrued before notice of dishonor, re-exchange, expenses and all other damages in favor of holders for value only, upon bills of exchange drawn within this territory, and protested for non-acceptance or non-payment, are as follows: If drawn on any person in this territory, two per cent; in *Nebraska*, *Iowa*, *Minnesota*, *Wisconsin*, *Illinois*, *Missouri*, or *Montana*, three per cent.; in all other States and Territories, five per cent.; on all foreign bills without the United States, ten per cent. If the amount of protested bill is expressed in money of the United States, damages are estimated without regard to the rate of exchange; if expressed in foreign money, damages are estimated upon the value of a similar bill at the time of protest in the place nearest where the bill was negotiated and where such bills are currently sold.

Delaware, Laws of Del. 1874, ch. 63, p. 356, § 3. The damages on bills of exchange drawn on any person, beyond the seas and returned unpaid with legal protest, shall, as to the drawer, indorser and all concerned, be at the rate of twenty per cent. on the contents of such bills in addition thereto.

Florida Laws 1881 (McClelland's Dig.), p. 839, § 123. Damages on all foreign bills of exchange shall be at the rate of five per cent.

Georgia Code, 1882, p. 700, §§ 2792–3. If any bill of exchange, draft or order is made payable at any place out of this State and within the United States, and protested for non-accept- ance or non-payment, the holder there of shall be entitled to recover of th drawer and indorsers in the first case and the acceptor also in the latter case in addition to the principal, interes and protest fees, five per cent. on th principal as damages for non-accep ance or non-payment. If such bil draft or order is payable at a pla without the limits of the United State the holder may recover ten per ce damages as above for non-acceptan or non-payment.

Idado Rev. Sts. 1887, §§ 3561- The statutory provisions in this Ter tory are the same as those of *Calif nia*.

Illinois Rev. Sts. 1891, ch. 98, §§ 2. On bills of exchange drawn or dorsed within this State and paya without the limits of the United Sta etc., ten per cent. damages toget with costs and charges of protest. Montelius *v.* Charles, 76 Ill. North *v.* Campbell, 72 Ill. 380; No *v.* Excelsior Stone Co., 78 Ill. Garvin *v.* Wiswell, 83 Ill. 215; Pe etc. R. Co. *v.* Neill, 16 Ill. 269; Th *v.* Peck, 84 Ill. 74; Eddy *v.* Pete 22 Ill. 536; Allen *v.* Kramer, 2 Ill. 205. If any bill of exchange d upon any person, etc., out of this S but within the United States, sha duly presented for acceptance or ment and protested for non-ac ance or non-payment, the draw indorser thereof, due notice given of such non-acceptance or payment, shall pay said bill with interest, from the time such bill to have been paid, until paid, to with costs and charges of protes in case suit be brought on such exchange, five per cent. damages dition. See Montelius *v.* Char Ill. 303; Sturges *v.* Fourth Nat. 75 Ill. 595; Hall *v.* Steel, 68 Il Stevens *v.* Park, 73 Ill. 387; Nat. Bank *v.* City Nat. Bank, 398; Cook *v.* Renich, 19 Ill. 598 *v.* Peterson, 22 Ill. 536; Cro Kellogg, 20 Ill. 13; Halbrook bard, 3 Ill. 465; Wood *v.* Price 435; Walker *v.* Rogers, 40 89 Am. Dec. 348; Mason *v.* 35 Ill. 424; 85 Am. Dec. 368; State Bank, 34 Ill. 313; Ault son, 14 Ill. 485; Nelson *v.* Fi Bank, 48 Ill. 36; 95 Am. D Phelps *v.* Northrop, 56 Ill. 156 Rep. 681; Chur Gil

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Michigan, Gen. Sts. 1882, tit. 11, ch. 35, p. 452, §§ 1584–5. Damages on protested bills of exchange payable without the limits of the United States, are five per cent. in addition to current rate of exchange at the time of the demand, etc. On bills payable without the State, but within the United States, damages are as follows: In *Wisconsin*, *Illinois*, *Indiana*, *Pennsylvania*, *Ohio*, or *New York*, three per cent. In *Missouri*, *Kentucky*, *Maine*, *New Hampshire*, *Vermont*, *Massachusetts*, *Rhode Island*, *Connecticut*, *New Jersey*, *Delaware*, *Maryland*, *Virginia* or *District of Columbia*, five per cent. In other States and Territories not heretofore mentioned, ten per cent.

Minnesota, Sts. 1891, vol. 1 p. 565, §§ 2107–8. Damages on foreign protested bills drawn or indorsed within this State and payable without the limits of the United States ten per cent. On inland bills drawn out of this State and within the United States five per cent., together with costs and charges of protest.

Mississippi, Rev. Code, 1880, ch. 40, p. 331, §§ 1127–8. On all protested bills of exchange drawn upon any person within the United States and out of this State, five per cent. damages. On all protested bills payable out of the United States, ten per cent. on the amount drawn for, the principal to draw interest also, and in all cases the holder shall be entitled to costs and charges. On domestic bills of exchange drawn on and payable in this State for the sum of $20 or upwards shall be protested for non-payment or non-acceptance in like manner as foreign bills, but no damages shall accrue, and in every other respect they shall be subject to and governed by the same customs and usages which govern foreign bills of exchange.

Missouri, Rev. Sts. 1889, vol. 1, p. 254, §§ 725–6–7–8. Damages on bills of exchange expressed to be for value received drawn or negotiated within this State protested for non-payment or non-acceptance are as follows: When drawn on any person within this State, four per cent. If drawn on any person out of this State but within the United States or Territories thereof, the rate of ten per cent. If drawn on any person without the United States, at the rate of twenty per cent. The damages herein allowed shall be recovered only by the holder of a bill who shall have purchased the same or acquired some interest therein for a valuable consideration.

The note must have been negotiable and negotiated or damages are not allowed. Bank of Missouri *v.* Wright, 10 Mo. 719.

Damages allowed only on the principal sum and not on the interest. Barnes *v.* McMullins, 78 Mo. 277.

Receipt of principal and interest are not a waiver of damages. Kennedy *v.* Bragg, 1 Mo. App. 574.

Note must contain words "value received" to authorize damages. Hallowell *v.* Page, 24 Mo. 590; Riggs *v.* St. Louis, 7 Mo. 438.

Words "value received" not necessary to negotiability of bill of exchange, but essential to recovery of damages for its dishonor. Lowenstein *v.* Knopf, 2 Mo. App. 159; Taylor *v.* Newman, 77 Mo. 263.

Nebraska, Comp. St. 1891, p. 522, ch. 41, § 7. Damages on protested bills of exchange payable without the jurisdiction of the United States, twelve per cent. Within the jurisdiction of the United States and without the jurisdiction of this State, six per cent.

Nevada, Gen. St. 1885, p. 1086, §§ 4892–3–4–5–6. Damages on all protested bills of exchange drawn or negotiated within this Territory upon any person in any of the United States east of the Rocky Mountains, fifteen per cent. In Europe or any foreign country twenty per cent. Such damages shall be in lieu of cost and charges of protest and all other charges incurred previous to, and at the time of giving notice of non-payment or non-acceptance, but the holder of such bill shall be entitled to recover lawful interest upon the principal sum specified in such bills and damages thereon from time of notice of protest for non-acceptance or non-payment. If the contents of such bill be expressed in money of the United States, the amount due thereon and on the damages herein allowed, shall be ascertained and determined without reference to the rate of exchange. If expressed in foreign currency then the amount due exclusive of the damages payable thereon shall be ascertained and determined at the rate of exchange or the value of such foreign currency at the time of the demand of payment. The damages allowed by this act shall be recovered only by the

holder of the bill who shall have purchased the same or some interest therein for a valuable consideration.

New Mexico, Comp. Laws, 1884, tit. 29, ch. 1, § 1728. The rate of damage on protested bills of exchange when drawn upon any person out of the United States, twelve per cent., with interest from the time of protest. When drawn upon any person within the United States or Territories thereof, six per cent., with interest.

New York, Rev. St., Codes and Laws, 1890, vol. 1, p. 276, §§ 1215–14–15–16. Damages on all bills of exchange protested for non-payment or non-acceptance, drawn upon any person in *Maine*, *New Hampshire*, *Vermont*, *Massachusetts*, *Rhode Island*, *Connecticut*, *New Jersey*, *Pennsylvania*, *Ohio*, *Delaware*, *Maryland*, *Virginia* or *District of Columbia*, three per cent. If drawn upon any person in *North Carolina*, *South Carolina*, *Georgia*, *Kentucky* or *Tennessee*, five per cent. If drawn upon any person in any other State or Territory of the United States or in any other place on, or adjacent to this continent, and north of the Equator, or in any other British or other foreign possession in the West Indies, or elsewhere in the Western Atlantic Ocean, ten per cent.; if drawn upon any person at any port or place in Europe, ten per cent. When the contents of such a bill are expressed in money of the United States, damages shall be ascertained and determined without reference to the rate of exchange existing between this State and the place on which the bill shall have been drawn at the time of the payment or notice of non-payment. When expressed in foreign currency, the amount due, exclusive of the damages payable thereon shall be ascertained and determined at the rate of exchange or the value of such foreign currency at the time of the demand of payment.

See Butt *v.* Hoge, 2 Hilt. (N. Y.) 83; DeRham *v.* Grove, 18 Abb. Pr. (N. Y.) 45; Brown *v.* Post, 6 Rob. (N. Y.) 117.

The above damages shall be recovered only by the holder of a bill who shall have purchased the same or some interest therein for a valuable consideration.

North Carolina, Code 1883, vol. 1, p. 19, § 48. The damages on protested bills of exchange, drawn or indorsed in this State, are as follows: For bills drawn upon any person in any other of the United States or Territories, three per cent.; for bills payable in any other place in North America (excepting the northwest coast of America) or in any of the West Indies, or Bahama Islands, ten per cent.; for bills payable in the Island of Madeira, the Canaries, the Azores, the Cape de Verd Islands, or in any other state or place in Europe or South America, fifteen per cent.; if payable in any other part of the world, twenty per cent.

Ohio, Rev. St. 1854 (Swan's ed.), p. 576. The damages on bills of exchange negotiated in this State, drawn on any person without the jurisdiction of the United States, and returned protested, are twelve per cent.; upon bills drawn on any person within the jurisdiction of the United States and without this State, six per cent. The bills in all cases bear interest at six per cent. from the date of protest. No damages are recoverable in case there is an agreement or understanding between the drawer or indorser and the payee or indorsee permitting the bill to be paid at any other place than that on which it was drawn.

Under this statute it is held that damages cannot be recovered on a bill drawn upon a person resident in *Ohio*, although payable in *New York*. Farmers' Bank *v.* Brainard, 8 Ohio 292.

But where a bill was drawn in Cincinnati, directed to T & C New Orleans, T & C being a firm, having business houses both in New Orleans and Cincinnati, T residing in the former city and C in the latter, and the bill was accepted for the New Orleans house by C at Cincinnati, and at maturity was presented for payment to the house in New Orleans and protested for non-payment, it was held that the drawers were liable to pay six per cent. damages according to the statute. The former case (Farmers' Bank *v.* Brainerd, 8 Ohio 292) was distinguished from this by the fact that the bill in that case was drawn, not on a firm, but on an individual resident within the State, and not appearing to have any place of business without the State at which the bill was addressed to him. West *v.* Valley Bank, 6 Ohio St. 168.

See in this connection, State Bank *v.* Bowers, 8 Blackf. (Ind.) 72; Wood *v.* Farmers' etc. Bank, 7 T.B.Mon. (Ky.) 281; Clay *v.* Hopkins, 3 A. K.

Marsh. (Ky.) 485; Bank of U. S. *v.* Daniel, 12 Pet. (U. S.) 32. Protest is necessary to entitle the holder of a bill, drawn in *Ohio* on another State, to statutory damages. Case *v.* Heffner, 10 Ohio 180. See 1 Parsons N. & B., 660, n.

Oregon, Hill's Ann. Laws, 1887, vol. 2, p. 1416, §§ 3195–6. Bills of exchange payable without the limits of the United States protested for non-acceptance or non-payment, the party liable for contents of such bill shall pay the sum at the current rate of exchange at the time of the demand, and damages at the rate of ten per cent., together with interest to be computed from the time of protest. Damages for non-acceptance or non-payment on inland bills, five per cent. damages.

Pennsylvania, 1 Brightly's Pur. Dig., p. 189, § 7 (P. L. 1850, 746). Damages on bills returned, legally protested, for non-acceptance or non-payment when drawn within this State upon any person, etc., in any of the United States or Territories, excepting Upper and Lower California, New Mexico and Oregon, shall be five per cent. on the principal sum; if upon Upper and Lower California, New Mexico, or Oregon, ten per cent.; if upon China, India or other parts of Asia, Africa, or islands in the Pacific Ocean, twenty per cent.; if upon Mexico, the Spanish Main, West Indies, or other Atlantic islands, east coast of South America, Great Britain or other places in Europe, ten per cent., and if upon places on the west coast of South America, fifteen per cent., and if upon any other part of the world, ten per cent.

These damages shall be in lieu of interest and all other charges, except the charges of protest, to the time when notice of protest and demand of payment shall have been given and made; and the amount of such bill and damages payable thereon shall be ascertained and determined by the rate of exchange, or value of the money or currency mentioned in such bill, at the time of notice of protest and demand of payment. See cases cited in 1 Brightly's Pur. Dig., p. 189.

Rhode Island, Pub. Sts. 1882, p. 343, ch. 142, § 1 & 2. Damages on protested foreign bills of exchange drawn on any person, etc., without the United States, ten per cent. On protested inland bills drawn or indorsed within the State and payable without the State, five per cent.

Tennessee, Code 1884, ch. 18, §§ 2720–1. Damages on protested bills of exchange are as follows: Bills drawn upon a person in any of the United States or Territories, three per cent. If drawn upon any person in any other State or place in North America, bordering upon the Gulf of Mexico or in any of the West India Islands, fifteen per cent. If drawn upon any person in any other part of the world, twenty per cent. These damages shall be in lieu of interest and all other charges, except charges of protest to the time when notice of the protest and demand of payment shall have been given. But interest shall be computed from that time on the principal, together with the damages and charges of protest.

In Cox *v.* Bank of Tennessee, 3 Sneed (Tenn.) 140, the court held that a bill drawn and accepted in this State, all the parties to which reside in this State, but payable in another State, is not such a bill as will entitle the holder to the three per cent. damages given by the statute.

Texas, Sayles' Civil Sts., vol. 1, p. 129, art. 275. The holder of any protested draft or bill of exchange drawn by a merchant within the limits of this State upon his agent or factor living beyond the limits of this State shall, after having fixed the liability of the drawer or indorser of any such draft or bill of exchange, be entitled to recover and receive ten per cent. on the amount of such draft or bill as damages, together with interest and costs of suit thereon accruing.

Utah, Com. Laws, 1888, ol. 2, p. 172–3, §§ 2941–2–4–5. Damages are allowed on protested bills as full compensation for interest accrued before notice of dishonor, re-exchange, expenses and all other damages in favor of holders for value only, as follows: When drawn upon any person in this Territory, one per cent.; in any of the other States or Territories of the United States, two and one-half per cent. In any foreign countries, five per cent. If the bill is expressed in money of the United States, damages are estimated without regard to the rate of exchange. If expressed in foreign money, damages are estimated upon the value of a similar bill at the time of protest, in the place nearest to the place where the bill was nego-

In most of the States, protest is generally necessary to render the drawer liable for statutory damages, and where there has been no protest, the holder can recover only the principal and interest.[1] This fixed rate of damage upon the dishonor of the bill is as much a part of the obligation as the sum specified in the bill, and it has been held in *New York* that the holder of a foreign bill is entitled to recover damages from the drawer for non-payment, upon the whole amount of the bill, even where the acceptor, after protest, paid part of the bill at the place where it was payable.[2] The weight of authority, however, seems

tiated, and where such bills are currently sold.

Virginia, Code 1887, p. 683, ch. 134, § 2851. When a bill of exchange drawn or indorsed within this State is protested for non-acceptance or non-payment, there shall be paid by the party liable for the principal of such bill, in addition to what else he is liable for, damages upon the principal, at the rate of three per cent., if the bill be payable out of Virginia and within the United States, and at the rate of ten per cent. if the bill be payable without the United States.

West Virginia, Code 1887, p. 701, ch. 99, § 9. Same as *Virginia*.

Washington, Hill's Sts. & Codes 1891, vol. 1, p. 824, §§ 2396–7. The rate of damages to be allowed and paid upon the usual protest for non-payment of bills of exchange, drawn or indorsed within the State, if payable without the limits of the United States shall be ten per cent., and if payable out of this State, but within the United States, five per cent.

Wisconsin, Sanborn and Berryman Annot. Sts., 1889, vol. 1. p. 997, §§ 1682–3. Whenever any bill of exchange drawn or indorsed within this State and payable without the limits of the United States shall be duly protested for non-acceptance or non-payment, the party liable for contents of such bill, shall, upon due notice and demand thereof, pay the same at the current rate of exchange at the time of the demand, and damages at the rate of five per cent., together with interest from date of protest. On bills drawn upon any person, etc., out of this State, but within some State or Territory of the United States, five per cent. damages, together with costs and charges of protest.

1. Case *v.* Heffner, 10 Ohio 180; McMurchey *v.* Robinson, 10 Ohio 496; Wanzer *v.* Tupper, 8 How. (U. S.) 234; Bailey *v.* Dozier, 6 How. (U. S.) 23; Murry *v.* Clayborn, 2 Bibb (Ky.) 300; Daniel *v.* Downing, 26 Ohio St. 578; Jordan *v.* Bell, 8 Port. (Ala.) 53; Robinson *v.* Johnson, 1 Mo. 434.

But see Phillips *v.* Evans, 64 Mo. 17, where the court held that, where a bill was drawn in another State for "value received," and accepted in *Missouri*, the acceptor was liable for the statutory damages without protest.

Before protest damages can be recovered, there must be such demand and notice as will charge the indorser. Noyes *v.* White, 9 Kan. 640.

Under an *Indiana* statute, which provides that "no damages beyond cost of protest, shall be chargeable against drawer or indorser, if, upon notice of protest and demand of the principal sum, the same is paid," the court held, that notice of protest was in effect a demand of payment, and the defendants failing to pay the principal of the bill upon notice of protest were liable for the statutory damages of five per cent. on all dishonored bills payable without the State but within the United States. May *v.* State Bank, 9 Ind. 233.

Foreign Distinguished from Inland Bills.—A bill of exchange drawn in one of the United States, payable in another is considered a foreign bill, and must be protested in order to preserve the liability of the indorser or drawer, as well for the damages on the dishonored bill as for the principal sum. 3 Rand. on Com. Pap., § 1142; 1 Parsons' N. & B. 642; Commercial Bank *v.* Varnum, 49 N. Y. 269; Buckner *v.* Finley, 2 Pet. (U. S.) 586; Duncan *v.* Course, 1 Mills 100; Warren *v.* Cooms, 20 Me. 139.

2. In Hargous *v.* Lahens, 3 Sandf. (N. Y.) 213 (1849), the court by Sandford, J., observes: "The allowance of damages rests upon the theory that the holder of the bill, by reason of its

to be, that where the acceptor pays part of the bill, the damages recoverable by the holder will be reduced accordingly.[1]

It will be observed that some of these statutes provide that exchange is allowed only on bills payable in foreign money, and where the same are payable in currency of the United States they are recoverable without exchange.[2] Other statutes provide for damages in lieu of exchange. In *South Carolina*, the jury may give the true difference of exchange on bills payable in a foreign country.[3]

non-payment, is put to the expense of remitting the same amount to replace that expressed in the bill, in the country where it was payable. The rate of exchange measures the damages, in the absence of a statutory or customary regulation. This allowance is made without any inquiry as to the fact of a remittance to cover the amount of the protested bill. The liability to pay the damages becomes perfect on the return of the bill protested. A subsequent part payment by the acceptor can have no greater influence in reducing or extinguishing that liability than a similar partial payment by the drawer or any other party. It is as fixed and determinate an obligation, as the debt represented by the sum expressed in the bill itself. . . . Now it is obvious that the subsequent collection of the amount of the protested bill at the place where it was payable, will not make the remitter whole in the transaction, unless it shall so happen that the rate of exchange is at that time so favorable to him that he can sell a bill drawn by him against such collection, for as much as it cost him to remit and take up the protested bill when he received notice of its dishonor, together with his expenses in the collection. Thus the result in reference to an actual reimbursement of the remitter, or a restoration to the same State he would have been in if the bill had been paid according to its tenor and obligation, would depend upon the fluctuations of exchange, the credit of the holder as a drawer of foreign bills, the continued solvency of his agent abroad, and other considerations, which we need not enumerate. It was intended by the rule of fixed damages provided in the statute, to avoid all inquiries of this character in every case of protested bills of exchange. And we think the good sense of the thing, whether regarded as under the statute or the law-merchant, entitles the holder of a foreign bill to his damages on its non-payment, irrespective of the place where he may subsequently receive entire or partial payment of its amount." See above opinion for a review of cases to the contrary.

1. Bangor Bank *v.* Hook, 5 Me. 174; Warren *v.* Cooms, 20 Me. 139; Porter *v.* Ingraham, 10 Mass. 88; Lang *v.* Barclay, 3 Stark. 38; 2 Chitty on Bills 669; Story on Bills 493.

2. *Alabama*, 1876, Code, § 2108; *Indiana*, 1881, R. S., § 5509; *Louisiana*, 1876, R. S., §§ 322-3; *Missouri*, 1879, R. S., §§ 545-6; *Nevada*, 1873, C. L., ch. 5, §§ 22-3; *Utah*, 1882, P. L. 64, § 105.

3. *South Carolina*, 1882, G. S., § 1300.

Waiver of Statutory Damages.— If the holder of a bill of exchange accepts payment after maturity without at the time demanding statutory damages for the dishonor of the bill, he thereby waives his right to recover such damages, although he may be entitled to interest from the time of dishonor to the time of the subsequent payment. U. S. *v.* Gurrey, 4 Cranch (U. S.) 333. But see Kennerly *v.* Bragg, 1 Mo. App. 574, where the court held, that in the case of a negoable and negotiated note, the receipt of principal and interest, after dishonor, by the holder, who purchased for value, is no waiver of the claim for damages.

The second of a foreign bill of exchange drawn at San Francisco, Cal. payable at sight, was presented to the drawee, at Columbus, Ohio, and, payment being refused, it was duly protested. Afterwards, and before suit was brought, the first of exchange was paid to the holder with interest and

VI. Re-exchange and Damages on Promissory Notes.—Although, by the law-merchant, promissory notes do not fall within the rule regulating re-exchange and damages on dishonored bills of exchange, it has been held that they can be so drawn as to include re-exchange.[1] And where a promissory note is made expressly payable at a particular place, if dishonored there, and the holder is compelled to seek payment elsewhere, he is entitled to the difference of exchange.[2] And this, on the ground that wherever suit is brought, the holder ought to receive the principal sum with interest, and such damages as would replace the money in the country where it ought to have been paid.[3] In *New York* and *Massachusetts*, however, the courts have decided that the par, and not the rate of exchange, shall govern.[4]

RE-EXECUTION.—See Lost Papers, vol. 13, p. 1069: Reformation.

RE-EXPATRIATION.—See Expatriation, vol. 7, p. 488.

cost of protest. *Held*, the drawer was released from the payment of damages for the dishonor of the second of exchange. Page *v.* Warner, 4 Cal. 395.

Where a drawer who has become liable for damages upon the non-acceptance of the bill, gives his check to the holder for the amount of the bill as a guaranty of its acceptance upon a second presentation to the drawee, the holder, by his acceptance of the check, waives his right to statutory damages for non-acceptance of the bill upon the first presentation. Pesant *v.* Pickersgill, 56 N. Y. 650.

1. 2 Daniel on Neg. Inst., § 1453; 1 Parsons N. & B. 652; Pollard *v.* Herries, 3 B. & P. 335; Grutacap *v.* Woulluise, 2 McLean (U. S.) 581.

2. Wood *v.* Kelso, 27 Pa. St. 241; Lee *v.* Wilcocks, 5 S. & R. (Pa.) 48.

3. Grant *v.* Healey, 3 Sumn. (U. S.) 523; Lanusse *v.* Barker, 3 Wheat. (U. S.) 147; Woodhull *v.* Wagner, 1 Baldw. (U. S.) 302; Smith *v.* Shaw, 2 Wash. (U. S.) 167.

In Bank of Missouri *v.* Wright, 10 Mo. 719, the court held that statutory damages would not be allowed on a negotiable promissory note unless the note had been negotiated. And in Howard *v.* Central Bank, 3 Ga. 375, the court held that, when the note was indorsed, the statutory damages would be allowed on its dishonor.

Where a note, not itself subject to statutory damages, was given to take up a bill drawn between parties in the same State, the court held that the amount of re-exchange as liquidated damages could be included in the note. Bank of U. S. *v.* Daniel, 12 Pet. (U. S.) 32.

4. In Martin *v.* Franklin, 4 Johns. (N. Y.) 124, the court held that the debt is to be paid according to the par, and not the rate of exchange. "It is recoverable and payable here to the plaintiffs or their agent; and the courts are not to inquire into the disposition of the debt, after it reaches the hands of the agent. He may remit the debt to his principal abroad, in bills of exchange, or he may invest it here on his behalf, or transmit it to some other part of the United States, or to other countries, on the same account. We cannot trace the disposition which is to take place, subsequent to the recovery, nor award special damages upon such uncertain calculation. All the plaintiffs can ask, Is their debt justly liquidated and paid in the lawful currency of the United States?"

See also Scofield *v.* Day, 20 Johns. (N. Y.) 102.

"When a foreign creditor sues for his debt in this State (*Massachusetts*), he will recover (except in the case of a bill of exchange) at the par of exchange." Adams *v.* Cordis, 25 Mass. 260; Alcock *v.* Hopkins, 6 Cush. (Mass.) 484; Lodge *v.* Spooner, 74 Mass. 166.

REFEREES[1]—(See also ARBITRATION AND AWARD, vol. 1, p. 646; AUDITORS, vol. 1, p. 1009; MASTER IN EQUITY, vol. 14, p. 919):

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I. **DEFINITION.**—A referee is a person especially selected to try a cause in the place of a court and jury; or to examine a question or issue raised in a pending suit and report thereupon to the court; or to give information as to the character or mercantile standing of a party asking credit from another; or to give information to an insurer about the party insured.[2]

1. **Referee in Case of Need** (or *Au Besoin*).—A person suggested in a bill of exchange to whom application shall be made on the drawee's refusal. 1 Rand. Com. Paper. § 4; Story, Bills Exch., § 65; Bills of Exchange Act, 45 and 46 Vict., ch. 61, § 15.

2. Bouv. L. Dict. (15th ed.), vol. 2, p. 526; Anderson's L. Dict., p. 866. The term includes, in a general sense, auditors, masters in equity, examiners, arbitrators, registers in bankruptcy, and like officers. Anderson's L. Dict., p. 866. But strictly speaking, a referee is distinguished from an arbitrator in that the latter is employed where no lawsuit has been brought, while the former decides issues or

II. **Referees to Decide Causes—1. Origin and History.**—In the common law action of account the settlement of the account was made before auditors appointed by the court, who, however, could not determine even provisionally any controverted matter of fact or law, but were required to refer the same to the court to be decided by a jury or by the judge.[1] The action of account was consequently intricate in its course of procedure, dilatory, and expensive; and moreover it did not reach all cases of accounts; so that a bill in equity for an accounting was preferable. This action, therefore, fell into disuse, and the practice arose in *England* of bringing *indebitatus assumpsit* in place of it, the parties usually consenting, where the account was obviously too complicated to be tried by a jury, to refer it as in equity; and finally the usage became so general that it was at last held, disregarding the old cases, that *indebitatus assumpsit* would lie, no matter how numerous the items in the account,—the practical effect of which was to compel parties to consent to refer where the accounts were long or complicated.[2]

questions arising in an actual suit. Abb. L. Dict., vol. 2, p. 394. And a reference is distinguished from a trial or hearing in being conducted by non-judicial persons in matters not capable of being conveniently examined by the court. Abb. L. Dict., vol. 2, p. 394. As used in U. S. Rev. Sts., § 824, the word "referee" relates to officers appointed under State laws and authorized to hear and determine questions submitted to them; and not to masters in chancery, whether generally or specially appointed. Central Trust Co. *v.* Wabash, etc., R. Co., 32 Fed. Rep. 684.

In courts of equity referees are usually termed "masters" or "commissioners."

In *Missouri*, there is a distinction between a referee and a commissioner. A referee is named and appointed by the consent of the parties. A commissioner can be appointed only when the parties do not agree on a reference. Walton *v.* Walton, 17 Mo. 376.

In some jurisdictions referees are appointed as masters in chancery were under equity practice. So in the English courts, where they are called official or standing referees. Abb. L. Dict., vol. 2, p. 395.

1. 3 Bl. Com. 162–3; 1 Chit. Pl. 44; 3 Rob Pr. (2d ed.) 410; Bac. Abr., Accompt, (A); 3 Th. Co. Lit. 346–7, notes (15), (16), (P); Godfrey *v.* Saunders, 3 Wils. 94.

2. Tomkins *v.* Willsheare, 5 Taunt. 431; Magown *v.* Sinclair, 5 Daly (N. Y.) 68.

In the colony of *New York* the same result took place at an earlier period. Under the Dutch rule, the settlement of matters of account was, in accordance with the usage in Amsterdam, referred to three persons called arbitrators; and like some other Dutch usages or laws, this was continued for many years after New York became an English colony, these three persons being sometimes called arbitrators and sometimes referees. Introd. to E. D. Smith's Reports, XLIV; 2 Rec. of Mayor's Court; Rec. of Mayors, vols. 2–7; Magown *v.* Sinclair, 5 Daly (N. Y.) 63. The charter of Liberties and Privileges of 1683, however, provided that all trials should be by a jury of twelve men, which virtually abolished this mode of procedure; and there was no way then by which a matter involving an account could be tried at common law, except by an action of account. But it was found not only that this action would not reach all cases of accounts, but also that the course of procedure in it, in addition to the delay, expense, and inconvenience involved in the action, could not be adapted to trial by jury; for in this ancient action there were two judgments, first, that the defendant account, or, as it was called, *quod computet*, and second, that the plaintiff recover, or *quod recuperet*. Upon the first judgment the court assigned two

In the modern practice of the common law courts, the system of references has been gradually but widely brought into use; and when a cause or action involves matters of account, or other intricate details, which require minute examination, and for that reason are not fit to be brought before a jury, it is not unusual to refer these to the decision of one or more disinterested and qualified individuals, who may investigate them and report to the court.[1]

2. Voluntary References.—The practice of referring pending actions, under a rule of court, where the parties consented, was well known at common law, and has been recognized also in most, if not all, the State courts; and the report of the referee, when regularly made and duly accepted, is regarded as the proper foundation of judgment.[2] The federal courts likewise, since they have authority to establish all necessary rules for the orderly conduct of their business, provided such rules are not repugnant to the laws of the *United States*, may upon consent appoint referees to hear and determine the issues in a case; and, upon the report of the same, judgment may be entered.[3] The consent to

auditors, usually officers of the court, to investigate the account. Before these the defendant might plead anew and the plaintiff might demur or take issue in point of fact; the demurrer or issue was certified by the auditors to the court, where matter of law was decided by the judge, and a *venire* was awarded to try an issue of fact. If that issue was found for the plaintiff, there was a second judgment *quod recuperet*, that he recover the sum found to be due. Bac. Abr., Accompt (F); 1 Stor. Eq. (13th ed.), §§ 447–8; Co. Lit. 90, b; Wyche's Pract. 14; 4 Anne, ch. 16, § 27; Godfrey *v.* Saunders, 3 Wils. 94; Williams *v.* Lee, 1 Mod. 42. Such a procedure as this was wholly inapplicable to the trial of issues of fact joined in an action by a jury, and as the remedy in equity was then but imperfectly understood in the colony, the action of *assumpsit* was resorted to as a necessity; and matters of account appear to have been tried in that form, before a jury, down to 1768, when the investigation of accounts before juries proved to be so inconvenient and unsatisfactory that a statute was passed establishing the present *New York* mode of trial before referees. Magown *v.* Sinclair 5 Daly (N. Y.) 69.

1. Abb. L. Dict., vol. 2, p. 395.

2. Hall *v.* Mister, 1 Salk. 84; Heckers *v.* Fowler, 2 Wall. (U. S.) 123; Yates *v.* Russell, 17 Johns. (N. Y.) 461; Bank of Monroe *v.* Widner, 11 Paige (N. Y.) 533; 43 Am. Dec. 768; Green *v.* Pathen, 13 Wend. (N. Y.) 295; Feeter *v.* Heath, 11 Wend. (N. Y.) 482; Miller *v.* Miller, 2 Pick. (Mass.) 570; Graves *v.* Fisher, 5 Me. 70; Com. *v.* Pejepscut Proprietors, 7 Mass. 420.

But in *New York* a reference may in the discretion of the court be refused, even where the parties consent, in matrimonial causes; in actions against a corporation to obtain a dissolution thereof, the appointment of a receiver of its property, or the distribution of the same. unless it is brought by the attorney-general; and in actions where the defendant is an infant. Code Civ. Pro., § 1012.

3. Heckers *v.* Fowler, 2 Wall. (U. S.) 123; Alexandria Canal Co. *v.* Swann, 5 How. (U. S.) 89; Lyons *v.* Lyons Nat. Bank, 8 Fed. Rep. 374; Sicard *v.* Buffalo, etc., R.Co., 15 Blatchf. (U. S.) 525; Tyler *v.* Angevine, 15 Blatchf. (U. S.) 536; York, etc., R. Co. *v.* Myers, 18 How. (U. S.) 246; Robinson *v.* Mutual Benefit Life Ins. Co., 15 Blatchf. (U. S.) 194. 201.

In Newcomb *v.* Wood, 97 U. S. 581, the court by Swayne, J, said: "The power of a court of justice, with the consent of the parties, to appoint arbitrators and refer a case pending before it, is incident to all judicial administration, where the right exists to ascertain the facts as well as to pronounce the law. *Conventio facit legem.* In such an agreement there is nothing contrary to law or public policy."

make a reference a rule of court is never implied, where the intent does not appear, or a contrary intent is manifest.[1] A party cannot be compelled to acquiesce in a reference as the condition of obtaining a favor,[2] or under penalty of having certain relief awarded against him.[3] All the parties must consent; hence, it is error for the court to order a reference in an action to which there is a party whose name is unknown.[4] The consent of the parties is usually required to be in writing,[5] or entered of record;[6] but a written consent may be implied or waived in certain cases,[7] or the consent may be given orally in open court by the parties' attorneys.[8] The consent once given, a party is estopped from asserting that the cause was not a referable one;[9] nor can either party, after consent has been given, and a rule of reference entered, revoke such consent or rescind such rule; although the court will rescind the rule upon good cause appearing to itself or shown by a party.[10]

When a case has, by the stipulation of the parties, been referred to a referee, and after judgment is entered upon his report, the court grants a new trial, it cannot, without a new consent of the parties, again refer the case to the same or any other referee.[11]

1. Brendlinger *v.* Yeagley, 53 Pa. St. 468.

2. Cordier *v.* Cordier, 26 How. Pr. (N. Y.) 187.

But, where an order of reference is consented to, as a condition of securing an adjournment of an action, objection cannot afterwards be made that the order was improper. Coston *v.* Morris, 51 Hun (N. Y.) 643.

3. Barnes *v.* West, 16 Hun (N.Y.) 68.

4. Benham *v.* Rowe, 2 Cal. 261; Hastings *v.* Cunningham, 35 Cal. 549.

5. Smith *v.* Polack, 2 Cal. 92; Shaw *v.* Kent, 11 Ind. 80.

In *New York*, the written consent to refer may be written by the parties, or by their attorneys, or by the clerk of the court entering their consent in the minutes of the court, or by the referees, who stand in the place of the court, entering it in their minutes. Leaycroft *v.* Fowler, 7 How. Pr. (N. Y.) 259.

6. Morisey *v.* Swinson, 104 N. Car. 555.

7. As where the parties appear before the referees and proceed with the cause. Bucklin *v.* Chapin, 53 Barb. (N. Y.) 488; 35 How. Pr. (N. Y.) 155; Quinn *v.* Lloyd, 7 Robt. (N. Y.) 157; McShane *v.* Gray, 13 Iowa 504. Or where, without objection from either party, the court orders the cause to be referred. Smith *v.* Hicks (N. Car), 1891), 12 S. E. Rep 1035. But in *Indiana* it was held that where the record contained no written consent to the reference, a waiver of the right of trial by jury could not be inferred from the fact that the record did not show that any objection was made to the reference. Shaw *v.* Kent, 11 Ind. 80. The consent of the parties may also be presumed from their stipulating to pay the referee a certain sum for his services. Dinsmore *v.* Smith, 17 Wis. 20. Similarly, it has been held that the want of a power of attorney to submit a cause to arbitration is cured by the client's personal appearance and participation in the arbitration. Diedrick *v.* Richley, 2 Hill (N. Y.) 271.

8. People *v.* McGinnis, 1 Park. Cr. Rep. (N. Y.) 387; Keator *v.* Ulster, etc., Plank Road Co., 7 How. Pr. (N. Y.) 41. In Bonner *v.* McPhail, 31 Barb. (N. Y.) 106, it is intimated that an oral consent by the parties is binding, if the reference is actually proceeded with.

A recital in an order of reference that a consent had been given in open court, has been held equivalent to an actual written consent. Waterman *v.* Waterman, 37 How. Pr. (N. Y.) 36.

9. Yates *v.* Russell, 17 Johns. (N.Y.) 461; Bloore *v.* Potter, 9 Wend. (N. Y.) 480.

10. Dexter *v.* Young, 40 N. H. 130; Ferris *v.* Munn, 22 N. J. L. 161.

11. Daverkosen *v.* Kelley, 43 Cal. 477.

The court will, in general, see that a proper person is appointed to act as referee upon consent.[1] If the parties agree to a reference to a particular referee, the cause cannot, against the consent of one of them, be referred to another.[2] But appearance and participation in a reference before a referee other than the one agreed upon, waives whatever right of preference there may have been.[3] Similarly, the objection that a court has not original jurisdiction of an action commenced in it, is waived by the mutual agreement of the parties to refer the action under a rule of court.[4] So also the consent of a party to a reference is a waiver of his constitutional right of trial by jury.[5] It may be added that the submission of an action to referees is a waiver of all formal defects in the writ and in the service thereof.[6] And so all questions affecting the mere form of the suit, and all questions of variance merely between the declaration and proof, are considered as waived by the reference.[7]

3. Compulsory References—*a.* CONSTITUTIONALITY OF COMPULSORY REFERENCES.—It is well settled that in cases of equitable cognizance the courts may constitutionally order a reference without the consent of the parties; for in such causes the right of trial by jury never existed, and cannot, therefore, be claimed.[8] But the power of the courts to order a reference in an action at law without the consent of the parties, is not derived from the common law, but is dependent wholly upon statute.[9] And hence the federal courts have no power to order a reference without consent, since there is nothing in the Constitution or laws of the

1. Litchfield *v.* Burwell, 5 How. Pr. (N. Y.) 341.

2. Smith *v.* Warner, 14 Mich. 152; Haner *v.* Bliss, 7 How. Pr. (N. Y.) 246; Preston *v.* Morrow, 66 N. Y. 452; Smith *v.* Warner, 14 Mich. 152; Billings *v.* Vanderbrek, 15 How. Pr. (N.Y.) 295. But under the present *New York* Code Civ. Pro., § 1011, the court must, in case of refusal, appoint another referee, and it is necessary for only one party to make the request. May *v.* Moore, 24 Hun (N. Y.) 351. See also Masten *v.* Budington, 18 Hun (N. Y.) 105.

3. Quinn *v.* Lloyd, 7 Robt. (N. Y.) 157. And so a party who has submitted to arbitration, will not be allowed to change the referee for causes which existed and were known to him prior to the reference. Perry *v.* Moore, 2 E. D. Smith (N. Y.) 32.

4. Maxfield *v.* Scott, 17 Vt. 634.

5. Lee *v.* Tillotson, 24 Wend. (N. Y.) 337; 35 Am. Dec. 624; St. Paul, etc., R. Co. *v.* Gardner, 19 Minn. 132; U. S. *v.* Rathbone, 2 Paine (U. S.) 578; Atkinson *v.* Whitehead, 66 N. Car. 296; Nissen *v.* Genesee Gold Min. Co., 104 N. Car. 309; Smith *v.* Hicks (N. Car., 1891), 12 S. E. Rep. 1035; Rhodes *v.* Russell (S. Car., 1890), 10 S. E. Rep. 828; Trenholm *v.* Morgan, 28 S. Car. 268; Beattie *v.* David, 40 N. J. L. 102.

6. Hicks *v.* Sumner, 50 Me. 290.

7. Waterman *v.* Connecticut, etc., R. Co., 30 Vt. 610. This case holds also that every matter which by the rules of law could properly have been introduced by way of amendment to the declaration, will be considered as having been added, or its absence waived or cured by the reference.

8. Grim *v* Norris, 19 Cal. 140; 79 Am. Dec. 206; Williams *v.* Benton, 24 Cal. 424; Jones *v.* Gardner, 57 Cal. 641; Moss *v.* McCall, 75 Ill. 190; Patten *v.* Patten, 75 Ill. 446; State *v.* Orwig, 25 Iowa 280; Burt *v.* Harrah, 65 Iowa 643; Topliff *v.* Jackson, 12 Gray (Mass.) 565; St. Paul, etc., R. Co. *v.* Gardner, 19 Minn. 132; Fair *v.* Stickney Farm Co., 35 Minn. 380; Mills *v.* Miller, 3 Neb. 87; Perkins *v.* Scott, 57 N. H. 55; Bellows *v.* Bellows, 58 N. H. 60.

9. Mead *v.* Walker, 17 Wis. 189.

United States granting such a power, and since, moreover, compulsory references in cases involving more than twenty dollars would be in direct violation of the seventh amendment to the Constitution of the United States, providing that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."[1] In the State courts the doctrine as to the constitutionality of compulsory references in actions at law varies in the several jurisdictions. In most of the States there is a general provision in the Constitution that the right of trial by jury shall remain inviolate.[2] In some of the States this is deemed to prohibit references against the parties' consent; in others the courts have taken the opposite view; and in still others, where compulsory references were practiced before the adoption of the State Constitution containing this clause,[3] it has been held that this provision merely continued the right of jury trial as it existed previously, and did not take away from the courts their former power of ordering references. In the accompanying note are given the views that have been taken of the question by the courts in the different States.[4]

1. U. S. *v.* Rathbone, 2 Paine (U. S.) 578; Howe Machine Co. *v.* Edwards, 15 Blatchf. (U. S.) 402; St. Paul, etc., R. Co. *v.* Gardner, 19 Minn. 132. In U. S. *v.* Rathbone, 2 Paine (U. S.) 578, the court by Thompson, J., said: "The convenience and utility of adopting this mode of trial by referees, where the controversy involves the examination of long accounts, have led me to look at the question with a wish to find the practice sanctioned by the Constitution and laws of the *United States*, but I have not been able to find any ground upon which such authority can be sustained."

But the prohibition in the seventh amendment applies only to courts sitting under the authority of the United States, and not to the State courts. Cool. Prin. of Const. Law, pp. 18–19; Cool. Const. Lim. (6th ed.) pp. 29–30; Barron *v.* Mayor, etc., of Baltimore, 7 Pet. (U. S.) 243; Livingston *v.* Moore, 7 Pet. (U. S.) 552; Fox *v.* Ohio, 5 How. (U. S.) 434; Smith *v.* Maryland, 18 How. (U. S.) 76; Withers *v.* Buckley, 20 How. (U. S.) 90; Pervear *v.* Com., 5 Wall. (U. S.) 475; Twitchell *v.* Com., 7 Wall. (U. S.) 321; Justices *v.* Murray, 9 Wall. (U. S.) 274; Edwards *v.* Elliott, 21 Wall. (U. S.) 532; Walker *v.* Sauvinet, 92 U. S. 90; U. S. *v.* Cruikshank, 92 U. S. 542; Munn *v.* Illinois, 94 U. S. 113; Pearson *v.* Yewdall, 95 U. S. 294; Davidson *v.* New Orleans, 96 U. S. 101; Kelly *v.* Pittsburg, 104 U. S. 78; Presser *v.* Illinois, 116 U. S. 265; Spies *v.* Illinois, 123 U. S. 166; Livingston *v.* Mayor, etc., of N. Y., 8 Wend. (N. Y.) 85; 22 Am. Dec. 622; Lee *v.* Tillotson, 24 Wend. (N. Y.) 337; 35 Am. Dec. 624; People *v.* Williams, 35 Hun (N. Y.) 516; Huston *v.* Wadsworth, 5 Colo. 213; State *v.* Keys, 8 Vt. 57; 30 Am. Dec. 450.

2. Stimson Am. Stat. L., §§ 72–3. But by the consent of a party the right of trial by jury may be waived. See *supra*, this title, p. 664, note 5.

3. Constitutional provisions securing the right of trial by jury are to be read in the light of the law existing at the adoption of the constitution. City Council *v.* O'Donnell, 29 S. Car. 355; Shepard *v.* Eddy (Supreme Ct.), 2 N. Y. Supp. 534. And the effect of a provision that the right of trial by jury shall remain inviolate forever, is not to extend such right to any case in which it did not exist before the adoption of the constitution. Lavey *v.* Doig, 25 Fla. 611.

4. In *California* a court has no power to send an ordinary action at law to a referee for trial against the objection of either party; and this, whether the action requires the examination of a long account or not. And a statute authorizing a reference in such a case would be contrary to the Constitution of the State, which provides that "the right of trial by jury shall be secured to all, and

remain inviolate forever." But this provision of the Constitution is limited in its operation to those cases in which the right of trial by jury previously existed and does not extend to equity causes. Grim *v.* Norris, 19 Cal. 140; Smith *v.* Polack, 2 Cal. 92; Benham *v.* Rowe, 2 Cal. 261; Smith *v.* Rowe, 4 Cal. 6.

In *Colorado* compulsory references are constitutional. Huston *v.* Wadsworth, 5 Colo. 213. In this case, the court by Beck, J., said: "On this point we find two lines of authorities on Code provisions substantially the same as our own; one in *California*, the other in *New York*. The courts of *California* have necessarily adopted a strict construction of the statute, being impelled thereto by a provision of the constitution of that State. The courts of *New York* have adopted a more liberal construction, not being under the same constitutional restraint. . . . We are disposed to favor the construction adopted by the courts of *New York* as one which the statute will bear, and one attended with great benefits to litigants, being more speedy and involving less expense. In our case there is no constitutional impediment in the way of a liberal construction of the Code remedy. Section 23 of the bill of rights, referred to in appellant's brief, secures the right of trial by jury in criminal cases, but imposes no restriction upon the legislature in respect to the trial of civil causes. No necessity, therefore, exists for a strict construction."

Under the *Iowa* constitution providing that "the right of trial by jury shall remain inviolate," it is held that the courts have no power by law to order a reference, where the parties do not consent thereto, except in cases cognizable in courts of equity. McMartin *v.* Bingham, 27 Iowa 234; Blair Town Lot, etc., Co. *v.* Walker, 50 Iowa 376; Burt *v.* Harrah, 65 Iowa 643; District Township of Grant *v.* Bulles, 69 Iowa 525.

In *Kansas* compulsory references are allowed. Williams *v.* Elliot, 17 Kan. 523; Galbraith *v.* McCormick, 23 Kan. 497.

In *Minnesota* it is held that references without consent are not unconstitutional on the ground of creating a diversion of judicial power from the legitimate channels. Carson *v.* Smith, 5 Minn. 78; 77 Am. Dec. 539. But such references in actions of common law cognizance violate the provision in the constitution that "the right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy;" for the effect of this clause was to recognize and continue unimpaired the right of trial by jury as it existed at the time of the adoption of the State constitution. Whallon *v.* Bancroft, 4 Minn. 95. And at that time Minnesota was a territory, and subject to the United States Constitution, Amendment 7, in accordance with which trial by jury was required in all cases where the amount in controversy exceeded $20. St. Paul, etc., R. Co. *v.* Gardner, 19 Minn. 132. But if the cause of action be equitable in its nature, the constitutional guaranty does not apply; for when the Minnesota Constitution was adopted, there was in cases of equitable cognizance no absolute right of trial by jury. And the subsequent adoption of a Code of Procedure by the legislature of Minnesota, abolishing the distinction between forms of action at law and equitable remedies, makes no change in this doctrine, because the Constitutional provision does not depend on the form of the proceeding, but on the nature of the right, and jury trial is preserved only where the right is of legal cognizance. St. Paul, etc., R. Co. *v.* Gardner, 19 Minn. 132; Fair *v.* Stickney Farm Co., 35 Minn. 380.

In *Missouri*, compulsory references do not infringe the constitutional right of trial by jury. In Shepard *v.* Bank of Missouri, 15 Mo. 143, 150, the court by Ryland, J., said: "Nor do we consider the statute thus authorizing the court to appoint referees, unconstitutional, as trenching upon the trial by jury. It has ever been the practice of the courts, in somewhat kindred cases, to appoint auditors or referees to settle accounts; nor has the power ever been seriously disputed before. Without going into a labored defense of this power of the court, under the present statute, to appoint referees in cases like the one before us, we will state it as our opinion, that this power is vested in our courts, and that it is not inconsistent with the provisions of our constitution, in trenching upon the right of trial by jury. Its practice often tends to the elucidation of accounts and transactions between man and man, and

mainly contributes to the ends of truth and justice. We are not willing, therefore, to put a stop to its exercise by throwing out doubts of its constitutionality." And again in Edwardson v. Garnhart, 56 Mo. 81, the court by Vories, J., said: "It is contended that the constitution provides that the right of trial by jury shall forever remain inviolate, and that this action being an action at law, the defendant had the right to have the questions of fact involved therein tried by a jury; that if our statute providing for the references of cases is to be construed to include actions at law, the statute itself would be unconstitutional and void. Our statute provides that the court in which a cause is pending, may, on the application of either party, direct a reference where the trial of an issue of fact shall require the examination of a long account on either side, etc. (Wagn. Stat. 1041, § 18.) This statute has been in force in this State for at least thirty years, twenty years before the adoption of our present constitution. It is not to be presumed that the provision of the constitution relied on, was intended to change the law as it then existed, and had been practiced on in the State for a quarter of a century; the object of the framers of the constitution must have been to preserve the right of trial by jury, as it then existed and had been practiced in the State and not to establish a new rule of practice on that subject." The issues in this case were held to involve necessarily the examination of a long account, and to have been properly referred.

In *Nebraska*, a purely legal action cannot be referred except by consent of the parties, the constitution guarantying to either party in such case the right of trial by jury. Mills v. Miller, 3 Neb. 87; Lamaster v. Scofield, 5 Neb. 148; Kinkaid v. Hiatt, 24 Neb. 562.

In *New Hampshire* an action at law may be committed, without the consent of the parties, to one or more referees for the settlement of accounts too complicated to intelligently investigate and adjust in a trial by jury. Copp v. Henniker, 55 N. H. 179; Sargent v. Putnam, 58 N. H. 182. In Copp v. Henniker, 55 N. H. 202; 20 Am. Rep. 194; the court by Ladd, J., said: "Applying the settled principles of constitutional construction to the provisions of § 13 of the act of 1874, which authorizes the court, without the consent of the parties, to commit such a case as this to one or more referees, to be appointed by the court for a trial, I do not see any infringement of the constitutional right of trial by jury. I see no constitutional objection to a compulsory arbitration that has no other effect than to force upon the parties an opportunity to try their case before some other tribunal than a jury. Such an arbitration may be called compulsory; but it is, in fact, nothing more than an effort to adjust a controversy in a court of reconciliation, which, by hearing the parties 'at such time and place as may be convenient,' and by otherwise conforming to their convenience in a manner impracticable for the more unwieldy tribunal of a court and jury, may be useful to them, whether the proceeding turns out to be satisfactory and therefore final, or unsatisfactory and therefore preliminary. The authorities are entirely decisive that such a proceeding is not an infringement of the constitutional right of jury trial, if a reasonably unfettered right of appeal is allowed to a court where the constitutional right in its entirety can be enjoyed." And again in Sargent v. Putnam, 58 N. H. 182, the court by Doe, C. J., said: "[The statute] of 1876 authorizes the court to commit to one or more referees any cause at law or equity, or the determination of any question of fact 'wherein the parties are not, as matter of right, entitled to a trial by jury.' 'As matter of right' here means as matter of constitutional right. And, by the constitution, neither party is entitled to a jury trial for the settlement of accounts too complicated to be intelligently investigated and adjusted in that way."

In *New York* compulsory references are constitutional. They do not violate the provision for trial by jury in the United States Constitution, Amendment 7, for that amendment relates only to the federal courts. Nor are they repugnant to the clause in the *New York* Constitution declaring that "the trial by jury, in cases in which it has been heretofore used, shall remain inviolate forever," for references were sanctioned by statute and practiced by the courts long before the adoption of the Constitution, which, as it made no change in jury trial, did not affect the power of reference formerly possessed by

the courts. Lee *v.* Tillotson, 24 Wend. (N. Y.) 337; 35 Am. Dec. 624; Van Marter *v.* Hotchkiss, 4 Abb. App. Dec. (N. Y.) 484; 1 Keyes (N. Y.) 585; Shepard *v.* Eddy (Supreme Ct.), 2 N. Y. Supp. 534; 15 Civ. Pro. Rep. (N. Y.) 403; Sands *v.* Tillinghast, 24 How. Pr. (N. Y.) 437. *Compare* Sands *v.* Harvey, 4 Abb. App. Dec. (N. Y.) 147; Sands *v.* Kimbark, 27 N. Y. 147.

In *North Carolina* compulsory references are permitted. State *v.* McKenzie, 65 N. Car. 102; Leak *v.* Covington, 87 N. Car. 501.

In *Ohio*, it was held in Johnson *v.* Wallace, 7 Ohio 62, that the courts of law, as opposed to the courts of equity, have not the power of reference without the parties' consent, since the *Ohio* Constitution and laws give to either party the right of jury trial. See also Averill Coal & Oil Co. *v.* Verner, 22 Ohio St. 372. But in Stanley *v.* Cincinnati, 1 Cin. Sup. Ct. Rep. 69, where the question was whether an order of reference might be made, to take and state long and intricate accounts, without the consent of the parties, it was stated that the doubt was removed by the *Ohio* Code, entitling the parties to both legal and equitable remedies.

In *Oregon*, references without the consent of the parties are constitutional. Tribou *v.* Strowbridge, 7 Oregon 156. In this case, upon the question whether the statute, authorizing compulsory references, impaired the right of trial by jury in civil cases, in violation of the constitutional provision "that in civil cases, the right of trial by jury shall remain inviolate," the court by Boise, J., said: "This language of the constitution indicates that the right of trial by jury shall continue to all suitors in courts in all cases in which it was secured to them by the laws and practice of the courts at the time of the adoption of the constitution. So that, in order to ascertain whether such right exists in this case, we must look into the history of our laws and jurisprudence, at and before the adoption of the State constitution. The statute in question was passed by the legislature of the late territory of *Oregon* in 1854, and has been copied into the present code; so that this statute has been in force since that time, and was the law of the territory at the time the constitution was adopted, and therefore does not abridge the right of trial by jury as it existed when we became a State. Under this statute, cases like this have been referred and tried by a referee, without question as to the authority of the court to order the reference, for a quarter of a century; and were there doubt as to the constitutionality of this statute, it would, under the circumstances and the sanction of long usage, have to be solved in favor of the statute. We think there is no doubt as to the validity of the statute and that its provisions are wise and aid in enabling the courts to arrive at just conclusions in cases of this nature, which cannot be intelligently tried by a jury."

In *Vermont* the act of 1856, providing for a compulsory reference of suits at law, and making the referee's report *prima facie* evidence of the facts therein reported, in case either party, as is allowed by the statute, claims a trial by jury, is held, in so far as it applies to common law actions suitable for trial by jury, to impair the right to jury trial as guarantied by the Constitution of *Vermont*. Plimpton *v.* Somerset, 33 Vt. 283. In this case the court by Aldis, J., said: "A trial by jury, within the meaning of the constitution, not only supposes that the controversy between the parties shall be submitted to twelve jurors, but that it shall be submitted to them upon the evidence, that it shall be submitted to them for their minds to weigh the evidence, unaffected by the opinion or judgment of any other tribunal in regard to it. It is to be a trial, the hearing of evidence and argument, and the deciding upon them, not the acting upon conclusions which some other tribunal has drawn from the evidence and argument. It is to be a trial by jury. The jurors are to hear for themselves, to use their own judgment, and the verdict is to be the result of their deliberation and reflection upon the testimony and argument. If the judgment of some other body upon the same matters is substituted for and is to control the decision of the minds, their action upon the subject ceases to be a trial and becomes but the mere recording of a verdict made for them by others. If the judgment of another body is so substituted in part, the right is impaired to the extent of the substitution. Herein lies the fatal objection to this clause of the statute. By making the judgment of the commissioners *prima facie* evidence, it enables one party to obtain a verdict without any showing whatever in the outset.

The jury are bound by the report of the commissioners, if no evidence can be had to the contrary. The party in whose favor the report is made, starts with an advantage, whilst his antagonist is obliged to carry the weight of an adverse finding from the start. His evidence must not only preponderate over that of his adversary, but must bear down the force of the report of the commissioners. Practically this would operate as a great advantage to one, and a great burden upon the other. The written report of a body of disinterested men, embodying their views upon a subject which they have investigated, will naturally have a material influence upon the minds of others newly called to the same investigation. In proportion to the respect and confidence which the jurors would feel for the commissioners, would be the bias which they would receive from their report. This would be likely to be considerable, even if the law only brought the report with its reasonings and facts to their knowledge. But when the law further requires them to receive it as *prima facie* evidence, controlling their verdict, unless they should be able to find, upon weighing the whole evidence, that there was a balance sufficient 'to change the result' specifically upon the facts put in issue by the statement of the party objecting to the report, it is obvious that in all doubtful and evenly balanced cases the verdict would follow the report. The statute seems to us to so present the decision of the former tribunal before the jury, so limits the statement in writing to the particulars in which the party objecting to the report expects to change the result, and so binds the jury to find a verdict 'specifically on the facts put in issue by the statement,' that it makes it materially to influence and affect the verdict, and to impair the right which the constitution intended to secure to litigants, viz., that their controversies should be heard and decided upon the evidence by jurors uninfluenced by the judgment of any other tribunal, and acting exclusively upon their own judgments. The report is *prima facie* evidence of the facts reported. In many cases the defense consists in this, that the plaintiff's evidence fails to make a *prima facie* case. The commissioners may think the evidence of the plaintiff sufficient for that purpose; if so, their finding of facts makes a *prima facie* case for the plaintiff. Before the jury the plaintiff is not required to produce his evidence and satisfy them as he did the commissioners; he rests upon the report. How can the defendant 'change the result'? Does the statute contemplate that he may show what the evidence was before the commissioners, and claim of the jury that it was not sufficient as *prima facie* evidence? How shall he make this showing; how bring before the jury the appearance and testimony of his adversary's witnesses? We think such was not the intent of the statute. Were it merely a question whether certain given facts amount to *prima facie* proof, that would be easily ascertained, and would be, indeed, only a question of law. But it is a question as to the weight of evidence, and whether the evidence establishes certain facts; and this is to be determined by very many considerations, by how witnesses appear as well as by what they say. In every view that we can take of this statute and of its practical working, we think it tends directly to introduce into the trial the judgment of the commissioners to that extent that it would materially impair and affect the free and unbiased exercise of judgment by the jury upon the evidence. This is not 'holding the trial by jury sacred.' It rather makes it incumbent on the court, in the eloquent language of Judge Blackstone, 'to guard with the most jealous circumspection against the introduction of new and arbitrary methods of trial, which, under a variety of plausible pretences, may in time imperceptibly undermine the best preservative of English liberty.' "

In *Wisconsin* compulsory references were provided for in actions at law, requiring the examination of long accounts, as early as 1839. This law was declared valid by the Supreme Court of the Territory. Rooker *v.* Norton, Burnett's Rep. 41. When the State constitution was adopted, it did not take away this right of reference, but provided only that the right of trial by jury should remain as it was before. Gaston *v.* Babcock, 6 Wis. 506; Stillwell *v.* Kellogg, 14 Wis. 461. Hence compulsory references, in cases involving the examination of long accounts, are not in conflict with art. 1, § 5, of the Constitution of the State, declaring that "the right of trial by jury shall remain inviolate, and shall extend to all cases at

b. GENERAL RULE AS TO GRANTING COMPULSORY REFERENCES.—Compulsory references are granted, as a rule, where long accounts are involved, and no difficult question of law arises.[1]

Whether a case falls within the rule authorizing compulsory references, is to be determined by the character of the plaintiff's

law, without regard to the amount in controversy." Mead *v.* Walker, 17 Wis. 189; Dane Co. *v.* Dunning, 20 Wis. 210; Cairns *v.* O'Bleness, 40 Wis. 469; Monitor Iron Works Co. *v.* Ketchum, 47 Wis. 177.

1. Williams *v.* Benton, 24 Cal. 425; McDonald *v.* American Mortgage Co., 17 Oregon 626; Dickinson *v.* Mitchell, 19 Abb. Pr. (N. Y.) 286; Hatch *v.* Wolfe, 1 Abb. Pr. N. S. (N. Y.) 77; 30 How. Pr. (N. Y.) 65; Thomas *v.* Reab, 6 Wend. (N. Y.) 303; Bensel *v.* Galt, 5 Thomp. & C. (N. Y.) 186; 2 Hun (N. Y.) 678; Jackson *v.* De Forest, 14 How. Pr. (N. Y.) 81; Holmes *v.* Bennett, 28 How. Pr. (N. Y.) 289; Townsend *v.* Hendricks, 40 How. Pr. (N. Y.) 143; De Hart *v.* Covenhaven, 2 Johns. Cas. (N. Y.) 402; Adams *v.* Bayles, 2 Johns. (N. Y.) 374; Degener *v.* Underwood, 57 N. Y. Super. Ct. 583; Shepard *v.* Eddy (Supreme Ct.), 2 N. Y. Supp. 534; State *v.* McKenzie, 65 N. Car. 102; McDonald *v.* American Mortgage Co., 17 Oregon 626; Cairns *v.* O'Bleness, 40 Wis. 469; Littlejohn *v.* Wisconsin University, 71 Wis. 437.

In *Kansas*, where an action involves "the examination of mutual accounts," it may be referred by the court on its own motion. Williams *v.* Elliott, 17 Kan. 523; Noble *v.* Dowell, 22 Kan. 498; Galbraith *v.* McCormick, 23 Kan. 706.

In *New York* "the court may, of its own motion, or upon the application of either party, without the consent of the other, direct a trial of the issues of fact by a referee, where the trial will require the examination of a long account on either side, and will not require the decision of difficult questions of law. In an action triable by the court without a jury, a reference may be made as prescribed in this section, to decide the whole issue or any of the issues, or to report the referee's finding, upon one or more specific questions of fact involved in the issue." *New York* Code Civ. Pro., § 1013.

Under this section it is not enough to justify a compulsory reference that the case may possibly involve the examination of a long account, but such fact must affirmatively appear. Thayer *v.* McNaughton, 117 N. Y. 111.

An action to recover money lost at stock gambling under the guise of purchases and sales of shares of stock and oil certificates, though covering many transactions and numerous items, is not an action involving the examination of a long account within the meaning of the above section. Willard *v.* Doran, etc., Co., 48 Hun (N. Y.) 402. In O'Brien *v.* Catskill Mountain R. Co., 32 Hun (N. Y.) 636, the court said: "On the part of the plaintiff a large amount is claimed for extra work, consisting of a multitude of items. These items will be, to a greater or less extent, contested, and some of these extras are embraced in such action. Such cases embracing such items involve a mass of figures which require to be reduced to writing by the tribunal which decides the cases, and to be collated, digested, compared, rejected, modified, increased or diminished, until an intelligent result, approximately accurate, can be attained. A jury would find it difficult, if not impossible, to do this. Their verdict would be little better than a rough guess, derived more from the argument and concessions of counsel or the charge of the judge than from the confused and blind mass of figures produced in evidence. They are not so situated as to keep notes, nor are they accustomed to analyzing and combining complicated, and, in many cases, incoherent items of accounts for work done or damage sustained, so as to draw therefrom a safe and just result. We think these cases can be well tried together before the referee, and he can readily apply the evidence to each case as may be proper, and thus, by his findings and in his decision, reach a definite and wise result. We think it is a proper case for a reference."

claim, and not by the issue made upon it,[1] nor by the nature of the defendant's reply.[2]

In *New York* it is held that there is no right to a compulsory reference of the issues, even where a long account is involved, but that the court will take into consideration all the circumstances[3] of the case, and will refuse the reference, if it would occasion a wrong or hardship, or be oppressive upon one or the other of the parties.[4] When a cause is at issue as to all the parties necessary for a decision, either side may move for a reference, and it may then be granted, but not before.[5] But the objection that the cause is not at issue, must be taken in time.[6] Necessary parties newly brought in after a reference has been started have a right to object to the reference.[7] But a party who appears and participates in a reference, waives thereby certain objections which he might otherwise make.[8]

1. Gopsill *v.* Hervey, 34 N. J. L. 435; Ludlow *v.* American, etc., Nat. Bank, 59 Barb. (N. Y.) 509. *Compare infra*, this title, p. 678, note 6.

2. Childs *v.* Mayer, 52 Hun (N. Y.) 615.

3. Instances of such circumstances are the following: An inability to pay the referee's fees is no objection to a compulsory reference. Place *v.* Chesebrough, 4 Hun (N. Y.) 577; 63 N. Y. 315. Nor is the fact that an order of arrest has been granted in the action. Atocha *v.* Garcia, 15 Abb. Pr. (N. Y.) 303. Nor the fact that the case has once been tried by a jury. Brown *v.* Bradshaw, 1 Duer (N. Y.) 635; 8 How. Pr. (N. Y.) 176. But if the issues have already been submitted to a competent arbitrator, the court will be averse to granting a compulsory reference. Felt *v.* Tiffany, 11 Hun (N. Y.) 62. The fact that the circuit calendar is crowded with business will incline the court to look with favor upon the application. M'Mahon *v.* Allen, 10 How. Pr. (N. Y.) 384. And, correspondingly, if a trial can soon be had in the regular way, it is a circumstance to influence the decision of the court in denying the motion. Rochester *v.* Mayor, etc., of N. Y., 3 How. Pr. N. S (N. Y.) 527; 9 Civ. Pro. Rep. (N. Y.) 226.

4. Martin *v.* Windsor Hotel Co., 70 N. Y. 101; Mayor, etc., of N. Y. *v.* Genet, 67 Barb. (N. Y.) 275; Rochester *v.* Mayor, etc., of N. Y., 3 How. Pr. N. S. (N. Y.) 527; 9 Civ. Pro. Rep. (N. Y.) 226; Godfrey *v.* Williamsburgh City Fire Ins. Co., 11 Abb. Pr. N. S. (N. Y.) 250; Goodyear *v.* Brooks, 4 Robt. (N. Y.) 682; 2 Abb. Pr. N. S. (N. Y.) 296. See Ubsdell *v.* Root, 3 Abb. Pr. (N. Y.) 142.

5. Goodyear *v.* Brooks, 4 Robt. (N. Y.) 682; 2 Abb. Pr. N. S. (N. Y.) 296; Enos *v.* Thomas, 4 How. Pr. (N. Y.) 290; Jansen *v.* Jansen, 3 Cow. (N. Y.) 34; Dutcher *v.* Wilgus, 2 How. Pr. (N. Y.) 180.

A reference should not be granted pending an undetermined demurrer going to the whole cause of action. Jansen *v.* Tappan, 3 Cow. (N. Y.) 339 *Compare infra*, this title, p. 672, note 4.

6. The objection must be taken on the motion to refer, and cannot be urged afterwards to proceeding with the trial before the referee. Hawkins *v.* Avery, 32 Barb. (N. Y.) 551.

7. Wood *v.* Swift, 81 N. Y. 31.

8. As, that he had not sufficient notice of trial. Wetter *v.* Schlieper, 7 Abb. Pr. (N. Y.) 92. That the court had no jurisdiction to order a reference, Baird *v.* Mayor, etc., of N. Y., 74 N. Y. 382. That the reference was irregularly ordered. Dwight *v.* St. John, 25 N. Y. 203. That the cause was not a referable one. McCall *v.* Moschowitz, 10 Civ. Pro. Rep. (N. Y.) 107; Ubsdell *v.* Root, 3 Abb. Pr. (N. Y., 142; Forrest *v.* Forrest, 25 N. Y. 501; 8 Bosw. (N. Y.) 640. That the reference was to but one person, when it should have been to three. McShane *v.* Gray, 13 Iowa 504. And see Callahan *v.* Shotwell, 60 Mo. 398. The objection that the cause is not a referable one, is properly raised only by appealing from the order directing the reference. Elliott *v.* Lewis, 16 Hun (N. Y.) 581.

If any one of the issues in a case involves a long account, or is otherwise referable, a compulsory reference may be directed,[1] notwithstanding some other issue does not involve a long account,[2] or cannot be referred by reason of being founded on fraud.[3] But although the trial of one issue might require the examination of a long account, a reference cannot be compelled, where the determination of some other issue would render the trial of the first named unnecessary, for the first named issue is then collateral or incidental to the trial.[4] However, an order referring the issues, one of which involves the examination of a

1. Whitaker *v.* Desfosse, 7 Bosw (N. Y.) 678; Batchelor *v.* Albany City Ins. Co., 6 Abb. Pr. N. S. (N. Y.) 240; 1 Sweeny (N. Y.) 346. See also Goodyear *v.* Brooks, 2 Abb. Pr. N. S. (N. Y.) 296; 4 Robt. (N. Y.) 682.

But *contra*, Evans *v.* Kalbfleisch, 16 Abb. Pr. N. S. (N. Y.) 13. In this case the court by Monell, J., said: "The principle affirmed in those cases was to the effect, that if any one of the issues made by the complaint or answer would, standing by itself, have been referable, then the court had power to refer all the issues; in other words, refer the whole action. notwithstanding some of the other issues would not, standing by themselves, have been referable. But in the recent case of Townsend *v.* Hendricks, 40 How. Pr. (N. Y.) 143, the court of appeals have affirmed, I think, a different rule; and have denied, in effect, the power of the court to refer any action, where any of the issues were such that the party had the right of trial by a jury. In that case, the complaint alleged a cause of action in tort. and the defense was, in part, a counterclaim, which, by itself, would have been referable. But the court held that a party could not be deprived of the right of trial by jury in any of the cases where such right is preserved by the constitution. The action in that case was not upon contract, but was for a tort; and the court recognizing it as among those in which a 'trial by jury has been heretofore used,' has declared that the court could not refer it. notwithstanding the counterclaim, which was legitimately set up, would otherwise have been referable. . . . It seems to me to follow necessarily that where there are several consistent causes of action, united in one complaint, some of which the parties have a right to have tried by jury, and others of which may be referable, the court cannot make a general reference of the action, against the consent of the parties. If it was otherwise, a plaintiff by merely inserting an additional but referable cause of action in his complaint, could always deprive his adversary of trial by jury in any case of contract; which by itself, would be a violation of a constitutional right. The principle, therefore, to be deduced from the decision referred to, is, that all the causes of action stated in the complaint must be referable. If part or one only is referable, the court cannot refer the others, but, as was said in Townsend *v.* Hendricks, 40 How. Pr. (N. Y.) 143, if such referable issues should ever require examination, a reference can be ordered as to those, after the trial of the other issues." And *compare* Williams *v.* Benton, 24 Cal. 424.

2. Place *v.* Chesebrough, 4 Hun (N. Y.) 577; 63 N. Y. 315.

3. Hall *v.* U. S. Reflector Co., 14 N. Y. Week. Dig. 48; 88 N. Y. 655. But where distinct causes of action are presented, and the issues under one are properly referable, while those under the other are not, it will be error to direct a reference of all the issues. Ross *v.* Combes, 37 N. Y. Super. Ct. 289.

And so where the long account relied on is only one of the issues, and there are charges of fraud and equities to be adjusted between the parties, the court cannot order all the issues to be referred, but in such case the reference must be confined to the issues involved in the account. Wheeler *v.* Falconer, 7 Robt. (N. Y.) 45.

4. Graham *v.* Golding, 7 How. Pr. (N. Y.) 260; Morrison *v.* Horrocks, 40 Hun (N. Y.) 428; Camp *v.* Ingersoll, 86 N. Y. 433. But the contrary doctrine was held in Batchelor *v.* Albany City Ins. Co., 6 Abb. Pr. N. S. (N. Y.) 240; Whitaker *v.* Desfosse, 7 Bosw. (N. Y.) 678; Woody *v.* Brooks, 102 N. Car. 334.

long account, will not be reversed on the suggestion that such issue is not a material one.[1]

c. LONG ACCOUNTS—(1) *What is Meant by an "Account."*—The account contemplated is a statement of debts and credits between parties having reciprocal or mutual dealings;[2] but the element of mutuality has not always been rigidly insisted upon.[3] It may be added that items of damage, however numerous they may be, do not constitute an account within the meaning of that term.[4] This last doctrine has been laid down especially in actions on policies of insurance, where there are many items of loss; and although it seems difficult to understand why, upon principle and within the spirit of the statutes authorizing compulsory references, it should not be allowable to refer all such actions as those upon policies of insurance, where there are numerous items in dispute, still the more recent authorities assert the rule as just stated.[5]

1. Lawless *v.* O'Mahoney, 9 Abb. Pr. N. S. (N. Y.) 44.

2. In McMaster *v.* Booth, 3 Code R. (N. Y.) 111; 4 How. Pr. (N. Y.) 427; the court by Barculo, J., said: "As I understand the meaning of that term, I should define an account to be a computation or statement of debts and credits arising out of personal property bought or sold, services rendered, material furnished, and the use of property hired and returned. If an account does not fall within this definition, it is not an account within the ordinary legal acceptation of the term, and cannot be referred without the consent of the parties."

Work, labor, and services performed, as well as goods sold and delivered, may be matters of account. People *v.* Peck, 57 How. Pr. (N. Y.) 315.

3. Hossack *v.* Heyerdahl, 38 N. Y. Super. Ct. 391. In this action, which was for services rendered by one party, there being nothing of a mutual or reciprocal character, the court by Sedgwick, J., said: "However correct the proposition of the learned counsel for the appellant may be, that an account as known by the law is not an *ex parte* enumeration of items, but a statement of dealings having a recognized mutual or reciprocal character, yet the practice is not to apply this strict definition to the words of the code, but to consider that the code intended that whatever presents the same kind of difficulties as a strict account for the action of a jury, should be sent to a referee." And in Camp *v.* Ingersoll, 86 N. Y. 433, the court by Folger, C. J., said: "An account between the parties is one made up of the dealings of the parties with one another, though the account may be that of one party only."

4. Dewey *v.* Field, 13 How. Pr. (N. Y.) 437; McCullough *v.* Brodie, 13 How. Pr. (N. Y.) 346; Bell *v.* Mayor, etc., of N. Y., 11 Hun (N. Y.) 511; Van Rensselaer *v.* Jewett, 6 Hill (N. Y.) 373; 41 Am. Dec. 750; McDonnell *v.* Stevens, 9 Hun (N. Y.) 28; Untermyer *v.* Beinhauer, 105 N. Y. 521; Camp *v.* Ingersoll, 86 N. Y. 433; Silmser *v.* Redfield, 19 Wend. (N. Y.) 21; Ross *v.* Mayor, etc., of N. Y., 2 Abb. Pr. N. S. (N. Y.) 266; 32 How. Pr. (N. Y.) 164; Stevenson *v.* Buxton, 37 Barb. (N. Y.) 13; 15 Abb. Pr. (N. Y.) 352.

Thus generally an action of tort cannot be referred save by consent. Stacy *v.* Milwaukee, etc., R. Co., 72 Wis. 331.

But, the fact that the defendant claimed credits because materials were furnished which were inferior to those required by the specifications, does not make a reference improper, such claim for damages being but an incident in the trial. Ittner *v.* St. Louis, etc., Association (Mo.), 11 S. W. Rep. 58.

5. Andrus *v.* Home Ins. Co. of N. Y., 73 Wis. 642. This case was an action on a policy of insurance upon a stock of drugs, paints, oils, medicines, stationery, books, wall-paper, and such other merchandise as is usually kept in a retail country drug store. The stock was wholly destroyed by fire within the life of the policy. The motion for the reference was founded upon affi-

davits which tended to show that it would be necessary to examine bills of sale, inventories, or accounts consisting of 1,200 or 1,500 items, to ascertain the amount of the loss of the assured. The court by Cole, C. J., in affirming the order refusing the reference, said: "Though the examination of numerous items may be necessary to ascertain the amount of damage, yet that does not involve directly the examination of a long account. The value of the property destroyed is only collaterally involved as affecting the measure of damages. Stacy *v.* Milwaukee, etc., R. Co., 72 Wis. 331. That case was an action for the negligent burning of the plaintiff's property. It was claimed the trial of the issues would involve the examination of a long account, and that a compulsory reference could be ordered. But the court overruled this position, holding that the value of the merchandise, lumber and other property burned was only collaterally involved. . . . An account implies dealings and transactions between the parties, and where the action is based upon such an account, which has to be examined and investigated in order to settle the rights of the parties, a reference can be made. But, it does not follow, because a variety of items has to be examined to ascertain the amount of damage recoverable, that the same rule obtains. There the examination of the account is merely an incidental matter, not the main issue in the cause. We therefore hold that the inquiry as to the list of articles or items destroyed by the fire, though it may be necessary and proper to determine the amount of loss or the damages recoverable on the policy, still, in a legal sense, does not require the examination of a long account, as where the action is upon the account itself, which is the real subject of investigation."

In Untermyer *v.* Beinhauer, 105 N. Y. 521, which was an action to recover damages for the breach of a building contract, the court by Rapallo, J., said: "These items of damage did not constitute an account. It has repeatedly been held that where there is no account between the parties, in the ordinary acceptation of the term, the cause cannot be referred, although there may be many items of damage. This rule has been applied in actions on policies of insurance, where there are many items of loss." But this last remark seems to be a mere *obiter dictum.*

In Camp *v.* Ingersoll, 86 N. Y. 433, which was an action brought to recover the value of certain shares of the stock of a manufacturing corporation, which the complaint alleged the plaintiff was entitled to recover under an award requiring the defendants to pay said value, the court by Folger, C. J., said: "It is plain that it would be for the convenience of the parties to try this case before a referee, where the various and numerous items which together show what was the value of the assets of the corporation, and thus what was the value of its capital stock, could be inquired into and arrived at with care and deliberation, and consequent accuracy. It is plain that it will be tedious, if not impracticable, to do this with a judge and jury. A reference of this case would be within the spirit of the law permitting a compulsory reference. We have seen but one case of former days, holding that it is within its purview. That is Samble *v.* Mechanics' F. Ins. Co., 1 Hall (N. Y.) 560. It is not in harmony with the cases that we have cited above, and we may not disregard them and follow it. We are constrained by the force of authority to hold that there was no power in the special term to compel the plaintiff to a reference to hear and determine. We must reverse the orders appealed from."

In Kingsley *v.* Brooklyn, 1 Abb. N. Cas. (N. Y.) 121, the court by Neilson, C. J., said: "The cases, cited at large in the brief, are of two classes, the one for wrongs, the other upon contracts. As to the first class, it is well settled upon principle and under the statute, that a reference cannot be ordered. The issue as to the wrong, whether arising from a willful act or from mere negligence, must be tried by a jury. As to the second class—actions on contract—the power to refer is limited. There must have been an account, not collaterally, as in some of the cases, but directly between the parties, as for property sold, or services rendered by the plaintiff to or for the defendant. This necessarily excludes insurance cases. One claiming under a fire or marine policy must prove his damages, the amount of his loss, and may have occasion to exhibit an account made up of items. But the property lost or destroyed had not been sold to or received by the insurance company.

The account which furnishes the ground for a reference, must be distinguished from the bill of particulars setting it forth, which does not constitute an account.[1] An account stated, moreover, is not such an account as will authorize a compulsory reference.[2] In order that the issues may be referable without consent, the account must not be incidental or collateral, but must be directly,[3]

The contract was not in its nature as for a mere purchase, but to indemnify the assured."

But in some of the older cases it is held, contrary to the above, that a compulsory reference may be awarded in actions upon policies of insurance. Thus a reference was ordered in Samble *v.* Mechanics' F. Ins. Co., 1 Hall (N. Y.) 560; Ryan *v.* Atlantic Mut. Ins. Co., 50 How. Pr. (N. Y.) 321; Lewis *v.* Irving Fire Ins. Co., 15 Abb. Pr (N. Y.) 303, note. In Godfrey *v.* Williamsburgh F. Ins. Co., 12 Abb. Pr N. S. (N.Y.) 250, although a reference was for other reasons refused, the court, by Monell, J., said: "An examination of the case of Townsend *v.* Hendricks, 40 How. Pr. (N. Y.) 143, has satisfied me that the several cases in this court and in the supreme court, sustaining the power of the court to make compulsory references in actions on insurance policies, have not been disturbed. The extent to which that case goes, is, that the right of trial by jury is absolute, in actions for torts; leaving untouched the principle established by the cases referred to, that where no question of fraud is involved, and a mere ascertainment of damages is required, the court may refer. The power to refer was exercised as far back as 1829 (Samble *v.* Mechanics' F. Ins. Co., 1 Hall (N. Y.) 560), and was frequently reasserted, in this court and in the supreme court, previous to the adoption of the constitution of 1846; and it may fairly be presumed that the framers of that instrument, when they preserved in the bill of rights the trial by jury in cases in which it had been theretofore used, were fully apprised of the power which had previously been exercised by the court in this class of cases. I have no doubt, therefore, that the court may still refer those cases, whenever it appears that the only question involved is the value of the property injured or destroyed."

In several other insurance cases a reference was refused, but on the ground that fraud was set up by the defense. McLean *v.* East River Ins. Co., 8 Bosw. (N. Y.) 700; Freeman *v.* Atlantic Mut. Ins. Co., 13 Abb. Pr. (N. Y.) 124; Levy *v.* Brooklyn Fire Ins. Co., 25 Wend. (N.Y.) 687. And in Lewis *v.* Irving Fire Ins. Co., 15 Abb. Pr. (N. Y.) 303, a reference was ordered notwithstanding a defense of fraud. See also Dean *v.* Empire State Mut. Ins. Co., 9 How. Pr. (N. Y.) 69.

1. Dickinson *v.* Mitchell, 19 Abb. Pr. (N. Y.) 286; Childs *v.* Mayer, 52 Hun (N. Y.) 615.

2. Baker *v.* Walsh, 9 N. Y. Week. Dig. 18; Marsen *v.* Philadelphia Arch Iron Co., 1 Month. L. Bul. 20. See also Day *v.* Jameson, 49 N. Y. Super. Ct. 373.

In Rowell *v.* Giles, 53 How. Pr. (N. Y.) 244, the court by Sandford, J., said: "The plaintiffs must recover, if at all, upon an account stated, and the only proof necessary or proper in support of it must relate simply to, and must establish the liquidation and settlement of, the amount of defendants' liability at the date when such statement and settlement are claimed to have been made. With respect to the items which entered into such account thus alleged to have been stated and settled, there is no controversy before the court. The case does not require the 'examination' of the account containing them, but only the determination of the issue as to whether such account was or was not stated and settled in the manner, and to the extent, alleged in the complaint."

Similarly, if the defense does not go to the items of the plaintiff's claim, a compulsory reference will not be ordered. Van Rensselaer *v.* Jewett, 6 Hill (N. Y.) 373; 41 Am. Dec. 750. Nor will it be ordered where the other side stipulates to admit the items, the trial of which necessitates the reference. Mullin *v.* Kelly, 3 How. Pr. (N. Y.) 12.

3. Wickham *v.* Frazee, 13 Hun (N. Y.) 431; Read *v.* Lozin, 31 Hun (N. Y.) 286; McDonnell *v.* Stevens, 9 Hun (N. Y.) 28; Claflin *v.* Drake, 38 Hun (N. Y.) 144; Morrison *v.* Hor-

as well as necessarily,[1] involved in the action. But where a question properly triable by a jury is so connected with accounts as to be unintelligible to a jury, there should be a reference.[2]

(2) *What is Meant by a "Long" Account.*—Just how long an account must be in order to justify a compulsory reference has not been, and, from the nature of the case, cannot be exactly determined.[3] A few items requiring simply proof of their value do not make a long account.[4] Where all the items were substantially reducible to two, the account was held not to be a long one.[5] Where the defendant questioned only three items in an account, a reference was refused.[6] Four items do not make a long account;[7] nor six;[8] nor seven;[9] nor ten.[10] But fifteen items have been regarded as constituting a long account.[11] And it has been held that an action to recover compensation for indorsing, for defendant's accommodation, notes exceeding twenty in number, is properly referable, as requiring the examination of a long account.[12] And cases involving a still higher number of

rocks, 40 Hun (N. Y.) 428; Camp *v.* Ingersoll, 86 N. Y. 433; Freeman *v.* Atlantic Mut. Ins. Co., 13 Abb. Pr. (N. Y.) 124; Kain *v.* Delano, 11 Abb. Pr. N. S. (N. Y.) 29; Streat *v.* Rothschild, 12 Abb. N. Cas. (N. Y.) 383; Lord *v.* Connor, 48 How. Pr. (N. Y.) 95; Hortwell *v.* Alberst, 3 Month. L. Bul. (N. Y.) 77; Hull *v.* Allen, 4 Civ. Pro. Rep. (N. Y.) 300; Miner *v.* Gardiner, 6 Thomp. & C. (N. Y.) 343; 4 Hun (N. Y.) 132; Mayor *v.* Tenth Nat. Bank, 11 Reporter 475; Bushnell *v.* Eastman, 2 Abb. Pr. N. S. (N. Y.) 411; Magown *v.* Sinclair, 5 Daly (N. Y.) 63; Seigel *v.* Heid, 36 How. Pr. (N. Y.) 506; Waring *v.* Chamberlain, 14 N. Y. Week. Dig. 564; Cameron *v.* Freeman, 10 Abb. Pr. (N. Y.) 333; 18 How. Pr. (N. Y.) 310; Keller *v.* Payne, 51 Hun (N. Y.) 316.

1. Sheldon *v.* Harris, 7 N. Y. Leg. Obs. 57; Keeler *v.* Poughkeepsie, etc., Plank Road Co., 10 How. Pr. (N. Y.) 11; Farrell Foundry, etc., Co. *v.* Anvil, etc., Co., 11 N. Y. Week. Dig. 350. *Contra*, Whitaker *v.* Desfosse, 7 Bosw. (N. Y.) 678.

In Mayor, etc., of N. Y. *v.* Genet, 67 Barb. (N. Y.) 275, and Dustin *v.* Wallace, 13 N. Y. Week. Dig. 518, it is intimated that the probability that a long account will be involved, is sufficient basis for a compulsory reference; but in Thayer *v.* McNaughton, 117 N. Y. 111, it is held that it is not enough to justify a compulsory reference that the case may possibly involve the examination of a long account, but such fact must affirmatively appear.

2. Mills *v.* Thursby, 11 How. Pr. (N. Y.) 113.

3. In Batchelor *v.* Albany City Ins. Co., 6 Abb. Pr. N. S. (N. Y.) 240, the court by Freeman, J., said: "In view of the fact that a review of all the cases bearing upon the point under consideration, and a comparison of the decisions therein made, with the facts of each case, discloses not only the expediency, but the almost utter impossibility of supplying the want of a statutory definition of the term 'long account on either side,' by a judicial construction to be followed in all future cases, I shall not attempt to determine the meaning of those words."

4. Adams *v.* Utica, 6 Civ. Pro. Rep. (N. Y.) 294; Dittenhoeffer *v.* Lewis, 5 Daly (N. Y.) 72.

5. Harris *v.* Mead, 16 Abb. Pr. (N. Y.) 257.

6. Kent *v.* Highleyman, 28 Mo. App. 614.

7. Parker *v.* Snell, 10 Wend. (N. Y.) 577.

8. Dickinson *v.* Mitchell, 19 Abb. Pr. (N. Y.) 286.

9. Harris *v.* Mead, 16 Abb. Pr. (N. Y.) 257; Smith *v.* Brown, 3 How. Pr. (N. Y.) 8.

10. Merritt *v.* Vigelius, 28 Hun (N. Y.) 420.

11. Sutton *v.* Wegner, 74 Wis. 347.

12. Masterton *v.* Howell, 10 Abb. Pr. (N. Y.) 118. *Compare* Nachtsheim *v.* Turner (Wis., 1888), 36 N. W. Rep. 637.

items have uniformly been held referable.[1] But a long account cannot be predicated of the several items of a single bill of goods or of the mere details of a single employment, by splitting up what in reality amounts simply to one bill or to one piece of business.[2] Yet although the items in gross, which are actually in dispute, may not be numerous, still if these items are in their nature properly made up of numerous smaller items, the case is a referable one.[3]

d. DIFFICULT QUESTIONS OF LAW.—Where it appears from the pleadings themselves, or is made to appear by affidavit, that difficult questions of law will arise on the trial, a compulsory reference will not be granted.[4] The "difficult questions" must be questions of real difficulty;[5] but they need not arise upon the pleadings, nor are they confined to the questions springing out of the facts presented by the issues in the case; they may grow out of their very character, and the evidence necessary to their investigation.[6] But the objection that the trial will involve difficult questions of law must be taken on the motion to refer, and is not available on appeal.[7]

e. TORTS.—In actions to recover damages for torts, compulsory references have with great uniformity been denied.[8] In

1. Ittner *v.* St. Louis, etc., Association, 97 Mo 561; Robinson *v.* New York. etc.. R. Co., 55 N. Y. Super. Ct. 152; Canda *v.* Robbins (Supreme Ct.), 7 N. Y. Supp. 895; Hale *v.* Swinburne, 17 Abb. N. Cas. (N. Y.) 381; Welsh *v.* Darragh, 52 N. Y. 590; Shipman *v.* Bank of New York, 53 Hun (N. Y.) 637; Risley *v.* Jewett, 53 Hun (N. Y.) 636; McDonald *v.* American Mortgage Co., 17 Oregon 626.

And see generally on the question of a long account, Bissell *v.* Whipple, 8 N. Y. Week Dig. 262; Simmons *v.* Bigelow, 53 Hun (N. Y.) 637; Dickinson *v.* Mitchell, 19 Abb. Pr. (N. Y.) 286; Seigel *v.* Heid, 36 How. Pr. (N. Y.) 506; Sharp *v.* Mayor. etc., of N.Y., 9 Abb. Pr. (N. Y.) 426; 18 How. Pr. (N. Y.) 213.

2. Daily *v.* Gescheidt, 9 Reporter 254; Ridgeway *v.* Taylor, 5 N. Y. Week. Dig. 250; Benn *v.* First Nat. Bank, 19 N. Y. Week Dig. 206; Felt *v.* Tiffany. 11 Hun (N Y.) 62; Hull *v.* Allen, 4 Civ. Pro. Rep. (N. Y.) 300; Swift *v.* Wells, 2 How. Pr. (N. Y.) 79; Miller *v.* Hooker, 2 How. Pr. (N. Y.) 171; Randall *v.* Kingsland, 53 How. Pr. (N. Y.) 512; Tracy *v.* Stearns, 61 How. Pr. (N. Y.) 265; Stewart *v.* Elwele. 3 Code R. (N. Y.) 139; Hale *v.* Swinburne, 17 Abb. N. Cas. (N. Y.) 381; Andrews *v.* Wallace, 1 Month. L. Bul. 19.

3. Cooper on Referees and References, p. 17; Williams *v.* Allen, 4 Thomp. & C. (N. Y.) 673; 2 Hun (N. Y.) 377.

4. Cooper on Referees and References, p. 25; Magown *v.* Sinclair, 5 Daly (N. Y.) 63; Rochester *v.* Mayor, etc., of N. Y., 3 How. Pr. N. S. (N. Y.) 527; 9 Civ. Pro. Rep. (N. Y.) 226; Adams *v.* Bayles, 2 Johns. (N. Y.) 374; Ives *v.* Vandewater, 1 How. Pr. (N.Y.) 168; Dane *v.* Liverpool, etc., Ins. Co., 21 Hun (N. Y.) 259; Shaw *v.* Ayers, 4 Cow. (N. Y.) 52.

5. Anonymous, 5 Cow. (N. Y.) 423.

6. Goodyear *v.* Brooks, 4 Robt. (N. Y.) 682; 2 Abb. Pr. N. S. (N. Y.) 296. In this case, which was an action to foreclose chattel mortgages, the defense being that the mortgages were fraudulent, it was held that the necessity of proving good faith and honest intent would probably raise difficult questions of law, and that therefore the case was not referable.

7. Dustin *v.* Wallace, 13 N. Y. Week. Dig. 518.

8. Siimser *v.* Redfield, 19 Wend. (N. Y.) 21; Dederick *v.* Richley, 19 Wend. (N.Y.) 109; Sharp *v.* Mayor, etc., of N. Y., 18 How. Pr. (N. Y.) 213; 9 Abb. Pr. (N. Y.) 426; 31 Barb. (N. Y.) 578; Beardsley *v.* Dygert, 3 Den. (N. Y.) 380; McMaster *v.* Booth, 4 How. Pr. (N. Y.) 427; Dewey *v.* Field, 13 How.

such an action the vital and substantial issue is the alleged negligence of the defendant, which caused the injury complained of, and such an issue is peculiarly one for a jury.[1] But if in the action the element of breach of contract predominates over that of tort, a reference without consent may be awarded.[2]

f. FRAUD.—As to how far the issues are referable where fraud is alleged, the authorities are conflicting. Actions to recover damages for fraud and deceit, cannot be referred without consent.[3] If the plaintiff's substantial issue is fraud, which must be established before it will be needful to examine the account, a reference should not be ordered.[4] But if the question of fraud forms only a part of the plaintiff's cause of action, or if the allegations of fraud are immaterial and unnecessary, or merely incidental, a compulsory reference may be granted.[5] On the question whether fraud alleged in the defense will prevent a reference, the authorities seem pretty evenly divided.[6]

Pr. (N. Y.) 437; Warren *v.* Western Trans. Co., 3 Robt. (N. Y.) 705; Ross *v.* Mayor, etc., of N. Y., 32 How. Pr. (N. Y.) 154; 2 Abb. Pr. N. S. (N. Y.) 266; Townsend *v.* Hendricks, 40 How. Pr. (N. Y.) 143; Wood *v.* Hope, 2 Abb. N. Cas. (N. Y.) 186; Clark *v.* Candee, 29 Hun (N. Y.) 139; Reilly *v.* Byrne, 1 Civ. Pro. Rep. (N. Y.) 201; Wickham *v.* Frasee, 13 Hun (N. Y.) 431; Hoffman *v.* Sparling, 12 Hun (N. Y.) 83; Durkin *v.* Sharp, 22 Hun (N. Y.) 132; Hewitt *v.* Howell, 8 How. Pr. (N. Y.) 346; Stacy *v.* Milwaukee, etc., R. Co., 72 Wis. 331. See *supra*, this title, p. 673, note 4.

But in Sheldon *v.* Wood, 3 Sandf. (N. Y.) 739, the contrary doctrine was held, namely, that although the ground of an action be fraud, a compulsory reference will be ordered, if the trial of the issue in the cause will require the examination of a long account on either side.

1. Stacy *v.* Milwaukee, etc., R. Co., 72 Wis. 331, 333.

2. Vilmar *v.* Schall, 61 N. Y. 564; Harden *v.* Corbett, 6 Hun (N. Y.) 522.

3. Verplanck *v.* Kendall, 45 N. Y. Super. Ct. 525. So of an action to set aside a fraudulent instrument. Rochester *v.* Mayor, etc., of N. Y., 3 How. Pr. N. S. (N. Y.) 527; 9 Civ. Pro. Rep. (N. Y.) 226. But where in an action for money fraudulently obtained, the plaintiff alleging that the defendants kept false accounts, and seeking to recover a balance claimed to be due on a true statement of the account, an order of reference was obtained by the plaintiff on the ground that the trial would involve the examination of a long account, it was held upon appeal, sustaining the reference, that the action could be referred without consent, there being nothing to be investigated but a mere account of moneys. Bensel *v.* Galt, 5 Thomp. & C. (N. Y.) 186; 2 Hun (N. Y.) 678.

4. Morrison *v.* Horrocks, 40 Hun (N. Y.) 428, *following* Camp *v.* Ingersoll, 86 N. Y. 433. See *supra*, this title, p. 672, note 4.

5. Hall *v.* U. S. Reflector Co., 14 N. Y. Week. Dig. 48; 88 N. Y. 655; Atocha *v.* Garcia, 15 Abb. Pr. (N. Y.) 303; Schermerhorn *v.* Wood, 4 Daly (N. Y.) 158; Harrington *v.* Bruce, 84 N. Y. 103.

In King *v.* Barnes, 109 N. Y. 267, the court by Ruger, C. J., said: "We know of no rule of law requiring that charges of fraud incidentally arising upon an accounting with reference to partnership transactions, shall be tried by a jury. It has been the invariable practice of courts of equity to try all questions arising before a referee in the stating of accounts between partners or joint owners, and necessarily involved in such accounting, since their origin, and we are referred to no authority questioning their power to do so."

6. In the following cases it is held that alleging fraud in the defense cannot prevent a reference. Welsh *v.* Darragh, 52 N. Y. 590; Patterson *v.* Stettauer, 39 N. Y. Super. Ct. 413; Devlin *v.* Mayor, 54 How. Pr. (N. Y.)

g. ATTORNEYS' BILLS.—In actions by attorneys to recover compensation for professional services, there appears to be great diversity of judicial opinion as to whether a compulsory reference is proper, although on principle there seems no reason why references should not be granted here as in other cases of long accounts.[1] But in such an action if it appears that expert testi-

50; Kingsley *v.* Brooklyn, 1 Abb. N. Cas. (N. Y.) 108; 7 Abb. N. Cas. (N. Y.) 28; 78 N. Y. 200; Lewis *v.* Irving Fire Ins. Co., 15 Abb. Pr. (N. Y.) 303, note. In Welsh *v.* Darragh, 52 N. Y. 590, the court by Church, C. J., said: "The character of an action is determined by the complaint. The answer cannot change it. If the action is a referable one, the answer cannot make it non-referable. The right to show fraud in the transaction, and claim the damages by way of recoupment or counterclaim, does not change the action." In Hall *v.* U. S. Reflector Co., 14 N. Y. Week. Dig. 48; 88 N. Y. 655; it is held that although one of the defenses to an action may be fraud, still if any other issue be referable, an order of reference may be made.

But in the following cases the contrary doctrine is laid down, namely, that if the defense sets up fraud, a compulsory reference cannot be ordered, since charges of fraud are properly to be tried by a jury. Mayor *v.* Tenth Nat. Bank, 11 Reporter 475; McLean *v.* East River Ins. Co., 8 Bosw. (N. Y.) 700; Freeman *v.* Atlantic Mut. Ins. Co., 13 Abb. Pr. (N. Y.) 124; Levy *v.* Brooklyn Fire Ins. Co., 25 Wend. (N. Y.) 687.

1. In the following cases references in actions upon attorneys' bills have been discountenanced: O'Dwyer *v.* Mack, N. Y. Daily Reg., May 15, 1884; Bradley *v.* Eager, 5 N. Y. Week. Dig. 330; Merritt *v.* Vigelius, 28 Hun (N. Y.) 420; Waring *v.* Chamberlain, 14 N. Y. Week. Dig. 564; Flanders *v.* Odell, 16 Abb. Pr. N. S. (N. Y.) 247; 2 Hun (N. Y.) 664; Fox *v.* Fox, 24 How. Pr. (N. Y.) 409; Martin *v.* Windsor Hotel Co., 10 Hun (N. Y.) 304.

In Martin *v.* Windsor Hotel Co., 10 Hun (N. Y.) 304, the court by Davis, P. J. said: "There is no fixed rule which prevents the reference of an attorney's account for services, to another attorney, and yet courts should be careful to avoid referring such questions to members of the same profession, where there appears upon the face of the claim good reason to suppose that the client's resistance, on the ground of exorbitance and oppression, may prove to be well founded. It is not because such referees will not do equal and full justice to the parties, but because of a general impression, that on questions of compensation for legal services, lawyers may not be, and sometimes are not, unprejudiced in determining values. A physician is not chosen as a referee on physicians' accounts, nor are clergymen when a pastor sues for the value of his services, and so also as to all other trades and professions; and in the public mind it is, not without some show of reason, thought invidious that lawyers only should be selected to determine the claims of lawyers. It is better for the profession and for the courts that this should not be so; and the honor and well-being of the profession requires that lawyers should not be thought to shrink from an examination of their charges by a jury, enlightened by the opinion of other lawyers as witnesses, and by the instructions of the courts."

But in these cases, references in actions to recover the amount of attorneys' bills have been allowed. Hale *v.* Swinburne, 17 Abb. N. Cas. (N. Y.) 381; Bowman *v.* Sheldon, 1 Duer (N. Y.) 607; Byrne *v.* Delmater, 1 Month. L. Bul. 62; Stebbins *v.* Cowles, 30 Hun (N. Y.) 523; Schermerhorn *v.* Wood, 4 Daly (N. Y.) 158; Perry *v.* Rollins, 56 How. Pr. (N. Y.) 242; Carr *v.* Berdell, 22 Hun (N. Y.) 130.

In Merritt *v.* Vigelius, 28 Hun (N. Y.) 420, the court by Learned, P. J., said: "I am not willing to accept the doctrine of some cases that a lawyer's bill ought not to be referred. The statute makes no exception as to lawyers, if they have (as unfortunately they sometimes have) long accounts against their clients. If it be unfair to appoint a lawyer as referee in such cases then a referee of another business may be selected." And in the same case Westbrook, J. (dissenting) said: "I concur fully in the views of brother Learned, that an account for lawyers'

mony as to the value of the services will be necessary, and the value of the services as a whole can be testified to, so that it will not be necessary to prove the value of the services rendered each day. as a long account is not here involved, an order of reference will not be made.[1] The refusal of the trial court to order a reference in an action for attorney's fees, where the defendant pleads payment, and sets up a counterclaim, is a matter of discretion, and will not be disturbed on appeal, though the trial may involve the examination of a long account.[2]

4. Motion for a Reference.—As soon as the cause is at issue as to both fact and law, the motion for a reference may, after due notice of the motion, be made;[3] and the party need not wait, before making the motion, to see whether his opponent will amend the pleadings or not.[4] The authority of the court to order the reference rests upon the pleadings, an affidavit made by the party or his attorney, the bill of particulars, if there be one, and the other papers in the case.[5] The affidavit must be made by the party to the action, unless a sufficient excuse be given, in which case, it may be made by the party's attorney.[6] Mere general allegations in the affidavit, as that the action is for goods sold and delivered, or that the examination of a long

services is referable, and I cannot subscribe to the doctrine, that such an account should be submitted to a jury, without any regard to the fact that it is a long one consisting of many items. Neither, in my opinion, is there any propriety in referring a cause involving issues of that character to a person not a lawyer. So to do is to create a tribunal unfit, for want of knowledge, to decide it, instead of one perfectly competent to deal with the questions it would present."

And in Hale *v.* Swinburne, 17 Abb. N. Cas. (N. Y.) 385, the court by Peckham, J., said: "If an attorney's account should ever be referred, it seems to me that this is such a case. I am not prepared to say that a claim on the part of an attorney against an individual for services rendered in many and different proceedings and cases, upon separate, distinct and several requests, embracing a very large number of items, and quite a number of separate and distinct proceedings, should never be referred, and, on the contrary, I think this is a very proper case for such reference. . . . Upon the whole case, I think the facts render a reference the appropriate disposition to be made of this case. I shall order the case referred to three referees, one lawyer and two laymen, as suggested on the argument, and if an agreement cannot be had as to the referees, the court will name them."

1. Watson *v.* Cooney, 56 N. Y. Super. Ct. 247.

2. Harris *v.* Aktiebolaget Separator, 51 Hun (N. Y.) 639.

3. Jansen *v.* Tappen, 3 Cow. (N. Y.) 34; Dutcher *v.* Wilgus, 2 How. Pr. (N. Y.) 180.

But it is premature to apply for a reference before the question of the right to an accounting has been determined. Until then, it does not appear that any examination of the accounts will be required. Mitchell *v.* Stewart, 3 Abb. Pr. N. S. (N. Y.) 250.

4. Enos *v.* Thomas, 4 How. Pr. (N. Y.) 289.

5. Ross *v.* Combes, 37 N. Y. Super. Ct. 289; Dane *v.* Liverpool, etc., Ins. Co., 21 Hun (N. Y.) 259; Bates *v.* Eagleton Mfg. Co., 10 Civ. Pro. Rep. (N. Y.) 218.

But the court may order a reference on the strength of the affidavit alone, or of the pleadings alone. De Graff *v.* Mackinley, 38 N. Y. Super. Ct. 203; Holmes *v.* Bennett, 28 How. Pr. (N. Y.) 289.

6. Wood *v.* Crowner, 4 Hill (N. Y.) 548; Mesick *v.* Smith, 2 How. Pr. (N. Y.) 7; Ross *v.* Beecher, 2 How. Pr.

account will be required, are not sufficient for a compulsory reference;[1] but the court must be enabled to see that a long account will be involved. The affidavit should state that issue is joined;[2] but it need not mention where the venue is laid.[3]

It is not necessary for the moving party to make out more than a *prima facie* case for a reference; thus he need not state in his affidavit that no difficult question of law will arise in the trial, but it is for the opposite party to show that the case is within that exception.[4] And it will not be sufficient for the opponent to state in general terms that difficult questions of law will be involved,[5] but the particular points of difficulty must be indicated.[6] The party opposing the reference may also object on the ground of delay in moving for the reference.[7]

Where a motion for a reference is denied, it does not become *res adjudicata*, so as to prevent the court afterwards, at the same term, from making an order to vacate the former one, and refer the cause.[8]

5. Selection of Referees.—In *New York* a *sole* referee, in a case of compulsory reference, must be an attorney;[9] if, however, there are several referees, some of them may be laymen;[10] but no person may be appointed a referee to whom all the parties object, except in matrimonial causes.[11] The judge of a court cannot, without the consent of the parties, be a referee in an action pending before him.[12] In *New York* clerks of courts cannot act as

(N. Y.) 157; Little *v.* Bigelow, 2 How. Pr. (N. Y.) 164; Bolton *v.* McCullough, 2 How. Pr. (N. Y.) 165.

1. Whitaker *v.* Desfosse, 7 Bosw. (N. Y.) 678; Kain *v.* Delano, 11 Abb. Pr. N. S. (N. Y.) 29; Lord *v.* Connor, 48 How. Pr. (N. Y.) 95; Sharp *v.* Mayor, etc., of N. Y., 31 Barb. (N. Y.) 578. But see *contra* Dean *v.* Empire State Mut. Ins. Co., 9 How. Pr. (N.Y.) 69; Continental Bank Note Co. *v.* Industrial Exhibition Co., 1 Hun (N. Y.) 118; 3 Thomp. & C. (N. Y.) 758.

2. Jansen *v.* Tappen, 3 Cow. (N. Y.) 34.

3. Feeter *v.* Harter, 7 Cow. (N. Y.) 478; Cleaveland *v.* Strong, 2 Cow. (N. Y.) 448. But see Chubb *v.* Berry, 7 Wend. (N. Y.) 483.

4. Barber *v.* Cromwell, 10 How. Pr. (N. Y.) 351.

5. Ryan *v.* Atlantic Mut. Ins. Co., 50 How. Pr. (N. Y.) 321.

6. Lusher *v.* Walton, 1 Cai. (N. Y.) 149; Salisbury *v.* Scott, 6 Johns. (N. Y.) 329; Patterson *v.* Stettauer, 39 N. Y. Super. Ct. 413; Dewey *v.* Field, 13 How. Pr. (N. Y.) 437. But *contra*, Low *v.* Hallett, 3 Cai. (N. Y.) 82.

7. Mayor, etc., of N. Y. *v.* Genet, 4 Hun (N. Y.) 658.

8. Nachtsheim *v.* Turner (Wis., 1888). 36 N. W. Rep. 637.

9. Gen. Rules Pract., Rule 80.

10. Townsend *v.* Glens Falls Ins. Co., 10 Abb. Pr. N. S. (N. Y.) 277; Hale *v.* Swinburne, 17 Abb. N. Cas. (N. Y.) 381; Olmstead *v.* Loomis, 9 N. Y. 424.

11. *New York* Code Civ. Pro., § 1024.

12. Dinsmore *v.* Smith, 17 Wis. 20; Hills *v.* Passage, 21 Wis. 294; Crane *v.* Hand, 3 N. J. L. 9; Rogers *v.* Woodmansie, 3 N. J. L. 510. And so the justice who takes the acknowledgment of the parties to the rule of reference cannot be one of the referees. Drew *v.* Canady, 1 Mass. 158; Drew *v.* Mulikin, 5 N. H. 153.

The *New York* statute declares that "a judge cannot be appointed a referee, in an action brought in the court of which he is a judge, except by the written consent of the parties; and in that case, he cannot receive any compensation as referee." *New York* Code Civ. Pro., § 1024. And under this statute it was held that where, pending the reference of a claim, the referee was appointed a justice of the supreme court, and thereafter, while judge, rendered his report, it was error not to set

referees;[1] nor can attorneys, in cases in which they have appeared as counsel.[2] A person suspected of bias or partiality toward one of the parties is, of course, unfit to act as referee; but the mere fact that a referee is the friend and legal adviser of a relative of one of the parties does not warrant an inference of partiality.[3] But if the referee accepts law business from one of the parties to the action, or if each of two attorneys in different actions is referee in the cause in which the other is counsel, in either case the order of reference will be vacated, and the question whether or not the referee was influenced or was likely to be influenced by the relation adverted to, is immaterial.[4]

Where a referee in an action has passed upon certain questions, he cannot be appointed referee in another action in which the same questions will arise.[5] And where a new trial is for any reason ordered, a different referee should, in general, be appointed.[6] On the question whether a referee should be a resident of the county in which the venue is laid, the doctrine seems to be that this, although advisable, is not required.[7]

But if a party is aware of objections to a referee and, nevertheless, without raising them, proceeds with the trial, he is deemed thereby to waive them.[8]

6. Order of Reference.—The order of reference limits and defines the power of the referee to act;[9] hence he should not proceed

aside the report. Countryman *v.* Norton, 21 Hun (N. Y.) 17.

1. *New York* Code Civ. Pro., § 90.

2. *New York* Code Civ. Pro., §§ 78–80.

3. Durant *v.* O'Brien, 2 How. Pr. N. S. (N. Y.) 313.

4. Stebbins *v.* Brown, 65 Barb. (N. Y.) 272; Carroll *v.* Lufkins, 29 Hun (N. Y.) 17.

But the question whether there are any relations between the referee and a party or his assignor, which would render it improper for the referee to act, is one addressed to the discretion of the court, and is not reviewable in the court of appeals. Baird *v.* Mayor, etc., of N. Y., 7 N. Y. Week. Dig. 70; 74 N. Y. 382.

5. *In re* Bliss, 39 Hun (N. Y.) 594; Conley *v.* Petrie, 60 How. Pr. (N. Y.) 299. But *contra*, Clark *v.* Clark, 7 Robt. (N. Y.) 62.

6. *New York* Code Civ. Pro., § 1011; Schermerhorn *v.* Van Alen, 13 How. Pr. (N. Y.) 82; Murphy *v.* Winchester, 35 Barb. (N. Y.) 616; Sharp *v.* Mayor, etc, of N. Y., 31 Barb. (N. Y.) 578. But see *contra* Shuart *v.* Taylor, 7 How. Pr. (N. Y.) 251; Catlin *v.* Adirondack Co., 81 N. Y. 379; 19 Hun (N. Y.) 389.

In Billings *v.* Vanderbrek, 15 How. Pr. (N. Y.) 295, the distinction is made that if a referee's decision is reversed entirely on questions of law, since he has, on re-trial, merely to conform to the law of the case as declared by the court, there is no ground for substituting a new referee; but that if the decision of the referee was reversed upon the facts alone, a new referee should be appointed.

7. O'Brien *v.* Catskill Mountain R. Co., 32 Hun (N. Y.) 636; Sniffen *ads.* Weed, 5 N. Y. Leg. Obs. 19; Sherwood *v.* Tremper, 11 Johns. (N. Y.) 406; Hart *v.* Trotter, 4 Wend. (N. Y.) 198. *Contra* Chubb *v.* Berry, 7 Wend. (N. Y.) 483.

8. Burnham *v.* Goffstown, 50 N. H. 560; Carroll *v.* Lufkins, 29 Hun (N. Y.) 17; Burrows *v.* Dickinson, 35 Hun (N. Y.) 492; Katt *v.* Germania F. Ins. Co., 4 Month. L. Bul. 59; Sniffen *ads.* Weed, 5 N. Y. Leg. Obs. 19; Durant *v.* O'Brien, 2 How. Pr. N. S. (N. Y.) 313.

9. Sullivan *v.* Sullivan, 41 N. Y. Super. Ct. 519; 52 How. Pr. (N. Y.) 453; Stone *v.* Merrill, 43 Wis. 72. In the former case the order, instead of directing the referee to hear and determine the issues, required him to

until the order has been duly entered;[1] and hence also appearing and going to trial, without objection, cannot cure the want of an order of appointment in the record.[2] But the court does not by the order of a reference lose power over the cause referred, which remains before the court, the referee having power only to try and report upon the issues.[3] Objections to the form of the order of reference, or to the appointment of the referee, have been deemed to be waived by proceeding with the reference;[4] and so the objection that the court had no jurisdiction to make the order of reference, is waived in like manner.[5] The manner of taking the objection is not by refusing to proceed on the reference, but by appealing from the order directing it.[6] The appeal may be taken on the ground that the account involved is incidental or collateral;[7] or that there is no proof that the account is such as to bring the action within the statute;[8] or that there is no evidence to show that a long account will be involved.[9] But if the action is in its nature referable, and any evidence, even though it be conflicting, is produced to the court to show that the trial will involve the examination of a long account, the judicial discretion in ordering a reference is not reviewable in an appellate court.[10]

take proof of the material facts set forth in the pleadings, and report the same to the court with his opinion thereon. *Held*, that this gave no power to try the issues.

1. Bonner *v.* McPhail, 31 Barb. (N. Y.) 106.

2. Stone *v.* Merrill, 43 Wis. 72.

3. Mathews *v.* Jones, 1 E. D. Smith (N. Y.) 429.

4. Claflin *v.* Farmers, etc., Bank, 25 N. Y. 293; Renouil *v.* Harris, 2 Sandf. (N. Y.) 641. And the same principle has been extended to voluntary references. Quinn *v.* Lloyd, 7 Robt. (N. Y.) 157; Lincoln *v.* Lincoln, 6 Robt. (N. Y.) 525; Robinson *v.* Mutual Benefit Life Ins. Co., 16 Blatchf. (U. S.) 194; Whalen *v.* Albany Co., 6 How. Pr. (N. Y.) 278.

5. Baird *v.* Mayor, etc., of New York, 74 N. Y. 382. But the contrary was held in Garcie *v.* Sheldon, 3 Barb. (N. Y.) 232.

6. Baird *v.* Mayor, etc., of N. Y., 74 N. Y. 382; Elliott *v.* Lewis, 16 Hun (N. Y.) 581.

7. Camp *v.* Ingersoll, 86 N. Y. 433; 13 N. Y. Week. Dig. 149; 1 Civ. Pro. Rep. (N. Y.) 340; Turner *v.* Taylor, 2 Daly (N. Y.) 278.

8. Ross *v.* Combes, 37 N. Y. Super. Ct. 289.

9. Whitaker *v.* Desfosse, 7 Bosw. (N. Y.) 678; Kain *v.* Delano, 7 Abb. Pr. N. S. (N. Y.) 29; Ronalds *v.* Mechanics' Nat. Bank, 37 N. Y. Super. Ct. 208. But unless the absence of evidence is manifest, the appellate court will not review the case on this ground. Welsh *v.* Darragh, 52 N. Y. 590.

10. Whitaker *v.* Desfosse, 7 Bosw. (N. Y.) 678; Ronalds *v.* Mechanics' Nat. Bank, 37 N. Y. Super. Ct. 208; Batchelor *v.* Albany City Ins. Co., 6 Abb. Pr. N. S. (N. Y.) 240; De Graff *v.* Mackinley, 38 N. Y. Super. Ct. 203; Dean *v.* Empire State Mut. Ins. Co., 9 How. Pr. (N. Y.) 69; Davis *v.* Coddington, 7 Alb. L. J. 346; Gray *v.* Fox, 1 Code R. N. S. (N. Y.) 334; Harrington *v.* Bruce, 84 N. Y. 103; Hatch *v.* Wolf, 30 How. Pr. (N. Y.) 65; 1 Abb. Pr. N. S. (N. Y.) 77; Ludlow *v.* American, etc., Nat. Bank, 59 Barb. (N. Y.) 509; Stebbins *v.* Cowles, 30 Hun (N. Y.) 523; Ubsdell *v.* Root, 3 Abb. Pr. (N. Y.) 142; Hossack *v.* Heyerdahl, 38 N. Y. Super. Ct. 391; Smith *v.* Dodd, 3 E. D. Smith (N. Y.) 348.

It is not a ground of appeal that one of the issues is not a material one, or that a reference was granted notwithstanding an allegation of fraud in an incidental issue. Lawless *v.* O'Mahoney, 9 Abb. Pr. N. S. (N. Y.) 44; Schermerhorn *v.* Wood, 4 Daly (N. Y.) 158.

Where a reference is refused on the ground of lack of power to order it, an appeal may be taken.[1]

7. Oath of Referees.—The requirements as to referees being sworn, vary in the different States.[2] But when the report of a referee is silent as to whether the referee was sworn or not, it will be presumed, in the absence of evidence to the contrary, that the oath was duly taken.[3]

8. Powers of Referees.—Referees have in general all the powers of courts of law and of equity,[4] and may decide matters of both fact and law;[5] but a referee may in his report leave to the court the decision of questions of law arising in his investigation.[6] In *New York* referees have complete jurisdiction over the cause, as much so as any judge could possess at special term for its trial; the mode of conducting the trial, therefore, must be within their discretion, so far as all questions are within the ordinary discretion of a judge on the trial of a cause.[7] It is well settled that referees

1. Harden *v.* Corbett, 6 Hun (N. Y.) 522. And in *New York* an order of the special term vacating an order of reference previously made is appealable. Hoffman *v.* Sparling, 12 Hun (N. Y.) 83.

2. In *California* referees are not required to be sworn. Sloan *v.* Smith, 3 Cal. 406.

In *Indiana* referees are not required to be sworn, unless the parties require it. Daggy *v.* Cronnelly, 20 Ind. 474.

In *Michigan* the constitutional provision that all executive and judicial officers are to be sworn before assuming the duties of their office, does not include referees. Underwood *v.* McDuffee, 15 Mich. 361; 93 Am. Dec. 194.

In *Missouri* referees or arbitrators must be sworn, or their award will be invalid. Fassett *v.* Fassett, 41 Mo. 516; Walt *v.* Huse, 38 Mo. 210; Toler *v.* Hayden, 18 Mo. 399.

In *New Jersey* the referees must be duly sworn, unless the oath be waived by the parties. Ford *v.* Potts, 6 N. J. L. 388.

In *New York* a referee must be sworn faithfully and fairly to try the issues. But the parties, being of age and present, in person or by attorney, may waive the referee's oath orally or in writing. *New York* Code Civ. Pro., § 1016. But the omission on the part of the referee to be sworn, is, after decision rendered, cured by Code Civ. Pro., § 721, enacting that "in a court of record, where a verdict, report or decision has been rendered, the judgment shall not be stayed . . . for an omission on the part of the referee to be sworn." See Katt *v.* Germania F. Ins. Co., 26 Hun (N. Y.) 429.

3. Leyde *v.* Martin, 16 Minn. 38.

4. Plant *v.* Fleming, 20 Cal. 92; Sweetsir *v.* Kenney, 32 Me. 464; Woodruff *v.* Dickie, 31 How. Pr. (N. Y.) 164; Wesleyan Cemetery *v.* Woodruff, 2 Disney (Ohio) 216; Stimson *v.* Estes, 3 Oregon 521; Downer *v.* Downer, 11 Vt. 395.

5. Whitmore *v.* Le Ballistier, 35 Me. 488; Hall *v.* Decker, 51 Me. 31. So in *New York* a reference of a cause refers all the issues therein, whether of law or fact. Renouil *v.* Harris, 2 Sandf. (N. Y.) 641.

In *California*, arbitrators are a part of the court, and have the same limits to their jurisdiction. Williams *v.* Walton, 9 Cal. 142.

In *Pennsylvania*, referees are restrained, when not expressly empowered by the submission, from doing what a jury may not do. McCracken *v.* Clarke, 31 Pa. St. 498.

In *Vermont*, the reference of a cause by rule of court is not considered a reference of the particular issue joined in court. It is a reference of the whole cause to be tried on its merits. Eddy *v.* Sprague, 10 Vt. 216; Davis *v.* Campbell, 23 Vt. 236; Hicks *v.* Cottrill, 25 Vt. 80; Spaulding *v.* Warren, 25 Vt. 316.

6. Hooper *v.* Taylor, 39 Me. 224.

7. Palmer *v.* Palmer, 13 How. Pr. (N. Y.) 363. In Woodruff *v.* Dickie, 31 How. Pr. (N. Y.) 164, 171, the court by Monell, J., said: "Referees are no longer officers of, or under control of,

have power, on the plaintiff's failure after notice to appear and prosecute the reference, to dismiss the complaint.[1] And so a referee may dismiss the complaint on the ground that it does not state facts sufficient to constitute a cause of action,[2] or may give judgment for the plaintiff, if the answer does not contain facts sufficient to constitute a defense.[3] A referee may admit new parties to an action pending before him.[4] The referee has inherent power to give time for the submission of briefs by counsel, and to extend the time for doing so.[5] He may reopen the case and receive further testimony;[6] and, before rendering his report, may open the case and hear further evidence, or allow a reargument, even after he has made up his mind.[7] When an order of reference or a statutory provision requires the report to be made within a limited time, the power of the referee ends with that time, and a report thereafter made is without validity.[8] Or if the report of the referee is sooner delivered, his judicial functions cease.[9]

the court. They become by appointment an independent tribunal, having such powers as are given by statute, and their decisions are reviewable only on appeal from their judgments. The legislature has from time to time increased the powers, and added to the dignity of this tribunal; and it was the plain intention of the legislature, it seems to me, that it should possess all the powers, and exercise all the functions of a court, independently, and without accountability to any other tribunal; and that its decisions should be subject to review only on appeal."

1. Stephens *v.* Strong, 8 How. Pr. (N. Y.) 339; Williams *v.* Sage, 1 Code R. N S. (N. Y.) 358; Morange *v.* Meigs, 54 N. Y. 207; Catlin *v.* Adirondack Co., 81 N. Y. 379; 19 Hun (N. Y.) 389; Wilkins *v.* Buck, 13 Hun (N. Y.) 124. *Contra*, several older cases: Mathews *v.* Jones, 1 E. D. Smith (N. Y.) 429; Holmes *v.* Slocum, 6 How. Pr. (N. Y.) 217.

The refusal of a party, when called on, to give his deposition, is no ground for the dismissal of the case by referees. Coburn *v.* Tucker, 21 Mo. 219.

2. Coffin *v.* Reynolds, 37 N. Y. 640.

3. Schuyler *v.* Smith, 51 N. Y. 309; 10 Am. Rep. 609.

4. Perkins *v.* Berry, 103 N. Car. 131.

5. Morrison *v.* Lawrence, 2 How. Pr. N. S. (N. Y.) 72.

6. Ayrault *v.* Sackett, 9 Abb. Pr. (N. Y.) 154, note; *aff'd*, 17 How. Pr. (N. Y.) 507; Duguid *v.* Ogilvie, 3 E. D. Smith (N. Y.) 527; 1 Abb. Pr. (N. Y.) 145; Cleaveland *v.* Hunter, 1 Wend. (N. Y.) 104; Loonam *v.* Myers, 1 N. Y. St. Rep. 276.

7. Cooper *v.* Stinson, 5 Minn. 201; Litch *v.* Brotherson, 16 Abb. Pr. (N. Y.) 384; 25 How Pr. (N. Y.) 407.

But he will not be justified in opening a case to admit the testimony of a witness, where the party offering him has been culpably negligent in the previous measures taken to procure the attendance and testimony of such witness; especially where such testimony is on an immaterial issue. Cooper *v.* Stinson, 5 Minn. 201.

8. Ryan *v.* Dougherty, 30 Cal. 218; De Long *v.* Stahl, 13 Kan. 558; Brower *v.* Kingsley, 1 Johns. Cas. (N. Y.) 334; White *v.* Kemble, 3 N. J. L. 53; White *v.* Puryear, 10 Yerg. (Tenn.) 441. *Compare* McClure *v.* Shroyer, 13 Mo. 104; Buntain *v.* Curtis, 27 Ill. 374. Hence, judgment on a report of referees, after the time of making such report has expired, should be reversed. Hanner *v.* Coffin, 1 Oregon 99. But in *California* it is decided that the statutory time within which a referee must file his report, is merely directory, and that a failure to file within that time will not invalidate the report or the judgment rendered thereon. Keller *v.* Sutrick, 22 Cal. 471.

9. Indiana Cent. R. Co. *v.* Bradley, 7 Ind. 49; Pratt *v.* Stiles, 17 How. Pr. (N. Y.) 211; Shearman *v.* Justice, 22 How. Pr. (N. Y.) 241; Leffler *v.* Field, 33 How. Pr. (N. Y.) 385; Barne *v.* Neuss, 14 N. Y. Week. Dig. 522; Hussey *v.* Mayer, 3 Month. L. Bul. 102. But in Ayrault *v.* Sackett, 17

Hence a second report by a referee proposing to correct his former report is a nullity.[1]

9. Duties of Referees.—Where there are several referees, all should be present to hear the allegations and proofs of the parties.[2] A referee cannot, against objection, delegate his authority to anybody else.[3] But it has been held that the parties may waive his presence, and consent that the testimony be taken before some one else.[4] A referee, however, is not entitled to charge for the services of a third person before whom the parties agree to proceed with the reference in the referee's absence.[5]

How. Pr. (N. Y.) 507; 9 Abb. Pr. (N. Y.) 154, note; 17 How. Pr. (N. Y.) 461; it was held that signing the report, together with notice of the fact to the party entitled to it, precluded the referee's opening the case for further evidence or consideration, and closed his judicial authority therein. And in other cases it has been intimated that the judicial control of the referee ceases when the report is made, that is, signed and ready for delivery. Coope *v.* Bowles, 42 Barb. (N. Y.) 87; 28 How. Pr. (N. Y.) 10; 18 Abb. Pr. (N. Y.) 442; Niles *v.* Price, 23 How. Pr. (N. Y.) 473; Kissam *v.* Hamilton, 20 How. Pr. (N. Y.) 369.

1. Conklin *v.* Morton, 40 Ind. 76.

2. Short *v.* Pratt, 6 Mass. 496; Walker *v.* Melcher, 14 Mass. 149; McInroy *v.* Benedict, 11 Johns. (N. Y.) 402. But if nothing appears to indicate the contrary, it will be presumed that all the referees were present. Yates *v.* Russell, 17 Johns. (N. Y.) 462. And it is not irregular for two of three referees to meet and keep open the cause until the arrival of the third referee. Small *v.* Deforest, 2 How. Pr. (N. Y.) 176.

3. Cooper on Referees and References, p. 65.

4. Metcalf *v.* Baker, 11 Abb. Pr. N. S. (N. Y.) 431; and see Schultz *v.* Whitney, 9 Abb. Pr. (N. Y.) 71; 17 How. Pr. (N. Y.) 471.

In Metcalf *v.* Baker, 11 Abb. Pr. N. S. (N. Y.) 434, the court by Monell, J., said: "The motion to set aside the report of the referee was properly denied. The ground of the motion was that the referee was not present when the witnesses were examined. As an abstract question, I am of opinion that it is the duty of a referee to be always present during the examination of the witnesses, as it is at all other times during the progress of the trial; but when a referee absents himself without objection, and with the tacit consent of the parties, it is too late *afterwards* to object. Should the objection be taken at the time, and be overruled or disregarded by the referee, the court would be obliged to set aside his report. But if no objection is made at the time, and the parties go on with the examination of the witnesses, and finally submit all the evidence to the referee for his decision, they must be deemed to have waived the right to object afterwards. For it is but fair to presume that no referee would allow a reference to proceed in his absence against the objection of the party. In this case it does not appear that any objection was made, or any notice taken at the time of the referee's absence. It cannot be done now. The order should be affirmed with costs."

5. Schultz *v.* Whitney, 9 Abb. Pr. (N. Y.) 71; 17 How. Pr (N. Y.) 471. In this case the court by Hilton, J., said: "The fee can only be allowed for each day spent by the referee in the business of the reference, and if the parties agree to dispense with his presence at the hearing, and he absents himself, I do not see how the fact that his clerk wrote down a statement of the witness which the parties agreed to regard as evidence, can, upon objection, entitle him to the fee which the statute only allows for actual and personal service. His inability, on account of other references or engagements, to attend to the trial which the court, at the request of the parties, had intrusted to him, would be a sufficient reason for appointing another referee—his clerk, indeed, if the parties desired it; but it furnishes no reason for allowing him a fee for a service he has never performed. I say *never* performed, because I cannot admit that a referee, any more than a

Where several referees are appointed to try a cause, it is not proper that one of them be called as a witness.[1] In causes referred to several referees, there must be a conference of them all, and a substantial conclusion by a majority, which should be embodied in a report made by them when they are all together.[2] A referee who desires additional light on any subject relating to the cause, should summon the attorneys for both parties before him, and should avoid all interviews respecting the case with one side alone.[3] A referee should not, before delivering his report, communicate his conclusions to either party.[4] But charges of any such irregularities must be affirmatively proved; mere suspicions and surmises, especially when these are founded on alleged previous improprieties with the unsuccessful side, will not be sufficient.[5]

judge or juror, can act by proxy in the trial of an action; and as a referee cannot so act, it follows that no fee can be allowed for any service shown or claimed to have been thus rendered. The actual presence of the referee is required as a condition precedent to the allowance of any fee for the hearing of a matter referred to him; and his presence must in all cases be shown affirmatively, when, as in the present instance, his absence is urged as an objection to the fees claimed by him, upon the adjustment of costs by the clerk. If the parties in any case, by consent, take testimony before a person mutually agreed upon, there certainly can be no objection to such a course; but the prevailing party cannot be permitted to charge for the services thus rendered as a disbursement in the cause, if the item is objected to, much less can such person be regarded as a referee, or considered as entitled to the fees of such an officer, if the action has not been regularly referred to him by the court."

1. Morss *v.* Morss, 11 Barb. (N. Y.) 510; 1 Code R. N. S. (N. Y.) 374; 10 N. Y. Leg. Obs. 151.

2. Townsend *v.* Glen's Falls Ins. Co., 10 Abb. Pr. N. S. (N. Y.) 277.

3. Cooper on Referees and References, p. 94. And see Dorlan *v.* Lewis, 9 How. Pr. (N. Y.) 1.

In Townsend *v.* Glen's Falls Ins. Co., 10 Abb. Pr. N. S. (N. Y.) 277, the court by Spencer, J., said: "After the submission of a controversy the referee should not consult with, nor receive any suggestion or advice from, any of the parties in regard to the subject-matter of the reference or to his finding or report therein except in the presence of the opposing party or his counsel, or their respective counsel. Referees, like judges, should avoid even the appearance or suspicion of unfairness or prejudice in the performance of their duties, and in all cases when they deem it necessary to hear the views of counsel, or obtain their assistance in regard to the case, or as to the form and substance of their report, they should exercise their undoubted power and privilege, by calling the respective counsel of both parties before them for that purpose, or request each of them to furnish a proposed formal report that should be made upon the general conclusions they have reached in the cause."

And in Harlem Bank *v.* Todd, 4 N. Y. Week. Dig. 64, it was held that friendly intercourse alone between the referee and one of the successful party's attorneys, after the case was submitted and before the report was made, was so suggestive of bias in the referee's decision, that the report must be set aside.

4. Ayrault *v.* Sackett, 17 How. Pr. (N. Y.) 461. In this case the court by Johnson, J., said: "Referees, on the score of propriety, should be exceedingly careful not to expose themselves to such applications [viz., from the parties for information as to what are the doubtful points in the mind of the referee] from either side, by advising them in respect to their conclusions in advance of the delivery of their report. Should the power be abused, the court would apply a remedy, after the report should be made, on the fact of such abuse being shown."

5. Gray *v.* Fisk, 12 Abb. Pr. N. S. (N. Y.) 212.

For a referee to go to either party and attempt to bring about a compromise, is out of his province, and will vitiate his report.[1]

A referee has no power to cause a party to be brought in by compulsory process,—this belonging to the court alone.[2]

10. Control Exercised over Referees by Court—*a.* BEFORE TRIAL.—If a referee already appointed by the court can be shown to have a prejudice against, or a bias in favor of, one of the parties, he may, on motion, be removed and another substituted;[3] and so, also, if a referee refuses or is unable to hear the cause, and it is important that it should be heard without delay.[4]

b. DURING TRIAL.—When during a trial before a referee it is shown to the court that some act has been committed by the referee indicating that means or influence other than the evidence and argument adduced before him, has affected his decision, or is likely to do so, the court possesses the power to interfere,[5] but, in general, since an adequate remedy by appeal has been provided for the erroneous rulings of a referee, the courts are very reluctant to interfere with what is, for the time being, an independent tribunal.[6]

c. AFTER REPORT IS RENDERED.—The return of a report to a referee, after it has been rendered, is not encouraged, but is sometimes allowed for the purpose of supplying technical or clerical omissions,[7] or of compelling the referee to state the findings of fact and conclusions of law separately.[8]

11. Effect of Death upon Reference—*a.* DEATH OF A PARTY.—The proceedings upon the death or transfer of interest of a party are the same in trials before referees as in trials before the court.[9]

b. DEATH OF REFEREE.—Where the referee dies after rendering his report, the case need not be re-tried, but judgment may be entered upon the report.[10] Where the death of the referee occurs before the report has been rendered, a distinction is to be made between compulsory and voluntary references. In the former the only effect of the referee's death is the failure of accom-

1. Livermore *v.* Bainbridge, 14 Abb. Pr. N. S. (N. Y.) 227; 44 How. Pr. (N. Y.) 357.

2. Newman *v.* Marvin, 12 Hun (N. Y.) 236.

3. Clark *v.* Clark, 7 Robt. (N. Y.) 62; Conley *v.* Petrie, 60 How. Pr. (N. Y.) 299. *Compare* Billings *v.* Vanderbrek, 15 How. Pr. (N. Y.) 295.

4. Parkhurst *v.* Berdell, 87 N. Y. 145; Forrest *v.* Forrest, 3 Bosw. (N. Y.) 650.

5. Marie *v.* Garrison 1 How. Pr. N. S. (N. Y.) 34; 7 Civ. Pro. Rep. (N. Y.) 40. *Compare* Barion *v.* Herman, 8 Abb. Pr. N. S. (N. Y.) 406.

6. Marie *v.* Garrison, 1 How. Pr. N. S. (N. Y.) 34; Oregon Steamship Co. *v.* Otis, 59 How. Pr. (N. Y.) 254; Knapp *v.* Fowler, 26 Hun (N. Y.) 200; Robinson *v.* Robinson, 4 Month. L. Bul. 70.

The above is at present the established rule, although in a few early *New York* cases the contrary was asserted or acted upon. Ford *v.* Ford, 53 Barb. (N. Y.) 525; Billings *v.* Baker, 6 Abb. Pr. (N. Y.) 213; Chittenango Cotton Co. *v.* Stewart, 67 Barb. (N. Y.) 423; Union Bank *v.* Mott, 18 How. Pr. (N. Y.) 506.

7. First Nat. Bank *v.* Levy, 41 Hun (N. Y.) 461.

8. See *infra*, this title, p. 700, note 1.

9. Cooper on Referees and References, p. 97.

10. Juliand *v.* Grant, 34 How. Pr. (N. Y.) 132.

plishment of anything, and a new referee must be appointed, before whom the trial is to be begun again.[1] In voluntary references, however, since the selection of the particular person agreed upon constituted one ground for the consent of the parties to such mode of trial, the death of the referee terminates the reference.[2]

12. Trial or Hearing Before Referees.—Trials before referees are in general conducted as before courts.[3]

a. NOTICE OF TRIAL.—After the referee has appointed a time and place for the trial, notice may be served by either party.[4] A defect in the notice will be waived by the appearance of the parties in pursuance of the notice.[5] After the time and place for the hearing have been fixed by the referee, and the adverse party has received notice that the hearing is to be had at the appointed time and place, such adverse party is in fault, if he neglects to attend, and in his absence the referee may proceed, upon the motion of the party giving the notice, to hear the proofs in the case *ex parte*.[6]

b. PLACE OF TRIAL.—A reference ordered by a court of special and limited jurisdiction must be held within such jurisdiction.[7]

1. Devlin *v.* Mayor, etc., of N. Y., 62 How. Pr. (N. Y.) 260; 9 Daly (N. Y.) 334. To avoid an entirely new trial before the new referee, Mr. Cooper suggests that the parties, if competent, might agree to let the testimony previously taken stand, or might consent that the referee render a decision upon the testimony taken. Cooper on Referees and References, p. 99.

2. Cooper on Referees and References, p. 99. And the same is true where two of three referees die before the report is made. Emmet *v.* Bowers, 23 How. Pr. (N. Y.) 300. The consequences of this rule may be provided against in the order of reference to several persons by inserting a provision that if one of them dies, the trial may continue before a single referee. Devlin *v.* Mayor, etc., of N. Y., 62 How. Pr. (N. Y.) 260.

3. Goodrich *v.* Marysville, 5 Cal. 430; Phelps *v.* Peabody, 7 Cal. 50; Gibson *v.* Burrows, 41 Mich. 713; Perkins *v.* Berry, 103 N. Car. 131; Stimson *v.* Estes, 3 Oregon 521.

4. Thompson *v.* Krider, 8 How. Pr. (N. Y.) 248; Williams *v.* Sage, 1 Code R. N. S. (N. Y.) 358. That the notice should be in writing, is advisable, but not essential. Sage *v.* Mosher, 17 How. Pr. (N. Y.) 367; Stephens *v.* Strong, 8 How. Pr. (N. Y.) 339.

5. Wetter *v.* Schlieper, 7 Abb. Pr. (N. Y.) 92. And so the complete want of notice is waived, where the party, although himself non-resident, appears by his attorney, and no objection is made by the latter on the ground of lack of notice. Harding *v.* Wallace, 8 B. Mon. (Ky.) 536.

6. Bray *v.* English, 1 Conn. 498; Stephens *v.* Strong, 8 How Pr. (N. Y.) 339. See, also, McInroy *v.* Benedict, 11 Johns. (N. Y.) 402.

The fact that, after a party has received due notice of trial before a referee, the referee informs him that he has made no appointment for the day noticed, and cannot try the cause on that day, does not avoid the regularity of the proceedings of the adverse party, who, without knowing that the party has been misled, attends on the day, and in his absence procures a judgment. If the attorney receives notice of trial before a referee, he is bound to attend to it, and attend to it at the time and place of hearing. Misinformation from the referee may furnish a good ground for an adjournment, but not for disregarding the notice of trial. Sage *v.* Mosher, 17 How. Pr. (N. Y.) 367.

7. Bonner *v.* McPhail, 31 Barb. (N. Y.) 106. But the objection that the trial was held outside the jurisdiction is untenable, where the point was not raised at the trial, and where it does not appear that the decision was made.

The trial need not necessarily be held in the county of venue, but may be had elsewhere, if the ends of justice would be best promoted thereby, and if the departure would not be oppressive to either party.[1] But the party for whose benefit such change of venue is granted, may be required to pay the expenses of the referees, while attending such meetings.[2] An intention on the part of the court to change the place of trial, will not be inferred from a reference to a person residing in another county than that in which the cause would otherwise be triable.[3]

c. ADJOURNMENTS.—Referees may adjourn for a reasonable time on their own motion, without the consent of the parties, provided such adjournment be convenient or necessary.[4] The grounds justifying an adjournment vary with circumstances. The most frequent cause is the absence of material witnesses. Provided the adjournment be not oppressive to either party, it may be granted for any reason that the referee in his discretion may deem necessary.[5] Applications to the court to direct an adjournment are discountenanced.[6] The imposition of reasonable terms by the referee as a condition of granting an adjournment is allowable.[7] Although the granting or refusal of an adjournment is discretionary with the referee, if injury is occasioned to either side, the court will interfere and set aside the referee's report, or appoint a new referee.[8]

outside the jurisdiction. Blake *v.* Lyon, etc., Mfg. Co., 77 N. Y. 626.

1. Newland *v.* West, 2 Johns. (N. Y.) 188; Pierce *v.* Voorhees, 3 How. Pr. (N. Y.) 111.

It is sometimes provided in the order of reference that the referee may sit in any county. O'Brien *v.* Catskill Mt. R. Co., 32 Hun (N. Y.) 636; Hart *v.* Trotter, 4 Wend. (N. Y.) 198.

2. Pierce *v.* Voorhees, 3 How. Pr. (N. Y.) 111.

3. Wheeler *v.* Maitland, 12 How. Pr. (N. Y.) 35.

4. Rickards *v.* Patterson, 5 Harr. (Del.) 235; Perkins *v.* Berry, 103 N. Car. 131; Campan *v.* Brown, 48 Mich. 145; *Ex parte* Rutter, 3 Hill (N. Y.) 467; 1 N. Y. Leg Obs. 178.

5. Cooper on Referees and References, p. 52; Billings *v.* Vanderbrek, 15 How. Pr. (N. Y.) 295. In this case it was held that it was proper for the referee to adjourn the cause in order to allow the defendant's attorney time to give the requisite notice for the examination of the defendant as a witness.

6. In Langley *v.* Hickman, 1 Sandf. (N. Y.) 681, the court, in denying a motion to postpone a trial, said: "These motions ought not to be encouraged. The propriety of the postponement of a trial, to give a party time to procure testimony, or because of the absence of a material witness, is peculiarly within the province of the referees. They are best able to judge how far the purposes of justice require the cause to be postponed from time to time. We are inclined not to listen to such applications, but to leave them to the decision of the referees, and to examine any alleged error in that behalf on a motion to set aside their report. The practice resorted to in this instance, will lead to great inconvenience. The court will frequently be called upon to determine the propriety of a postponement, when it is not sufficiently possessed of the case, and of all the circumstances to make up a right judgment in the matter."

7. Sickles *v.* Fort, 12 Wend. (N. Y.) 199. By the N. Y. Code Civ. Pro., § 3255, where an application is made to a court or a referee to adjourn a trial, the payment to the adverse party of a sum not exceeding ten dollars, besides the fees of his witnesses, may be required as a condition of granting the adjournment.

8. Cooley *v.* Huntingdon, 16 Abb. Pr. (N. Y.) 384, note; Forbes *v.* Frary,

d. EVIDENCE IN TRIALS BEFORE REFEREES—(1) *Securing Attendance of Witnesses.*[1]

(2) *Swearing Witnesses.*—In *New York* the witnesses may be sworn by the referee, or if there are several, by any one of them.[2] But the referee's authority to administer the oath, which is based upon the order of reference duly made and entered,[3] cannot be delegated by him to another.[4] The referee need not swear the witness more than once, even if the party calling the witness requests it.[5]

(3) *Duties of Witnesses.*[6]

(4) *Admission of Evidence.*—The rules of evidence applicable to trials before referees are the same as those in trials before

2 Johns. Cas. (N. Y.) 224; Forrest *v.* Forrest. 3 Bosw. (N. Y.) 650.

1. In *New York*, where a referee is authorized to hear, try, or determine a matter, he may issue a subpœna requiring the a tendance of witnesses, and also, in a proper case, the production of a book or paper. The subpœna must be served as in all other cases. *New York* Code Civ. Pro., §§ 854, 1017.

A book of account may be brought before a referee by an order to a person to produce it, as well as by a *subpœna duces tecum.* N. Y. Code Civ. Pro., § 867.

A record or document may be removed by the officer having it in custody, to a trial before a referee. *New York* Code Civ. Pro., § 866.

A referee has no power to issue a commission to examine witnesses out of the State, nor can he compel the attendance of such witnesses. Only the court can allow the issuing of a commission. Rathbun *v.* Ingersoll, 34 N. Y. Super. Ct. 211.

2. *New York* Code Civ. Pro., § 1026.

3. Bonner *v.* McPhail, 31 Barb. (N. Y.) 106.

4. Security F. Ins. Co. *v.* Martin, 15 Abb. Pr. (N. Y.) 479. In this case a referee received an affidavit sworn to before a commissioner of deeds. *Held*, that this was not legal, as the witness ought to be sworn before the referee.

5. Parsons *v.* Suydam, 3 E. D. Smith (N. Y.) 276.

6. The following summary of the duties of witnesses testifying before masters in chancery, which applies equally well to all witnesses in cases of references, was laid down by Vice-Chancellor McCoun in Stewart *v.* Turner, 3 Edw. Ch. (N. Y.) 458: On an examination of a witness before a master on a reference in any suit or proceeding, the witness has the right, in the presence of the master, but not privately, to consult his own counsel, and may select for such purpose the counsel for the complainant or defendant as to the propriety or duty of answering any question proposed to him. He may decline answering such question, taking upon himself the consequences of a proceeding as for a contempt, if his objection is not well founded; or he may demur to such question, and then the matter will be heard on his demurrer as between him and the party proposing such question. He is not bound to answer any question which will have a tendency to accuse himself of any crime or misdemeanor, or to expose him to any penalty or forfeiture. But that his answer may establish, or tend to establish, that the witness owes a debt, or is otherwise subjected to a civil suit, is no excuse for refusing to answer a question relevant to the matter in issue and proper to be put. The witness and counsel are to be governed by the same rules which would control them on an examination before a jury in a court of law. It is not to be permitted that counsel should hold a whispering conversation with a witness, or retire with him during his examination for private consultation, or after consultation write out his answer; but his advice must be given under the eye and in the hearing of the master. There must be no room for suspicion of tampering with the witness or of suggesting his answers. More especially the witness must be left, after being advised as to his rights, to give his answers in his own language, without aid in writing or otherwise from counsel.

courts.[1] The referee has power in his discretion to receive evidence at any time from the opening of the cause until he makes his report;[2] and the order of admitting the proofs is also in his discretion.[3] He may permit, or may refuse to permit, a party to recall a witness, before the case has been rested, and ask questions inadvertently omitted.[4] After a party has rested his case, the referee may allow further evidence to be introduced,[5] or may decline to do so.[6] He may receive further testimony, after the summing up has been begun,[7] or ended on both sides,[8] or, in fact, at any time before his report is signed and delivered.[9] The evidence should be taken at the place designated; but a party who, without objecting, appears of his own accord at a different place, waives the right to object afterwards.[10] Objections to evidence must be passed upon by the referee himself, without laying them at every turn before the court; and a dissatisfied party may except.[11] The practice in trials before referees of receiving evidence that has been objected to, reserving the question of its admissibility, has been censured,[12] and has even been

1. See, for instance, De La Riva *v.* Berreyesa, 2 Cal. 195; Mutual L. Ins. Co. *v.* Anthony, 50 Hun (N. Y.) 101.

2. Cooper on Referees and References, pp. 73–4.

3. Gibson *v.* Pearsall, 1 E. D. Smith (N. Y.) 90.

4. Trimble *v.* Stillwell, 4 E. D. Smith (N. Y.) 512.

5. Delafield *v.* DeGrauw, 9 Bosw. (N. Y.) 2; 3 Keyes (N. Y.) 467.

6. Fielden *v.* Lahens, 2 Abb. App. Dec. (N. Y.) 111; 3 Trans. App. (N. Y.) 218; 6 Abb. Pr. N. S. (N. Y.) 341; 9 Bosw. (N. Y.) 436; Beach *v.* Raymond, 2 E. D. Smith (N. Y.) 496; Pearson *v.* Fiske, 2 Hilt. (N. Y.) 146; Dow *v.* Darragh, 42 N. Y. Super. Ct. 80; Loonam *v.* Myers, 1 N. Y. St. Rep. 276.

7. Schermerhorn *v.* Develin, 1 Code R. (N. Y.) 28.

8. Packer *v.* French, Hill & D. Supp. (N. Y.) 103.

9. Ayrault *v.* Sackett, 9 Abb. Pr. (N. Y.) 154, note; 17 How. Pr. (N. Y.) 507; Duguid *v.* Ogilvie, 3 E. D. Smith (N. Y.) 527; 1 Abb. Pr. (N. Y.) 145; Cleaveland *v.* Hunter, 1 Wend. (N. Y.) 104.

10. Catlin *v.* Catlin, 2 Hun (N. Y.) 378.

11. Robinson *v.* Robinson, 4 Month. L. Bul. 70.

If improper evidence has been received by the referee, it will be no ground for reversal, if sufficient evidence to sustain his findings was properly admitted in the case. Holendyke *v.* Newton, 50 Wis. 635; Duffy *v.* Hickey, 68 Wis. 380.

12. Sharpe *v.* Freeman, 45 N. Y. 802; Clussman *v.* Merkel, 3 Bosw. (N. Y.) 402. In Sharpe *v.* Freeman, 45 N. Y. 802, the court by Folger, J., said: "[The practice] is one not to be commended; . . . for it does not conduce to a clear and accurate trial of the action, nor to an explicit presentation of the question for review. If the referee in his report, shall state what he has done in admitting or rejecting the evidence, and it shall appear, without question, in the case as made up, that he has ruled and an exception had been taken to his ruling, such exception may be considered on review. But if, when evidence has been received subject to objection, he shall afterward either sustain or overrule the objection, and there does not appear in the case any exception by the party aggrieved, it may turn out that the party has no sufficient remedy. This case presents an instance. The plaintiff offered in evidence a judgment-roll; the defendant made several objections; the roll was received subject to those objections. The plaintiff whose evidence was in fact received, and is incorporated in the case now on appeal, claims that it was not considered by the referee; and one of his points is that 'the referee erred in rejecting the record in evidence against the heirs, after it had once been received in

declared to be error;[1] but, on the other hand, it has been held that if the testimony is, in fact, relevant, and not likely to injure the party objecting, there is no error in receiving the evidence and reserving the question of its admissibility.[2] And in another case a distinction has been made between questions touching the effect of evidence as applicable or not to one or more of several defendants, and questions touching the admissibility of evidence; and it was held, but by a divided court, that the former might be reserved in all cases, while the latter could be reserved only where the reservation of the decision would not affect injuriously the rights of the party objecting.[3] In order to raise the question of reservation on appeal, an exception must be taken to the

evidence and the cause was submitted to him.' But there is nothing to show us that he rejected it in evidence. There is no exception to any rejection of it by him. He has reported among his conclusions certain statements as facts, which he could have derived only from the judgment roll. But in his conclusions of law he makes no deduction from those facts to the benefit of the plaintiff, as against the grantees of Parks. It is possible that had a ruling been requested at the hearing, when the testimony was objected to, and it had been made, the plaintiff might have conducted the trial otherwise than he did. But his evidence was admitted. On the other hand, had the referee receiving the evidence given to it all the weight which the plaintiff claims for it, the defendant has no exception to its admission. Inasmuch as a general rule, we are confined in our review to the errors of law which are presented by the exceptions made, it is evident that such a mode of trial of actions is hazardous."

1. Smith *v.* Kobbe, 59 Barb. (N. Y.) 289; Wagener *v.* Finch, 65 Barb. (N.Y.) 493; 1 Thomp. & C. (N. Y.) 145; Brooks *v.* Christopher, 5 Duer (N. Y.) 216; Peck *v.* Yorks, 47 Barb. (N. Y.) 131.

2. Mercer *v.* Vose, 40 N. Y. Super. Ct. 218. And see Kerslake *v.* Schoonmaker, 3 Thomp. & C. (N. Y.) 524; 1 Hun (N. Y.) 436.

In Berrian *v.* Sanford, 1 Hun (N. Y.) 627, the court by Davis, P. J., said: "The reservation itself is probably not error, but the referee ought, before closing the case, to make his final ruling, receiving or rejecting the evidence, and advise the parties, so that proper exception may be taken. Failing to do this, the court, on motion, might with propriety open the case and send back the report, so that the ruling may be made and due exception taken; or, on appeal, treat the action of the referee as error, where the evidence given is so far material that it may have had some influence on the findings and conclusion of the referee."

In Bihin *v.* Bihin, 17 Abb. Pr. (N. Y.) 25, the court by Scrugham, J., said: "On the trial before the referee a witness produced by the plaintiff was asked whether he had seen anything harsh in the defendant's conduct . . . The question was objected to by defendant's counsel, and the referee overruled the objection, but stated that he would reserve his decision on the admissibility of the question, and directed the witness to answer, to which ruling and decision the counsel for the defendant excepted. If the referee had afterwards decided that the testimony which was elicited was inadmissible, it might be necessary to inquire whether he could properly hear it and reserve his decision upon its admissibility until his final decision of the cause. In all of the cases to which we are referred upon this question, testimony was received on the trial and afterwards rejected, and this was held to be error because impressions made by evidence which is improperly received, may remain after it is stricken out, and may influence the final decision. If, however, the testimony is admissible, and is retained, the declaration of the referee that he will reserve his decision upon its admissibility until his decision of the case, cannot prejudice the party who objects to it, provided he is given the benefit of an exception to the overruling of his objection."

3. Lathrop *v.* Bramhall, 64 N. Y.

365; *affirming* 5 Thomp. & C. (N. Y.) 680; 3 Hun (N. Y.) 394.

"In this case four of the seven judges by Miller, J., said: "The evidence which was thus admitted conditionally, and in regard to which the referee reserved his decision, affected the most important issues in the case, and the principal question involved, which was the liability of all of the defendants for the indebtedness, to recover which the action was brought. If the evidence tended to show the liability of any one of the parties, it would be to that extent entirely competent Whether it affected more than a single one, or all of them, could not well be determined at the time when the testimony was introduced, and might depend upon evidence which was subsequently given, which tended to establish the liability of the defendants. It cannot always be decided at the moment when such testimony is offered as to what effect it may have, and when this cannot be done, there is no objection to a reservation of the decision for the time being. Some discretion must be allowed to the judge or referee in regard to questions of this kind. Where the trial is before a jury in open court, there would be an eminent propriety in a decision by the judge as to the applicability of such evidence before the case is finally committed to their consideration; and then he should determine as to its effect in respect to any particular party, and give proper instructions in regard to it upon being requested to do so. See Raymond *v.* Howland, 17 Wend. (N. Y.) 389. Under such circumstances, it is not apparent how the rights of the parties could be seriously affected by the reservation of the judge's decision. Upon a trial before a referee. there appears to be a far less urgent necessity for the decision of questions of this character, even at the close of the case. As he takes the place of the jury, he is to balance the testimony and decide where the weight lies; and in so doing must determine to what extent the evidence thus objected to bears upon the different parties. He can make a proper discrimination as to how far it affects one or more of the parties in most cases; and if this can be done, no injury can result from such a course of procedure. . . . An important distinction exists between the reservation of the question as to the effect of evidence and a reservation as to its admissibility, and the question arises and is directly presented by one or more of the decisions of the referee, whether the party who raises an objection to evidence offered by his adversary has a right to have such objection passed upon absolutely at the time when it was presented, and whether the refusal to do so is erroneous. . . . There are cases where it is easy to see that the admission of evidence in this form [where the question of the final admissibility is reserved] might embarrass the defense in determining to what extent testimony should be introduced in answer to that which has been admitted under such a restriction. And where the case shows in any way that such a ruling would be prejudicial to the rights of the party objecting, it would be a subject of exception which would lead to a reversal of the judgment. . . . As was well said, in Sharpe *v.* Freeman, 45 N. Y. 804, by Judge Folger: 'It (the practice referred to) is then not to be commended, however, for it does not conduce to a clear and accurate trial of the action, nor to the explicit presentation of the questions for review.' When rulings of this kind are made, they must be considered upon review, the same as if an objection had been made and overruled and an exception taken to the decision of the referee. It is not apparent that any of the decisions which were reserved by the referee could have affected the rights of the defendant injuriously so as to render them liable to objection, and they therefore do not present any legal ground for a reversal of the judgment."

But in this same case Allen, J., expressing the dissenting opinion of three of the seven judges, characterizes the practice of reserving questions as to the admissibility and competency of evidence, as vicious, and "not to be commended even when assented to by counsel. It seriously interferes with the proper and orderly conduct of the trial, and tends to embarrass the parties whenever a review of the trial becomes necessary. The comments of Judge Folger in Sharpe *v.* Freeman, 45 N. Y. 802, are just, and should be heeded as well by counsel as by referees and trial courts. . . . The right to object to evidence as it is offered, is a legal right of which the party cannot be deprived, and the right to object and to be heard

reservation,[1] or the party must call for a specific ruling at the close of the case and then take his exception.[2]

Where improper evidence has been admitted against objection, it may be stricken out before the case is submitted for decision.[3] But after the proofs are closed, and the parties are no longer before the referee, he cannot reject evidence admitted on the trial by claiming to disregard it in making up his decision.[4]

upon the objection necessarily implies a like right to a decision by the court or referee, and the refusal to entertain an objection or to pass upon it when made, is a denial of a legal right, to which an exception lies. . . . The judge or referee has, within proper limits, a discretion as to the order of proof, and may permit facts to be proved provisionally, subject to the condition that other facts shall be subsequently proved which are essential to the competency of the evidence admitted. But when all the facts upon which the party relies for the admissibility of the evidence, have been put before the court by him, and he has rested his case, the adverse party is then entitled to a definite determination as to the competency of the evidence objected to. It is then no longer a question as to the order of proof, nor is it within the discretion of the court to postpone the decision. It appears by the record before us that the parties acquiesced by mutual consent in the reservation of several questions made upon objections to the admissibility of evidence as against some of the defendants, which was conceded to be competent as against the others, until the close of the evidence on the part of the plaintiffs. The defendants objecting, then demanded, as they had a right to do, that the referee should pass upon the competency of the evidence as against them, respectively. The question was not as to the effect of the evidence, if admitted, but whether the defendants taking the objections had been so far connected with the transaction and the other parties who were actors in it, as to make the evidence competent against them for any purpose. The question of admissibility was one of law; its effect was a question of fact. It was their right to know before entering upon their defense, what evidence they had to meet, and they were necessarily embarrassed in their defense by the refusal of the referee to pass upon the questions made. A decision adverse to the plaintiffs would not have prevented a renewed offer of evidence upon other facts appearing; and had the evidence been either rejected or admitted, the defendants might have shaped their defense entirely differently from what they were compelled to do, proceeding in ignorance of the fact whether the evidence was in or out of the case as against them. . . . A party has a legal right to a decision upon the admissibility of evidence, whether the same is competent or otherwise, and a refusal of that right is a legal error. A court sitting in review cannot say that a party is not prejudiced by such a refusal. The orderly administration of justice and the preservation of the rights of suitors, require that referees, as well as courts, should be held to a strict observance of those substantial forms and modes of procedure which are the result of experience and are firmly established. It is neither safe nor consistent with a proper administration of the laws to permit referees or trial courts to exercise their discretion as to whether they will or will not pass upon questions made in proper time and in proper form, or to permit each referee to be a law unto himself and leave it to the appellate tribunals to sustain or reverse judgments, as they may think justice has or has not been done in each case. The law vests no such discretion in courts or referees. If a referee may exercise this power, and act upon his discretion, he may change the burden of proof, and in fact deprive the party of his exceptions and the benefits of established rules of evidence."

1. Holden *v.* New York, etc., Bank, 72 N. Y. 286.

2. Brooks *v.* Christopher, 5 Duer (N. Y.) 216. But the party benefited by the reservation cannot except to it. Trimmer *v.* Trimmer, 90 N. Y. 675.

3. Marsh *v.* Kinney, 11 N. Y. Week. Dig. 144.

4. Cooper on Referees and References, p. 78; Meyers *v.* Betts, 5 Den. (N. Y.)

A view of the locality, or subject-matter in dispute, by the referee is not objectionable, if the parties consent; and the referee's report as to the facts within his observation will be practically conclusive.[1] But a private view, or a view where the referee is attended by the attorney or the witnesses of one of the parties, without the knowledge or consent of the other side, is error.[2]

(5) *Credibility of Evidence.*—It is for the referee to determine the weight to be attributed to the evidence and the degree of credit to which a witness is entitled.[3]

e. AMENDMENTS TO PLEADINGS.—Referees have authority to allow amendments to the pleadings,[4] a power usually exercised on a motion to conform the pleadings to the proofs.[5]

f. MOTION FOR DISMISSAL OF COMPLAINT.—At the close of the plaintiff's evidence the defendant may move to dismiss the complaint, on the ground that the evidence fails to make out a cause of action.[6] But for the referee to grant the motion where

81; Allen *v.* Way, 7 Barb. (N. Y.) 585; 3 Code R. (N. Y.) 243. But see *contra* People *v.* Strevel, 15 N. Y. Week. Dig. 88.

1. West *v.* Kiersted, 15 N. Y. Week. Dig. 549.

2. Cooper on Referees and References, p. 78; Yale *v.* Gwinits, 4 How. Pr. (N. Y.) 252.

3. Kinney *v.* Short, 2 Harr. (Del.) 357; Hogan *v.* Laimbeer, 3 N. Y. Week. Dig. 27; 66 N. Y. 604; Beach *v.* Raymond, 2 E. D. Smith (N. Y.) 496; Leach *v.* Kelsey, 7 Barb. (N. Y.) 466; Vandercook *v.* Cohoes, 12 N. Y. Week. Dig. 84; Loonam *v.* Myers, 1 N. Y. St. Rep. 276; Drury *v.* Wigg, 19 N. Y. Week. Dig. 417.

4. Eldred *v.* Eames, 48 Hun (N. Y.) 253; 115 N. Y. 401; Perkins *v.* Berry, 103 N. Car. 131. In *New York* prior to the present Code of Civil Procedure, which in section 723 allows very general powers of amendment, it was held that referees were clothed with all the powers, in respect to allowing amendments to the pleadings, which were possessed by the court. Woodruff *v.* Dickie, 5 Robt. (N. Y.) 619; 31 How. Pr. (N. Y.) 164. See also Hoyt *v.* Hoyt, 8 Bosw. (N. Y.) 511. But the power of a referee to allow amendments on the trial was restricted to amendments to cure variances; he could not authorize an amendment changing the issues referred to him, as by adding a new defense by way of set-off, or a new cause of action. Union Bank *v.* Mott, 10 Abb. Pr. (N. Y.) 372; 18 How. Pr. (N. Y.) 506; Woodruff *v.* Hurson, 32 Barb. (N. Y.) 557; Ford *v.* Ford, 53 Barb. (N. Y.) 525. And so in *Vermont*, where a cause was referred before any plea in offset had been filed, and the rule of reference did not provide for the adjustment of claims in offset, it was held that the referee had no authority to consider any such claims. Fulton *v.* Wiley, 32 Vt. 762.

Under the present *New York* Code Civ. Pro., § 723, referees have the same extensive powers of amendment that are possessed by the court. Knapp *v.* Fowler, 26 Hun (N. Y.) 200. The only limit to the referee's power to amend is that no essential issue shall be affected, or any new cause of action brought in. Price *v.* Brown, 98 N. Y. 388; Knapp *v.* Fowler, 30 Hun (N. Y.) 512. On the question of amendments see also Quimby *v.* Claflin, 77 N. Y. 270; Oregon Steamship Co. *v.* Otis, 59 How. Pr. (N. Y.) 254; Knapp *v.* Fowler, 26 Hun (N. Y.) 200; Frazer *v.* Hunt, 18 N. Y. Week. Dig. 390; Grattan *v.* Metropolitan Life Ins. Co., 80 N. Y. 281; 36 Am. Rep. 617; Bean *v.* Edge, 46 N. Y. Super. Ct. 455.

In Myers *v.* York, etc., R. Co., 2 Curt. (U. S.) 28, it was held that a referee may disregard formal defects in a declaration, but that he has no power to allow an amendment of them And *compare* De La Riva *v.* Berreyesa, 2 Cal. 195.

5. Cooper on Referees and References, pp. 69, 83–5.

6. Cooper on Referees and References, p. 82. The referee may reserve

the evidence is such as would require the case to be submitted to a jury, and would be sufficient to sustain a verdict for the plaintiff, will be error.[1]

g. REQUESTS TO FIND.[2]

13. Report of Referee.—A referee should, in his report, respond to all the material issues of fact made by the pleadings.[3] In the case of such material and necessary issues, the referee must find one way or the other; he cannot find in the case of conflicting evidence that it "leaves the mind in doubt." Where, by conflicting evidence, the referee's mind is left in doubt, the facts should be found adversely to the party holding the affirmative; for, since the burden of proof lies upon him, he is to be consid-

his decision upon this motion until the entire case has been submitted. Hughes *v.* Griffith, 12 N. Y. Week. Dig. 501. But where the referee did not give his decision at the time when the motion was presented, and finally reported adversely to the plaintiff upon the facts of the entire case, finding as a conclusion of law that the complaint be dismissed, held, that this could not be considered as a non-suit, but was a disposition of the case upon a consideration of all the testimony; and hence that exceptions to the referee's findings of fact and conclusions of law did not present the point that there was no evidence to sustain the complaint. Van Derlip *v.* Keyser, 68 N. Y. 443.

1. Scofield *v.* Hernandez, 47 N. Y. 313.

2. By statute in *New York*, before the case is finally submitted to the referee, or within such time afterwards and before the report is rendered, as the referee may allow, the attorney for either party may submit in writing a statement of the facts which he deems established by the evidence, and of the rulings upon questions of law which he desires the referee to make; the referee must pass upon each proposition; and upon this an exception may be taken, (*a*) to any ruling of the referee upon a question of law, (*b*) to a finding upon a question of fact without any evidence tending to sustain it, and, (*c*) to a refusal of the referee to make any finding whatever upon a question of fact. *New York* Code Civ. Pro., §§ 1023, 992–3. Under this section a referee need not make express findings on the issues presented, unless requests are submitted for that purpose. Hanley *v.* Crowe, 50 Hun (N. Y.) 605. The refusal of a referee to make the findings asked for is not error, where it appears that the evidence bearing on such findings was conflicting, or that they were not material, or would not have benefited the party asking for them, or could not have changed the result. Robinson *v.* Smith, 53 Hun (N. Y.) 638; Woodman *v.* Penfield, 53 Hun (N. Y.) 638. The requests to find facts must be in the form of facts established, and not in the form of evidence tending to establish them. Friedman *v.* Bierman, 43 Hun (N. Y.) 387. Where a very large number of findings of facts is proposed, and the referee overlooks one, even a material one, the fact that it is concealed under such a mass of details is deemed a sufficient excuse for its want of recognition by the referee. Quincey *v.* Young, 5 Daly (N. Y.) 44; 53 N. Y. 504. And, finally, under the above section, the referee, after rendering his report, cannot be allowed or required to make any additional findings of fact or conclusions of law. Gardiner *v.* Schwab, 34 Hun (N. Y.) 582; Bamc *v.* Neuss, 2 Civ. Pro. Rep. (N. Y.) 185; Gormerly *v.* McGlynn, 84 N. Y. 284; Morgan *v.* Bosworth, 1 Month. L. Bul. 35. *Compare supra*, this title, p. 685, note 8.

3. Bulsom *v.* Lampman, 1 Kan. 324; Bazille *v.* Ullman, 2 Minn. 134; Brainard *v.* Hastings, 3 Minn. 45; Collins *v.* Clark, 54 Barb. (N. Y.) 184.

When the report is defective in this respect, and wherever, in general, there is any improper omission, the proper proceeding is not by exception to the report, but by an application to the court for an order sending the report back to the referee, with instructions to supply the omission. Foster *v.* Voigtlander, 36 Kan. 572; Mason *v.* School District, 34 Mich. 228; Bazille *v.* Ullman, 2 Minn. 134.

Where a referee in his report,

ered as not having made out his case.[1] But although the referee cannot ignore the principal issues in a case, he is not required to report formally upon all the issues formed by the pleadings. Where an issue is reported upon by necessary implication from the rest of the report, this will be deemed sufficient. If there are issues upon which no evidence was introduced, the referee need not notice them in his report; and even where evidence is introduced upon a material issue, he is not required to report negatively upon the issue; it will be sufficient to find affirmatively what facts are proved.[2]

A referee has power to pass, in his report, upon all matters legitimately within the issues referred.[3] But, strictly, it is only necessary to pass upon those facts which enter into and form the basis of the judgment to be entered upon the report, and it is not requisite to negative, in express terms, any other facts; for facts not found, are necessarily negatived by implication.[4] The referee should set forth in his report the facts as found upon the evidence, and not the evidence itself. And it is sufficient to give simply the conclusions of fact, it being unnecessary to explain the means or processes by which such findings of fact were

entirely ignores the principal, if not the only issue in the case, and no judgment can be properly rendered until such issue is decided, the judgment entered upon his report will be reversed, and a new trial ordered. Bulsom *v.* Lampman, 1 Kan. 324; Collins *v.* Clark, 54 Barb. (N. Y.) 184.

Facts found by a referee, but not embraced within the issues formed by the pleadings, cannot be considered. O'Brien *v.* St. Paul, 18 Minn. 176.

1. Bradley *v.* McLoughlin, 8 Hun (N. Y.) 545; Strong *v.* Place, 4 Robt. (N. Y.) 385; 33 How. Pr. (N. Y.) 114.

The statement in the report of a referee that he is unable to find upon certain suggested questions of fact, is not subject to exception, where it does not appear that a finding on such questions was essential, or that there was evidence before the referee on which such a finding was practicable. Cook *v.* Stevenson, 30 Mich. 243.

2. Patterson *v.* Graves, 11 How. Pr. (N. Y.) 91; Sermont *v.* Baetjer, 49 Barb. (N. Y.) 362; Ingraham *v.* Gilbert, 20 Barb. (N. Y.) 151.

Where a referee has passed upon all the issues formed by the pleadings, so far as is material to a decision of the cause, stating separately the general facts found and the conclusions of law, he has discharged his whole duty in respect to form. Marston *v.* Johnson, 13 How. Pr. (N. Y.) 93.

3. Cooper on Referees and References, p. 102; Lee *v.* Tillotson, 24 Wend. (N. Y.) 337; 35 Am. Dec. 624.

4. Sermont *v.* Baetjer, 49 Barb. (N. Y.) 362; Quincey *v.* Young, 5 Daly (N. Y.) 44; Nelson *v.* Ingersoll, 27 How. Pr. (N. Y.) 1; and see *supra*, this title, p. 698, note 2. In McAndrew *v.* Whitlock, 2 Sweeny (N. Y.) 632, the court by Monell, J., said: "The defendant, on the trial, requested the referee to find certain other and additional facts, which had been established by uncontradicted evidence, and which it was claimed exonerated from liability. But the referee refused to make such additional findings, not because they had not been proven, but because, in his judgment, they were immaterial. The rule on this subject is, that a referee is required to make such findings of fact as are necessary to sustain his conclusions of law. He is not required to find other facts which are merely of a negative character."

On the other hand, a conclusion of law which is involved in the issues made by the pleadings and necessarily flows from the facts found, need not, if no fact is found hostile to it, be expressed in terms. Cagger *v.* Lansing, 64 N. Y. 417.

arrived at.[1] Upon the facts at issue, a general finding may be made, in which the facts are stated only according to their legal effect.[2] A referee's findings of fact, which are, in general, conclusive,[3] should be stated in the report separately from the conclusions of law.[4] When this is not done, if the party wishes it to be corrected, the proper practice is by motion for an order send-

1. Dorr *v.* Noxon, 5 How. Pr. (N. Y.) 29; Patterson *v.* Graves, 11 How. Pr. (N. Y.) 91; Avery *v.* Foley, 4 Hun (N. Y.) 415; Lane *v.* Borst, 5 Robt. (N. Y.) 609; *In re* Hemiup, 3 Paige (N. Y.) 305; Jarvis *v.* Jarvis, 66 Barb. (N. Y.) 331; Dolan *v.* Merritt, 18 Hun (N. Y.) 27; Wilson *v.* Knapp, 42 N. Y. Super. Ct. 25.

A finding of fact cannot be made except upon evidence before the referee. Putnam *v.* Hubbell, 42 N. Y. 106.

A general finding of fact by a referee in his report, is, as in the case of a verdict, controlled by a special finding of fact. Phelps *v.* Vischer, 50 N. Y. 72; 10 Am. Rep. 433; Bennett *v.* Buchan, 76 N. Y. 386.

2. Hihn *v.* Peck, 30 Cal. 280.

3. Goodrich *v.* Marysville, 5 Cal. 430; Walker *v.* Eagle Works Mfg. Co., 8 Kan. 397; Campbell *v.* Phillips, 28 Kan. 753; St. Denis *v.* Saunders, 36 Mich. 369; Russell *v.* Minnesota Outfit, 1 Minn. 168; Brainard *v.* Hastings, 3 Minn. 45; Winona *v.* Huff, 11 Minn. 119; Humphrey *v.* Havens, 12 Minn. 298; Manufacturers' Sav. Bank *v.* Big Muddy Iron Co., 97 Mo. 38; Goodrich *v.* Thompson, 4 Robt. (N. Y.) 75; Dows *v.* Montgomery, 5 Robt. (N. Y.) 445; Baker *v.* Cutting, 2 Sweeny (N. Y.) 435; Orchard *v.* Cross, 12 Barb. (N. Y.) 294; Monell *v.* Marshall, 25 How. Pr. (N. Y.) 425; Perkins *v.* Berry, 103 N. Car. 131; Martin *v.* Wells, 43 Vt. 433. *Compare* Colwell *v.* Lawrence, 38 N. Y. 71; Coleman *v.* Eyre, 1 Sweeny (N. Y.) 476; Watson *v.* Campbell, 28 Barb. (N. Y.) 421; Gilliland *v.* Gasque, 6 Rich. (S. Car.) 406.

4. Lambert *v.* Smith, 3 Cal. 408; Oaks *v.* Jones, 11 Kan. 443; Bazille *v.* Ullman, 2 Minn. 134; Van Slyke *v.* Hyatt, 46 N. Y. 260; State *v.* McKenzie, 65 N. Car. 102. *Compare* Ware *v.* Adams, 12 Ind. 359.

Where the report does not contain separate findings of law and fact, the Supreme Court in *New York* can set aside the report and the interlocutory judgment entered *ex parte* thereon. Maicas *v.* Leony, 113 N. Y. 619; 22 Abb. N. Cas. (N. Y.) 465.

Where the referee in his report has found the amount due from the defendant to the plaintiff as a matter of fact, and that the plaintiff is entitled to a judgment for that amount as a matter of law, the defendant cannot claim to have the report set aside on the ground that the referee has not returned his findings of fact and of law separately. Riley *v.* Coghill, 1 Cin. Sup. Ct. Rep. 241.

In Van Slyke *v.* Hyatt, 46 N. Y. 260, the court by Rapallo, J., said: "This right [to have the findings of fact and conclusions of law stated separately in the report] is secured by statute, and is is substantial, inasmuch as these findings and conclusions enable the unsuccessful party to determine whether or not to appeal; and in case he desires to appeal, they are indispensable to enable him to frame and serve his exceptions in due time, and to present the case in proper form for review."

The *New York* statute, contained in the Code of Civil Procedure, § 1022, provides that the report of the referee must state separately the facts found and the conclusions of law. Under this section, if the report be not drawn up in due form, the remedy seems to be the same as in practice under the earlier Code of Procedure, viz., a motion that the report be returned to the referee for correction, or that the referee be required to make a further report, or that the report and the judgment, if any, entered upon it be set aside. Tilman *v.* Keane, 1 Abb. Pr. N. S. (N. Y.) 23; Van Steenburgh *v.* Hoffman, 6 How. Pr. (N. Y.) 492; Church *v.* Erben, 4 Sandf. (N. Y.) 691; Manley *v.* Ins. Co. of North America, 1 Lans. (N. Y.) 20; Peck *v.* Yorks, 14 How. Pr. (N. Y.) 416; Wright *v.* Sanders, 28 How. Pr. (N. Y.) 395; Snook *v.* Fries, 19 Barb. (N. Y.) 313. These modes of procedure seem to exist still under the Code of Civil Procedure. Ricketts *v.* Wessels, 12 N. Y. Week. Dig. 397. But in order to get the benefit of them, it appears that it is incumbent upon the moving party to show to the court that

ing the report back to the referee for correction.[1] Where a referee states in detail the facts which constitute a transaction, his finding as to the effect of such facts may be regarded as a conclusion of law.[2]

Conclusions of law, as well as of fact, should not be stated argumentatively, but should be set forth concisely, directly, and without repetition.[3]

Where in an equitable action the whole issue is referred for decision to a referee, and the latter decides that the taking of an account will be necessary before complete judgment can be made, he may either proceed and take such account himself, or, what is regarded as the better practice, he may report the fact that an account is necessary, specifying upon what basis judgment is to be awarded between the parties to the action after the account has been taken. In the latter case, the judgment entered upon the report will direct that the account be taken by the same referee; or if he declines or is unable to take it, the case will be sent to another referee for that purpose.[4]

A referee is not permitted to ignore in his report evidence which he admitted on the trial.[5]

he requested the referee at the trial, or before the submission of the cause to him, to find specifically such facts and conclusions of law as he seeks by his motion to have inserted in the report. Cooper on Referees and References, p. 105; Gove *v.* Hammond, 48 How. Pr. (N. Y.) 385; Drury *v.* Wigg, 19 N. Y. Week. Dig. 417.

In *Indiana* a referee has no authority to report to the court the facts found by him, unless he is required by the order of reference to do so; and if, not being so required, he should report them, they will not be deemed legitimately before the court. Wabash, etc., Canal *v.* Huston, 12 Ind. 276; Royal *v.* Baer, 17 Ind. 332; Thornburg *v.* Alleman, 17 Ind. 434. *Compare* O'Brien *v.* St. Paul, 18 Minn. 176.

1. Bazille *v.* Ullman, 2 Minn. 134; Califf *v.* Hillhouse, 3 Minn. 311. *Compare* the preceding note.

2. Hotchkiss *v.* Mosher, 48 N. Y. 483

3. Glacius *v.* Black, 50 N. Y. 145; Mills *v.* Thursby, 12 How. Pr. (N. Y.) 417. In the former case the court by Church, C. J., said: "Neither evidence, argument, nor comment has any legitimate place in findings of fact or law. They should be conclusions of fact from the evidence and conclusions of law from the facts found, and both stated without repetition, and in the most concise and direct manner."

4. Palmer *v.* Palmer, 13 How. Pr. (N. Y.) 363; Ludington *v.* Taft, 10 Barb. (N. Y.) 447; Mundorff *v.* Mundorff, 1 Hun (N. Y.) 41: 3 Thomp. & C. (N. Y.) 171; Cheeseman *v.* Wiggins, 1 Thomp. & C. (N. Y.) 595; Trufant *v.* Merrill, 37 How. Pr. (N. Y.) 531.

5. Monson *v.* Cooke, 5 Cal. 436; Meyers *v.* Betts, 5 Den. (N. Y.) 81; Allen *v.* Way, 7 Barb. (N. Y.) 585; 3 Code R. 243. But see *contra*, People *v.* Strevel, 15 N. Y. Week. Dig. 88.

In Meyers *v.* Betts, 5 Den. (N. Y.) 81, the court used this language: "It appears that on the trial of the cause the referee decided that the proof made by the defendant was sufficient to authorize his books to be received in evidence, and they were received accordingly. It is very likely that in this he may have erred, but they were received, and thereupon the defendant gave no further proof of his account. The effect of this decision was, of course, to lull him into security. *Non constat* that if the decision had been against him, he might not have introduced other and more conclusive evidence. After the trial is ended, and the parties are gone, the referee reviews his decision, and comes to an opposite conclusion, and decides to exclude the books as testimony. This will not answer. The rights of parties may be seriously compromised by such a practice, and it might lead

Where costs are discretionary, it is the right and duty of the referee, in references to hear and determine, to pass upon all questions relating to costs; and since, in this class of cases, the award or refusal of costs is a matter of discretion with the referee, an appellate court will not, except in case of palpable abuse, interfere.[1] But where costs are allowed as a matter of course to the successful party, on the facts found, the referee has no discretion as to the amount of the costs, nor as to which party is entitled thereto: and he cannot, for instance, direct that neither party recover costs.[2] The report should, however, indicate what costs go to the successful party.[3]

A report is not considered to be made until it is signed.[4] As to how a report shall be made when there are several referees, it has been held in a State where a report may be signed by a majority of the referees,[5] that there must be a conference of all, and a substantial conclusion by a majority, embodied in a report made by them when they are together.[6] But it has been held in a case where there were three referees, that the parties might agree to receive a report from one or more of them.[7]

After a referee's report has been made, it may be amended by leave;[8] and the court itself may amend the referee's report as the

to serious abuse if a judicial tribunal, on the trial of a cause, should receive testimony which, in a subsequent stage of the case, it determined to disregard."

1. Barker *v.* White, 1 Abb. App. Dec. (N. Y.) 95; Graves *v.* Blanchard, 4 How. Pr. (N. Y.) 300; Ludington *v.* Taft, 10 Barb. (N. Y.) 447; First Nat. Bank *v.* Levy, 41 Hun (N. Y.) 461.

2. Lanz *v.* Trout, 46 How. Pr. (N. Y.) 94; Tilman *v.* Kean, 1 Abb. Pr. N. S. (N. Y.) 23; Fuller *v.* Conde, 47 N. Y. 89; Burdick *v.* Hale, 13 Abb. N. Cas. (N. Y.) 60; 4 Civ. Pro. Rep. (N. Y.) 311.

3. Gilliland *v.* Campbell, 18 How. Pr. (N. Y.) 177; Parker *v.* Baxter, 19 Hun (N. Y.) 410.

4. Kissam *v.* Hamilton, 20 How. Pr. (N. Y.) 369.

5. *New York* Code Civ. Pro., § 1026.

6. Townsend *v.* Glens Falls Ins. Co., 10 Abb. Pr. N. S. (N Y.) 272. Hence, after a cause has been heard before three referees, and a consultation has taken place, in which no two of the referees agreed upon a conclusion or any findings, if a party, even though acting in good faith, obtain a report which has been signed by any two of the referees together without another conference of all, or by a majority or all of the referees separately, the report is irregular and must be set aside. *Compare* Daniels *v.* Ripley, 10 Mich. 237. So, also, it has been held that two of three referees cannot meet and sign a report without giving notice to the third to attend. Brower *v.* Kingsley, 1 Johns. Cas. (N. Y.) 334. Nor can they, if the third is absent, sign the report, unless all were present at the trial and heard the proofs. McIlroy *v.* Benedict, 11 Johns. (N. Y.) 402. But in Clark *v.* Fraser, 1 How. Pr. (N. Y.) 98, where the three referees met and discussed the case, and two agreed as to a report, the other dissenting, it was held that the two who agreed might sign the report on a subsequent day, although the third was absent.

7. Wright *v.* Macey, 21 Ind. 301.

In *Maine* where an action was referred to three referees, it was held that the court had no authority to accept a report signed by two of them, and that parol evidence was inadmissible to show that the third referee acted as such, and agreed to sign the award. Anderson *v.* Farnham, 34 Me. 161. And so in *Ohio*, a report made by only two of three referees was held invalid. Rhodes *v.* Baird, 16 Ohio St. 573. See also The Nineveh, 1 Low. (U. S.) 400.

8. Gardner *v* Mason, 5 Harr. (Del.) 286; Ann *v.* Coleman, 11 Kan. 443; Smith *v.* Sprague, 40 Vt. 43.

facts and the law require,[1] or to the intent that it may show facts essential to a proper disposal of the case.[2] So, if a referee in stating his account uses an illegal rate of interest in his computation, the court may direct a modification of the report.[3] And when, moreover, from an application of the law to the facts, the court can arrive at the exact amount by which a judgment rendered on a referee's report should be modified, the case will not be remanded for a new trial, but the court will affirm the judgment with the modification.[4]

The report of a referee stands, until judgment thereon, merely as a verdict.[5]

Where the report is not made within the appointed time, the court may extend the time.[6]

After the acceptance of the report of referees and before judgment, if good reasons for its recommitment exist, and are disclosed to the court, the presiding judge has power to order a reinvestigation of the case before the same referees.[7]

14. Motion to Set Aside Report.—Although referees are, to some extent, clothed with the powers of a court,[8] and their decisions can in general be reviewed only by appeal, yet in proper cases the court may set aside a report for causes upon which it would proceed to set aside the verdict of a jury,[9] or for matters arising subsequent to the submission, which could not be brought before the court by appeal.[10] Thus, a motion may be made to set aside a referee's report on the ground of partiality, corruption, or other misconduct,[11] such as, listening to *ex parte* explanations or argu-

1. Krapp *v.* Aderholt, 42 Kan. 247.

But in *New York* it is not considered good practice to amend the referee's report, either in respect to any ambiguity in the language used, or for a clerical error, but it should be referred back to him for correction. *In re* Smith's Estate, 4 N. Y. Supp. 467.

And in *Missouri* it is held that the trial court has power to set aside altogether the finding of a referee, but not to amend it. Caruth-Byrnes Hardware Co. *v.* Wolter, 91 Mo. 484; Clark *v.* Phillips, 99 Mo. 550.

2. Bannister *v.* Patty, 35 Wis. 215.

3. Topping *v.* Windley, 99N. Car. 4.

4. Hanley *v.* Crowe, 50 Hun (N. Y.) 605.

5. Clements *v.* Painter, 46 Ga. 486; Gimbel *v.* Pignero, 62 Mo. 240.

6. Norton *v.* Huntoon, 43 Kan. 275; Stacker *v.* Cooper Circuit Court, 25 Mo. 401. *Compare* p. 685, note 8.

7. Mayberry *v.* Morse, 39 Me. 105; Tharington *v.* Tharington, 99 N. Car. 811. And *compare* on the subject of recommitment, Sheppard *v.* Atwater Mfg. Co. 43 Conn. 448; Brann *v.* Vassalboro, 50 Me. 64; Smith *v.* Warner, 14 Mich. 152; Bazille *v.* Ullman, 2 Minn. 134; Reed *v.* Wiley, 5 Smed. & M. (Miss.) 394; Stafford *v.* Bacon, 6 Hill (N. Y.) 264; Packer *v.* French, Hill & D. Supp. (N. Y.) 103.

8. See *supra*, this title, p. 684. note 4.

9. Walton *v.* Minturn, 1 Cal. 362; McHenry *v.* Moore, 5 Cal. 90; Dunn *v.* Starkweather, 6 Iowa 466; Childs *v.* Shower, 18 Iowa 261; Johnston *v.* Johnston, 19 Iowa 74; Green *v.* Brown, 3 Barb. (N. Y.) 119; Baker *v.* Martin, 3 Barb. (N. Y.) 634; Woodin *v.* Foster, 16 Barb. (N. Y.) 146; Roberts *v.* Carter, 28 Barb. (N. Y.) 462; Colwell *v.* Lawrence, 24 How. Pr. (N. Y.) 324; Foster *v.* Coleman, 1 E. D. Smith (N. Y.) 85.

10. Barton *v.* Herman, 8 Abb. Pr. N. S. (N. Y.) 379; 3 Daly (N. Y.) 320; Fullmer *v.* Fullmer, 6 N. Y. Week. Dig. 42.

11. Leonard *v.* Mulry, 93 N. Y. 392; Livermore *v.* Bainbridge, 44 How. Pr. (N. Y.) 357; 14 Abb. Pr. N. S. (N. Y.) 227; 47 How. Pr. (N. Y.) 350, 354; 15 Abb. Pr. N. S. (N. Y.) 436;

ments,[1] or pursuing a course of vacillation or indecision.[2] Personal disqualifications on the part of a referee may also be taken advantage of by motion to set aside the report.[3] A party who wishes to take advantage of an irregularity must move in the matter without delay;[4] and if he knew of the irregularity or improper acts of the referee before the trial commenced, or before he submitted the case to the referee, and did not apply for relief, he is presumed to have waived the objections,[5] but not so if the misconduct is not complete until the action has been submitted for decision.[6] A motion to set aside the report should be made before judgment is finally entered, for, if successful, it would prevent the entry of judgment.[7] It has been held that the service of a notice of appeal from judgment does not affect a party's right to move that the report be set aside.[8] If the application to set aside the report be granted, the cause stands as if it had never been tried.[9]

15. Judgment Upon the Report.—After the report of the referee has been filed by the referee himself, or by the successful party, in the office of the clerk of the court, judgment may be entered upon it.[10] If the judgment as entered is not authorized by the

56 N. Y. 72; Greenwood *v.* Marvin, 29 Hun (N. Y.) 99; Stebbins *v.* Brown, 65 Barb. (N. Y.) 272: Harlem Bank *v.* Todd, 4 N. Y. Week. Dig. 64.

1. Dorlon *v.* Lewis, 9 How. Pr. (N. Y.) 1; Yale *v.* Gwinits, 4 How. Pr. (N. Y.) 253.

2. Roosa *v.* Saugerties, etc., Turnpike Co., 12 How. Pr. (N. Y.) 297.

3. Countryman *v.* Norton, 21 Hun (N. Y.) 17; Carroll *v.* Lufkins, 29 Hun (N. Y.) 17.

4. Catlin *v.* Catlin, 2 Hun (N. Y.) 378; 4 Thomp. & C. (N. Y.) 664; Carroll *v.* Lufkins, 29 Hun (N. Y.) 17; Patterson *v.* Graves, 11 How. Pr. (N. Y.) 91; Johnson *v.* Swart, 11 Paige (N. Y.) 385. *Compare* Durant *v.* O'Brien, 2 How. Pr. N. S. (N. Y.) 318; Macpherson *v.* Ronner, 40 N. Y. Super. Ct. 448.

Thus, a delay of about seven months in making a motion to set aside the report of a referee for irregularity, is fatal. Patterson *v.* Graves, 11 How. Pr. (N. Y.) 91.

5. Burrows *v.* Dickinson, 35 Hun (N. Y.) 496; Carroll *v.* Lufkins, 29 Hun (N. Y.) 17; Fudickar *v.* Guardian Mut. L. Ins. Co., 62 N. Y. 392.

Thus, where the misconduct of the referee is known and understood during the progress of the trial, and is then of a nature to be complete and consummated, if a party, after discovery of the fact, proceeds with the trial, he will be deemed to have waived the right to move afterwards to set aside the referee's report. Burrows *v.* Dickenson, 35 Hun (N. Y.) 496.

And with still stronger reason it has been held that where a reference was to but one person when it should have been to three, no objection having been made at the time, and the party complaining having appeared before the referee and submitted the cause, the irregularity afforded no ground for setting aside the report. McShane *v.* Gray, 13 Iowa 504.

6. Burrows *v.* Dickinson, 35 Hun (N. Y.) 496.

7. McPherson *v.* Ronner, 40 N. Y. Super. Ct. 448.

8. Greenwood *v.* Marvin, 29 Hun (N. Y.) 99.

9. Rice *v.* Benedict, 18 Mich. 75.

10. Cooper on Referees and References, p. 120.

It is not necessary for a referee to report a formal judgment. His report is only the foundation for a judgment. Brown *v.* Cochran, 11 N. H. 199.

Where a referee finds the facts upon all the issues, and draws an erroneous conclusion of law from the facts found, and reports a judgment in accordance with such conclusion, the court, before judgment is entered, may set aside the erroneous conclusion and direct the

referee's report, the remedy is by motion to correct and set it aside, and not by appeal.[1] Where the report of a referee omits to find in terms as a conclusion of fact or law the amount of damages for the unlawful taking of property, but finds facts from which the law implies damages, the judgment is not thereby invalidated.[2] A judgment upon the report of referees may justly include interest from the time of the award till judgment is rendered.[3]

16. Motion for a New Trial.—A motion for a new trial may be made on the ground that the report of the referee is not sustained by sufficient evidence,[4] or on the ground of newly discovered evidence.[5] But such motion will not be granted on account of the discovery of new and further evidence which is only cumulative, and not controlling in its character.[6] Nor will the rejection of testimony by a referee be ground for a new trial, where the testimony rejected is reported to the court.[7]

17. Appeal from Judgment—*a.* EXCEPTIONS.—Errors committed during the course of a trial before a referee must, as in trials before courts, be excepted to at the time they occur.[8] Where an error of law is made in the report of the referee, an exception to it must be taken by filing a notice thereof in the clerk's office, and serving a copy of the same upon the attorney for the adverse party.[9] If this is not done, the appellant will be confined to exceptions taken in the course of the trial.[10] An exception can be taken in *New York* only to a ruling of law; an

proper judgment to be entered. Calderwood *v.* Pyser, 31 Cal. 333.

1. Campbell *v.* Seaman, 63 N. Y. 587.

2. Caldwell *v.* Arnold, 8 Minn. 265.

3. Kintner *v.* State, 3 Ind. 86.

4. Chandler *v.* Dye, 37 Kan. 765.

5. Adams *v.* Bush, 2 Abb. Pr. N. S. (N. Y.) 104; Woolf *v.* Jacobs, 45 How. Pr. (N. Y.) 503; Quinn *v.* Lloyd, 1 Sweeny (N. Y.) 253.

But in *New York*, with the exception of the case where the report directs an interlocutory judgment, a motion for a new trial cannot be made for errors committed during the trial, or on the ground that the verdict is against the weight of the evidence. Cooper on Referees and References, p. 152; *New York* Code Civ. Pro., § 1001. The proper proceeding here is an appeal from the judgment. Enos *v.* Thomas, 5 How. Pr. (N. Y.) 361; Kiersted *v.* Orange, etc., R. Co., 54 How. Pr. (N. Y.) 39; Schweizer *v.* Raymond, 6 Abb. N. Cas. (N. Y.) 378; Malcolm *v.* Foster, 5 Week. Dig. 310; Donohue *v.* Champlin, 1 Code R. N. S. (N. Y.) 138; Dana *v.* Howe, 13 N. Y. 306.

6. McDaniels *v.* Van Fosen, 11 Iowa 195; Bowen *v.* Steere, 6 R. I. 251; Thayer *v.* Cent. Vermont R. Co., 60 Vt. 214.

7. Yates *v.* Shepardson, 27 Wis. 239, in which case it was also held that the court should consider the testimony so rejected, and determine whether the referee's findings, or decision of the cause, should be modified in consequence thereof.

8. Tyson *v.* Wells, 2 Cal. 122; Phelps *v.* Peabody, 7 Cal. 50; Branger *v.* Chevalier, 9 Cal. 353; Wabash, etc., Canal *v.* Huston, 12 Ind. 276; Gibson *v.* Stetzer, 3 Hun (N. Y.) 539; Brewer *v.* Isish, 12 How. Pr. (N. Y.) 481; Johnson *v.* Whitlock, 12 How. Pr. (N. Y.) 571; Tremain *v.* Rider, 13 How. Pr. (N. Y.) 148; Cowen *v.* West Troy, 43 Barb. (N. Y.) 48; Hunt *v.* Bloomer, 13 N. Y. 341; Southern Md. R. Co. *v.* Moyer, 125 Pa. St. 506. And *compare* Graham *v.* Stiles, 38 Vt. 578.

9. N. Y. Code Civ. Pro., § 994.

10. Tallmadge *v.* Whitman, 11 Hun (N. Y.) 367; Bussell *v.* Duflon, 4 Lans. (N. Y.) 399: Mayor, etc., of N. Y. *v.* Erben, 24 How. Pr. (N. Y.) 358;

exception to a ruling of fact is not only precluded by statute,[1] but is unnecessary and unavailing, for the reason that the facts are brought up for review by an exception to the referee's conclusion of law in which he awards judgment;[2] and so, also, the only mode of reviewing a finding of fact by a referee, as being against the weight of the evidence, is by a request to find, and an excepton to the refusal.[3] An exception must be specific, and it must clearly appear which of the referee's conclusions is assailed.[4] But in the case of exceptions to the findings of referees

Bearup *v.* Carraher, 5 N. Y. Week. Dig. 558. And *compare* Weed *v.* New York etc., R. Co., 29 N. Y. 616; Enos *v.* Eigenbrodt, 32 N. Y. 444.

But in *New York* the court has power to permit exceptions to be filed *nunc pro tunc.* Sheldon *v.* Wood, 14 How. Pr. (N. Y.) 18; Bortle *v.* Mellen, 14 Abb. Pr. (N. Y.) 228; Gade *v.* Gade, 14 Abb. N. Cas. (N. Y.) 510; Douglas *v.* Douglas, 7 Hun (N. Y.) 272.

1. N. Y. Code Civ. Pro., § 992.

2. N. Y. Code Civ. Pro., § 992; Mead *v.* Smith, 3 Civ. Pro. Rep. (N. Y.) 171; Lefler *v.* Field, 50 Barb. (N. Y.) 407; Mayor, etc., of N. Y. *v.* Erben, 24 How. Pr. (N. Y.) 358; Russell *v.* Duflon, 4 Lans. (N. Y.) 406. *Compare* Briggs *v.* Boyd, 56 N. Y. 289.. But in *New York* a finding upon a question of fact without any evidence tending to sustain it, may be excepted to. *New York* Code Civ. Pro., § 993; Mead *v.* Smith, 3 Civ. Pro. Rep. (N. Y.) 171; Mason *v.* Lord, 40 N. Y. 477; Duffy *v.* Masterson, 44 N. Y. 557; Murray *v.* Harway, 56 N. Y. 347; Pollock *v.* Pollock, 71 N. Y. 137.

A party cannot complain of an erroneous finding of fact which is clearly in his own favor. Heim *v.* Link, 52 N. Y. Super. Ct. 547.

Upon an appeal in the federal courts, the findings of fact made by the lower court are conclusive, and the same is true where the facts found by a referee in a State jurisdiction are called in question in a federal court as not being sustained by the evidence. Melendy *v.* Rice, 15 Alb. L. J. 267. *Compare* Norris *v.* Jackson, 9 Wall. (U. S.) 127.

3. Hugg *v.* Shank, 17 Civ. Pro. Rep. (N. Y.) 128.

4. Califf *v* Hillhouse, 3 Minn. 311; Hepburn *v.* Montgomery, 5 Civ. Pro. Rep. (N. Y.) 244; Graham *v.* Chrystal, 32 How. Pr. (N. Y.) 287; 37 How. Pr. (N. Y.) 279; 2 Keyes (N. Y.) 21; 2 Abb. App. Dec. (N. Y.) 263; Van Derveer *v.* Wright, 6 Barb. (N. Y.) 553; Lefler *v.* Field, 50 Barb. (N. Y.) 407; Oppenheimer *v.* Walker, 3 Hun (N. Y.) 34; 5 Thomp. & C. (N. Y.) 328; Riley *v.* Sexton, 32 Hun (N. Y.) 245; McMahon *v.* New York, etc., R. Co., 20 N. Y. 263; Newell *v.* Doty, 33 N. Y. 83; Wheeler *v.* Billings, 38 N. Y. 263; Goodrich *v.* Thompson, 44 N. Y. 335; Crawford *v.* Everson, 68 N. Y. 625; Ward *v.* Craig, 87 N. Y. 550.

Thus, a general exception to a legal conclusion containing two or more distinct legal propositions, is unavailing, if either of the propositions is correct. Hepburn *v.* Montgomery, 5 Civ. Pro. Rep. (N. Y.) 244; Crawford *v.* Everson, 68 N. Y. 625. So the following exceptions have been held too general:—

An exception "to each and every one of the decisions and rulings of the referee against the plaintiff, on the trial of this action, severally, separately, and distinctly." Newell *v.* Doty, 33 N. Y. 83.

An exception "to each and every conclusion of law in the referee's report." Graham *v.* Chrystal, 32 How. Pr. (N. Y.) 287; 37 How. Pr. (N. Y.) 279; 2 Keyes (N. Y.) 21; 2 Abb. App. Dec. (N. Y.) 263.

An exception "to the report of the referee and to each and every part thereof, both as to its findings of fact and conclusions of law." Wheeler *v.* Billings, 38 N. Y. 263.

An exception "to the several findings of fact and the conclusions of law contained in the report of the referee herein." Goodrich *v.* Thompson, 44 N. Y. 335.

An exception to the "conclusions of law and to each and every part thereof." Lefler *v.* Field, 50 Barb. (N. Y.) 407.

An exception "to each of the findings of law of the referee in this action." Riley *v.* Sexton, 32 Hun (N. Y.) 245.

An exception "to all the referee's findings, and each and every of them." Ward *v* Craig. 87 N. Y. 550.

An exception "to each of the conclusions of law." Hepburn *v.* Montgomery, 5 Civ. Pro. Rep. (N. Y.) 244.

An exception to the report "for various other errors, insufficiencies, and inaccuracies." Oppenheimer *v.* Walker, 3 Hun (N. Y.) 34; 5 Thomp. & C. (N. Y.) 328.

And *compare* BILL OF EXCEPTIONS, vol. 2, p. 220; Bain *v.* Whitehaven, etc., R. Co., 3 H. L. Cas. 16; Moore *v.* Bank of Metropolis, 13 Pet. (U. S.) 302; Camden *v.* Doremus, 3 How. (U. S.) 530; Stimpson *v.* Westchester R. Co., 4 How (U. S.) 380; Maxwell *v.* Newbold, 18 How. (U. S.) 511; Johnston *v.* Jones, 1 Black (U. S.) 209, Rogers *v.* The Marshal, 1 Wall. (U. S.) 644; Harvey *v.* Tyler, 2 Wall. (U. S.) 328; Springfield, etc., Ins. Co. *v.* Sea, 21 Wall. (U. S.) 158; Beaver *v.* Taylor, 93 U. S. 46; Washington, etc., R. Co. *v.* Varnell, 98 U. S. 479; Stockwell *v.* U. S., 3 Cliff. (U. S.) 301; Baker *v.* Joseph, 16 Cal. 173; Payne *v* Treadwell, 16 Cal. 248; Hicks *v.* Coleman, 25 Cal. 146; Brown *v.* Kentfield, 50 Cal. 132; Russell *v.* Branham, 8 Blackf. (Ind.) 277; White Water Valley Canal Co. *v.* Dow, 1 Ind 141; Carter *v.* Hanna, 2 Ind. 45; Houston *v.* Houston, 4 Ind. 139; Wakeman *v.* Jones, 5 Ind. 456; Anderson *v.* Fry, 6 Ind. 76; Stump *v.* Fraley, 7 Ind. 679; Jolly *v.* Terre Haute Drawbridge Co., 9 Ind. 417; Fleming *v.* Potter, 14 Ind. 486; Torr *v.* Torr, 20 Ind. 128; Aurora *v.* Cobb, 21 Ind. 511; Ammerman *v.* Crosby, 26 Ind. 454; Jemison *v.* Walsh, 30 Ind. 388; Ohio Ins. Co. *v.* Edmondson, 5 La. 295; Clark *v.* Conway, 23 Mo. 438; Haggart *v.* Morgan, 5 N. Y. 422; Jones *v.* Osgood, 6 N. Y. 233; Sands *v.* Church, 6 N. Y. 357; Hunt *v.* Maybee, 7 N.Y. 266; Hart *v.* Rensselaer, etc., R. Co., 8 N. Y. 37; 59 Am. Dec. 447; Acker *v.* Ledyard, 8 N. Y. 66; Booth *v.* Swezey, 8 N. Y. 276; Howland *v.* Willetts, 9 N. Y. 170; Caldwell *v.* Murphy, 11 N. Y. 416; Decker *v.* Mathews, 12 N. Y. 320; Magie *v.* Baker, 14 N. Y. 435; Oldfield *v.* New York, etc., R Co., 14 N. Y. 314, 315; Winchell *v.* Hicks, 18 N. Y. 558; Day *v.* Roth, 18 N. Y. 448; Chamberlain *v.* Pratt, 33 N. Y. 52; Magee *v.* Badger, 34 N. Y. 247; 90 Am. Dec. 691; Buck *v.* Remsen, 34 N. Y. 383; Stone *v.* Western Transp. Co., 38 N. Y. 242; Walsh *v.* Kelly, 40 N. Y. 556; O'Neill *v.* James, 43 N. Y. 84; Requa *v.* Rochester, 45 N. Y. 129; 6 Am. Rep. 52; Ayrault *v.* Pacific Bank, 47 N. Y. 570; 7 Am. Rep. 489; Hayden *v.* Demets, 53 N. Y. 426; 34 N. Y. Super. Ct. 344; McGinley *v.* U. S. L. Ins. Co., 77 N. Y. 495; Schile *v.* Brokhahus, 80 N. Y. 614; Smedis *v.* Brooklyn, etc., R. Co., 88 N. Y. 23; Angevine *v.* Jackson, 103 N. Y. 470; Fitch *v.* Livingston, 7 How. Pr. (N. Y.) 410; Keller *v.* New York Cent. R. Co., 24 How. Pr. (N. Y.) 184; Coghlan *v.* Dinsmore, 35 How. Pr. (N. Y.) 416; Lansing *v.* Wiswall, 5 Den. (N. Y.) 218; Kluender *v.* Lynch, 4 Keyes (N. Y.) 364; 2 Abb. App. Dec. (N. Y.) 538; O'Donnell *v.* New York, etc., R. Co., 8 Daly (N. Y.) 413; Snell *v.* Snell, 3 Abb. Pr. (N. Y.) 430; Reab *v.* McAlister, 8 Wend (N. Y.) 109; Mann *v.* Eckford, 15 Wend. (N. Y.) 510, 511; Norman *v.* Wells, 17 Wend. (N. Y.) 143; Krumm *v.* Beach, 25 Hun (N. Y.) 296; Taylor *v.* Ketchum, 35 Hun (N. Y.) 302; 5 Robt. (N. Y.) 520; Van Ostran *v.* New York, etc., R. Co., 35 Hun (N. Y.) 598; Merritt *v.* Seaman, 6 Barb. (N. Y.) 330; McBurney *v.* Cutler, 18 Barb. (N. Y.) 203; Robinson *v.* New York, etc., R. Co., 27 Barb. (N. Y.) 519; Elton *v.* Markham, 20 Barb. (N. Y.) 346; Frantz *v.* Ireland, 66 Barb. (N. Y.) 386; Rider *v.* Union India Rubber Co., 4 Bosw. (N. Y.) 179; Mayor, etc., of N.Y. *v.* Hamilton F. Ins. Co., 10 Bosw. (N. Y.) 554; French *v.* White, 5 Duer (N. Y.) 257; Roe *v.* Roe, 40 N. Y. Super. Ct. 1; Daly *v.* Byrne, 43 N. Y. Super. Ct. 261; Sun Printing, etc., Assoc. *v.* Tribune Assoc., 44 N. Y. Super. Ct. 136; Gumb *v.* Twenty-Third St. R. Co., 53 N. Y. Super. Ct. 469; Adams *v.* State, 29 Ohio St. 587; Taylor *v.* Leith, 26 Ohio St. 474; Adams *v.* State, 29 Ohio St. 417; Marietta, etc., R.Co *v.* Strader, 29 Ohio St. 451; Railway *v.* Probst, 30 Ohio St. 104; Serviss *v.* Stockstill, 30 Ohio St. 432; Fitzgerald *v.* Cross, 30 Ohio St. 450; Berry *v.* State, 31 Ohio St. 224; 27 Am. Rep. 506; Western Ins. Co. *v.* Tobin, 32 Ohio St. 88; McKee *v.* Hamilton, 33 Ohio St. 11; Powers *v.* Hazelton, etc., R. Co., 33 Ohio St. 438; Union Ins Co. *v.* McGookey, 33 Ohio St. 563; Banta *v.* Martin, 38 Ohio St. 536; Carskadden *v.* Poorman, 10 Watts (Pa.), 82; 36 Am. Dec. 145; Harman *v.* Lynchburg, 33 Gratt. (Va.) 43. But see Bowman *v.* Cudworth, 31 Cal. 150; McCreery *v.* Everding, 44 Cal. 249.

the courts do not insist on the same strictness of specification as where exceptions are taken to a judge's charge.[1]

b. RECORD ON APPEAL.—The record, consisting, in general, of the summons, the pleadings, the order of reference, the judgment, and the exceptions taken to the rulings of the referee, should be so prepared that the errors complained of may appear on its face.[2] But only so much of the evidence and proceedings should be incorporated as is necessary to present the points relied upon as ground of error.[3] Anything more serves only to increase the expense of clients, to augment the labor of the appellate court, and to confuse rather than enlighten the case.[4] In making up the record, much is to be left to the discretion of the referee who tried the case, and it is for him to determine what actually happened on the trial before him.[5] In case of doubt as to words, resort may be had to the minutes of the stenographer.[6]

1. Newlin *v.* Lyon, 49 N. Y. 661. In this case the court, by Folger, J., said: "It is claimed that the exception to the conclusion of law of the referee in which the judgment is contained, is too broad and general, covering that part of the conclusion and judgment which is good as well as that part which is ill. Were it an exception to a charge, or to a refusal to charge as requested, this claim might be entertained. Where a charge is good in part and ill in part, the exception must point out the very part which is ill, so that the court may have its attention directed specifically to it, and may then make a correction, and so of a refusal to charge as requested on such occasions, as all takes place *pari passu* by an explicit and pointed exception, the court is saved the labor of separating the correct from the incorrect, the latter is drawn sharply into notice, and errors may be avoided. And the presumption is that such would be the case. But here the conclusion of law is found and the judgment is pronounced, and the case passes from the consideration of the judge or the referee; after that the exception comes, and after, the power in the court to rectify has passed away. And be it ever so exact and pointed the exception affords no information which may be availed of for correction and avoidance of error, so that the reason fails for holding the party to the strict but salutary rule enforced as to exceptions taken in open court."

2. Cooper on Referees and References, pp. 128, 132. So, if an erroneous ruling adverse to the appellant was made, this fact should be made to appear plainly, and not by inference or conjecture. Clark *v.* Donaldson, 49 How. Pr. (N. Y.) 63.

3. Tweed *v.* Davis, 1 Hun (N.Y.) 252.

4. Dunlap *v.* Hawkins, 2 Thomp. & C. (N. Y.) 298; Ryan *v.* Wavle, 4 Hun (N. Y.) 894; Marckwald *v.* Oceanic Steam Nav. Co., 8 Hun (N. Y.) 547; Magie *v.* Baker, 14 N. Y. 435; Jewell *v.* Van Steenburgh, 58 N. Y. 85; Howland *v.* Woodruff, 60 N. Y. 75.

5. Canzi *v.* Conner, 4 Abb. N. Cas. (N. Y.) 148; Tweed *v.* Davis, 1 Hun (N. Y.) 252.

In the latter case the court by Daniels, J., said: "It is not intended to be affirmed, that the court can enter upon the solution of the inquiry, whether a particular occurrence transpired upon the trial, which the presiding justice may have rejected as forming no part of the proceeding, for that is necessarily within the province of the justice settling the case or bill. He must decide, from the evidence before him, whether disputed evidence was given, or contested exceptions were taken. And for that purpose, he may hear and consider the affidavits of the parties and their counsel, inspect their notes as well as his own, and consult his own recollection, as well as other accessible means of information, for the purpose of settling the controversy between the parties concerning what may have actually taken place. Beyond that, it does not seem practicable to extend the investigation, otherwise there would be danger of protracting the litigation indefinitely, resulting from a single controversy."

6. Nelson *v.* New York, etc., R. Co., 1 Month. L. Bul. 15.

c. REVIEW OF REFEREE'S DECISIONS ON APPEAL.—Where final judgment may be entered on a referee's report, the proper method of correcting errors committed during the trial before the referee is by appeal,[1] in which the burden of showing error is upon the excepting party.[2] But the finding of a referee is to be regarded by an appellate court as having the same force and weight as the verdict of a jury; and will not be disturbed unless clearly against the weight of evidence.[3] Where, however, there are material findings of fact which are clearly against, or unsupported by, the evidence,[4] or without any evidence tending to sustain them,[5] or where erroneous conclusions of law are drawn from the facts,[6] the judgment will be reversed. But even though the conclusions of law be erroneous, if the judgment actually rendered is proper upon the facts, no reversal will be ordered.[7] Nor will the finding of a referee be set aside upon appeal, if the evidence before the appellate court is conflicting.[8] So, where there is some evidence to sustain every material finding of the referee, his report will not be set aside upon a bare preponderance of evidence against some of his findings.[9]

d. PRESUMPTIONS ON APPEAL.—Upon appeal from a judgment entered upon the report of a referee, every intendment of

1. Cooper on Referees and References, p. 139.

2. White *v.* Reviere, 57 Ga. 386.

3. Knowles *v.* Joost, 13 Cal. 620; Noonan *v.* Hood, 49 Cal. 293; Whicher *v.* Steamboat Ewing, 21 Iowa 240: Lyons *v.* Harris, 73 Iowa 292: Gimbel *v.* Pignero, 62 Mo. 240; Fitch *v.* Archibald, 29 N. J. L. 160; Watkins *v.* Stevens, 4 Barb. (N. Y.) 168; *In re* Odell's Estate, 4 N. Y. Supp. 463; McCarthy *v.* Teale, 51 Hun (N. Y.) 638. *Compare* Davis *v.* Allen, 3 N. Y. 168; Quackenbush *v.* Ehle, 5 Barb. (N. Y.) 469; Vansteenburgh *v.* Hoffman, 15 Barb. (N. Y.) 28; Sinclair *v.* Tallmadge, 35 Barb. (N. Y.) 602; Smith *v.* McCluskey, 45 Barb. (N. Y.) 610; Hoogland *v.* Wight, 7 Bosw. (N. Y.) 394; Roth *v.* Colvin, 32 Vt. 125; Thayer *v.* Central Vt. R. Co., 60 Vt. 214. And see *supra*, this title, p. 702, note 5.

Hence, the findings of a referee will not be disturbed when the evidence is conflicting, or there is any evidence tending to sustain them. Marshall *v.* Bumby, 25 Fla. 619; Southbridge Sav. Bank *v.* Mason, 147 Mass. 500; Mayer *v.* Hazard, 49 Hun (N. Y.) 222; Curtice *v.* West, 50 Hun (N. Y.) 47; Van Bokkelein *v.* Berdell, 50 Hun (N. Y.) 605; Snyder *v.* O'Connor, 50 Hun (N. Y.) 604; *In re* Fithian's Estate, 3 N. Y. Supp. 193; *In re* Eisner's Estate, 5 N. Y. Supp. 30; Holmes *v.* Young, 53 Hun (N. Y.) 638; Stanley *v.* Pickhardt, 57 N. Y. Super. Ct. 147; Deach *v.* Perry, 53 Hun (N. Y.) 638; Perry *v.* Hardison, 99 N. Car. 21. *Compare* Opdyke *v.* Whiting, 54 Hun (N. Y.) 636. But see Carter *v.* Munson, 27 Neb. 172.

It is not competent for the appellate court to say that evidence entitling a referee to pass upon a question of fact does not sustain his conclusions. Kirkland *v.* Cureton, 4 S. Car. 122.

4. Cooper on Referees and References, p. 141; Matthews *v.* Coe, 49 N. Y. 57; Meacham *v.* Burke, 54 N.Y. 217.

5. *New York* Code Civ. Pro., § 993; Mason *v.* Lord, 40 N. Y. 484. In *New York*, moreover, a refusal to make any finding whatever upon a question of fact, when a request to find thereupon is seasonably made by either party, is a ground of appeal. *New York* Code Civ. Pro., § 993.

6. Hickok *v.* Bliss, 34 Barb. (N. Y.) 321.

7. Scott *v.* Pilkington, 15 Abb. Pr. (N. Y.) 280; Christensen *v.* Kolby, 23 N. Y. Week. Dig. 87.

8. Keller *v.* Sutrick, 22 Cal. 471.

9. Ruth *v.* Ford, 9 Kan. 17; Owen *v.* Owen, 9 Kan. 91; Clouch *v.* Moyer, 23 Kan. 404.

which the evidence will admit, is to be made to sustain the report and to supply the facts necessary to justify it.[1] Thus, where a finding of facts essential to support a judgment is not directly expressed by the referee, it will, on appeal, be assumed, provided there is evidence in the case which might have clearly justified such a finding;[2] or, in other words, a general conclusion

1. See PRESUMPTIONS, vol. 19, p. 49; Donahue *v.* Cromartie, 21 Cal. 80; Hoyt *v.* Hoyt, 8 Bosw. (N. Y.) 511; Brainerd *v.* Dunning, 30 N. Y. 211; Hill *v.* Grant, 46 N. Y. 496; Meacham *v.* Burke, 54 N. Y. 217.

In Hill *v.* Grant, 46 N. Y. 496, the court by Church, C. J., said: "If the findings of a referee are ambiguous, that construction will be adopted which will sustain the judgment rather than that which will lead to a reversal. The rule is that the findings are to receive the most favorable construction of which they are capable, for the purpose of upholding the judgment."

Thus, where a cause was referred to three referees, of whom only two signed the report, it will be presumed on appeal, in the absence of anything to the contrary on the record, that all the referees met and heard the parties. Yates *v.* Russell, 17 Johns. (N. Y.) 461.

So it will be presumed that the referee, in determining the case, considered all the competent testimony, and that he found from the evidence not only all the facts necessary to sustain his conclusions of law, but also all the facts warranted by the evidence. Valentine *v.* Conner, 40 N. Y. 257; Warner *v.* Warren, 46 N. Y. 235; Lewis *v.* Greider, 49 Barb. (N. Y.) 606; Matthews *v.* Coe, 56 Barb. (N. Y.) 430; 49 N. Y. 57; Kemple *v.* Darrow, 39 N. Y. Super. Ct. 451; Tryon *v.* Baker, 7 Lans. (N. Y.) 511; Talcott *v.* Smith, 20 N.Y. Week Dig. 562. Accordingly, when the record does not contain any of the evidence, but merely the findings of fact, it will be presumed that there was no evidence from which any other fact could be found. Stoddard *v.* Whiting, 46 N. Y. 631. And so when the record does not show that it contains all the evidence given on the trial, or all bearing on the findings of fact sought to be reviewed, the appellate court will assume that the evidence was sufficient to uphold the findings of fact. Spence *v.* Chambers, 39 Hun (N. Y.) 195; Porter *v.* Smith, 7 Civ. Pro. Rep. (N. Y.) 195; Phillip *v.* Gallant, 62 N. Y. 265; Tomlinson *v.* Mayor, etc., of N. Y., 44 N. Y. 605; Frost *v.* Smith, 7 Bosw. (N. Y.) 108; Tryon *v.* Baker, 7 Lans. (N. Y.) 511.

2. Grant *v.* Morse, 22 N. Y. 323; Valentine *v.* Conner, 40 N. Y. 254; Chubbuck *v.* Vernam, 42 N. Y. 432; Walsh *v.* Powers, 43 N. Y. 23; 3 Am. Rep. 654; Oberlander *v.* Spiess, 45 N. Y. 175; Erickson *v.* Quinn, 47 N. Y. 410; Cook *v.* Whipple, 55 N. Y. 165; Parker *v.* Baxter, 86 N. Y. 586; 19 Hun (N. Y.) 410; Sinclair *v.* Talmadge, 35 Barb. (N. Y.) 602; Bancker *v.* Mayor, etc., of N. Y., 8 Hun (N. Y.) 409; Whittaker *v.* Chapman, 3 Lans. (N. Y.) 155; Westcott *v.* Fargo, 6 Lans. (N. Y.) 325; 63 Barb. (N. Y.) 349; 61 N. Y. 542; 19 Am. Rep. 300; Bennett *v.* Agricultural Ins. Co., 15 Abb. N. Cas. (N. Y.) 234; Wells *v.* Ross, 6 N. Y. Week. Dig. 154. And *compare* Viele *v.* Troy, etc., R. Co., 20 N. Y. 184.

In Walsh *v.* Powers, 43 N. Y. 27; 3 Am. Rep 654; the court by Allen, J., said: "While every intendment will be in support of a judgment, and nothing will be taken by inference against it upon appeal, this court cannot infer or assume the existence of a fact lying at the foundation of the action, in the absence of any finding upon the subject, or evidence warranting such a finding. Omissions and defects in a finding may be supplied by inference, but not the entire want of finding, in the absence of evidence of the necessary fact appearing in the case."

In Meyer *v.* Amidon, 45 N. Y. 169, which was an action for false and fraudulent representations, the referee found that the representations made by the defendant were false, that the plaintiffs were induced by them to give credit to the party making them, and that damages ensued therefrom to the plaintiffs, but upon the request of the defendant's counsel to find that the statements were made without fraud or intent to deceive, he refused to find "otherwise than as contained in his finding of fact." It was held that in order to sustain the judgment, the court would not presume the

will be held to embrace every finding of fact essential to uphold the judgment founded on it, where the evidence in the case will fully warrant such finding, and there appears no finding that shows the judgment to be erroneous.[1] Similarly, where the record does not contain all the evidence, the appellate court cannot decide that the findings of the referee are contrary to the evidence, but will presume that they are correct.[2]

e. EFFECT OF REVERSAL OF JUDGMENT ON ORDER OF REFERENCE.—In *New York* it is held that the reversal of a judgment entered upon a referee's report does not of itself vacate the order of reference, and allow the action to be tried by a jury;[3] the order of reference, unless vacated by the order of reversal, or by a motion made for that purpose, continues in force,[4] and the cause may be tried by the same person as at first, or the court may appoint a new referee, even in cases where, without the consent of the parties, no reference could have originally been ordered.[5]

18. Fees of Referees.—The referee receives in general a compensation fixed by statute, unless the parties, at or before the commencement of the hearing, consent to a different rate.[6] If

finding of the necessary fact of fraud or intent to deceive on the part of the defendant. *Compare* Comstock *v.* Ames, 1 Abb. App. Dec. (N. Y.) 411.

The principle stated above in the text has no application to the subject of costs, over which the referee has no jurisdiction. Fuller *v.* Conde, 47 N. Y. 92.

1. Dewey *v.* Niagara Co., 4 Thomp. & C. (N. Y.) 609; 2 Hun (N. Y.) 395; Gibson *v.* Stetzer, 3 Hun (N. Y.) 540; Grant *v.* Morse, 22 N. Y. 323.

2. Murray *v.* Kelley, 23 Kan. 666. *Compare* Porter *v.* Hall, 11 Kan. 514; Fell *v.* New York Locomotive Works, 50 Hun (N. Y.) 602.

Where none of the evidence is preserved, and there is no affirmative showing to the contrary, it will be presumed that the referee heard and decided the issues submitted, upon testimony applicable thereto, and properly admissible under the pleadings. Simpson *v.* Woodward, 5 Kan. 571.

3. Carter *v.* Wallace, 3 How. Pr. N. S. (N. Y.) 350; Catlin *v.* Adirondack Co., 81 N. Y. 379; 19 Hun (N. Y.) 389; Kiersted *v.* Orange, etc., R. Co., 54 How. Pr. (N. Y.) 41; Shuart *v.* Taylor, 7 How. Pr. (N. Y.) 252. *Compare* White *v.* Smith, 1 Lans. (N. Y.) 469. But see *contra* Devlin *v.* Mayor, etc., 54 How. Pr. (N. Y.) 11; 6 Daly (N. Y.) 486; which was a case of compulsory reference, and in which the court seemed to make a distinction between a compulsory order of reference and one made by the consent of the parties. See, however, in this connection, Cooper on Referees and References, p. 149.

4. Catlin *v.* Adirondack Co., 81 N. Y. 379; 19 Hun (N. Y.) 389. *Compare* Bissell *v.* Hamlin, 13 Abb. Pr. (N. Y.) 28.

5. Carter *v.* Wallace, 3 How. Pr. N. S. (N. Y.) 350; Masten *v.* Budington, 18 Hun (N. Y.) 105; Murphy *v.* Winchester, 35 Barb. (N. Y.) 620. But *compare* Billings *v.* Vanderbrek, 15 How. Pr. (N. Y.) 295.

6. *Compare New York* Code Civ. Pro., § 3296; People *v.* Continental L. Ins. Co., 15 N.Y. Week. Dig. 569; Chase *v.* James, 16 Hun (N. Y.) 14, in which case the reasons why a compensation other than the statutory one should be agreed upon prior to the trial are stated by Learned, P. J.: "Such agreements as to compensation ought always to be made before the referee has accepted his office. When made during the progress of the trial, they are of doubtful propriety. After the referee has commenced to act, if either party proposes that the referee shall have a greater sum than the statute prescribes, the other cannot refuse. He is justly afraid that such refusal may prejudice the referee against him.

the parties so agree, the rate must be definitely fixed.[1] Where the parties do not consent, the referee, if unwilling to accept the statutory fees, should decline the reference. A declaration that he will proceed with the hearing, that he will expect a higher rate of compensation from the prevailing party, and that he will hold the report as security for its payment, will be sufficient ground for his removal.[2] And so, where a referee, after the case was finally closed and submitted to him, applied to the parties and their attorneys to have his fees fixed at a sum in excess of the statutory rate, it was held proper ground for setting aside the report.[3]

A referee is not, in general, entitled to his fees in advance of the hearing; nor, in fact, until the report is actually made,[4] that is, signed and ready for delivery.[5] It is said that on sufficient grounds the court would, perhaps, require the deposit of money to meet the fees of the referee before requiring him to proceed, but that such requirement would rest on something unusual and peculiar in the particular case.[6]

An attorney, though not liable himself for the fees of the referee,[7] can bind his client by a stipulation to pay an increased referee's fee.[8]

On the other hand, a party sometimes thinks it is a wise measure to be the first to propose, in the referee's presence, that his compensation shall be some liberal sum. These motives have tended to make attorneys agree on large compensation, each hoping that the burden would fall on the opposing party. If, then, more than the statutory fees are to be allowed, a written agreement fixing the exact fees agreed upon should be made and signed before the referee commences to act. If he is not satisfied with the statutory rate or the rate agreed upon, he can decline to serve."

1. Thus an agreement, that a referee may charge the fair value of his services, does not authorize any charge in excess of the statutory fees. Chase *v.* James, 16 Hun (N. Y.) 14. Nor does an oral agreement between the parties, in which it is left to the referee to say what his compensation shall be, and to fix it at what he may deem reasonable. First Nat. Bank *v.* Tamajo, 77 N. Y. 476.

2. Devlin *v.* Mayor, etc., of N. Y., 7 Daly (N. Y.) 466; *reversing* 54 How. Pr. (N. Y.) 64.

3. Greenwood *v.* Marvin, 29 Hun (N. Y.) 99.

4. Ellsworth *v.* Brown, 16 Hun (N. Y.) 1; 56 How. Pr. (N. Y.) 237; Clapp *v.* Clapp, 38 Hun (N. Y.) 540. *Compare In re* Kraus, 4 Dem. (N. Y.) 217.

5. See *supra*, this title, p. 701, note 4.

6. Ellsworth *v.* Brown, 16 Hun (N. Y.) 1; 56 How. Pr. (N. Y.) 237.

7. Howell *v.* Kinney, 1 How. Pr. (N. Y.) 105; Judson *v.* Gray, 11 N. Y. 408.

The referee must look to the successful party for his fees. Geib *v.* Topping, 83 N. Y. 46. *Compare* Perkins *v.* Taylor, 19 Abb. Pr. (N. Y.) 148. And the latter in turn recovers them from the adverse party as taxable disbursements. Clegg *v.* Aikens, 17 Abb. N. Cas. (N. Y.) 88.

8. Mark *v.* Buffalo, 87 N. Y. 184. *Compare* Chase *v.* James, 16 Hun (N. Y.) 14; First Nat. Bank *v.* Tamajo, 77 N. Y. 478.

And in Mark *v.* Buffalo, 87 N. Y. 184, it was held that when a stipulation for fees higher than the amount allowed by statute has been made by the attorneys and acted upon by the parties and the referee, the court has no power, in the absence of fraud or collusion, to reduce the allowance, notwithstanding it may be in excess of a reasonable and fair compensation.

Whether a receiver can consent, without leave of court, to such an increase is doubtful. People *v.* Continental L. Ins. Co., 15 N. Y. Week.

III. **Referees to Inform the Court.**—In some jurisdictions, the persons performing the duties of masters or commissioners under the old equity practice, are called referees. The legal principles applicable to these functionaries depend almost altogether on local statutes. Where they are of sufficient general interest to require mention, they will be found treated fully elsewhere.[1]

IV. **Referees in Mercantile Law.**—A reference, in mercantile law, is a direction or request by a party asking credit, to the person from whom he expects it, to call on some other person named—the referee—in order to ascertain the character or mercantile standing of the party so naming him.[2]

V. **Referees in Life Insurance.**—It has been held that a physician, or other person, to whom an insurer is referred for information by the insured, is impliedly the agent of the party insured, who is therefore bound by the referee's statements, and must suffer if they be false.[3] But this doctrine has in *England* been overruled by a more recent case, holding that such referees are not the agents of the assured so as to make their fraud, misrepresentation, or concealment that of the assured.[4]

Dig. 569. And it has been decided under the *New York* statute that where an assignment has been made for the benefit of creditors, the assignee's counsel, and the several counsel for the creditors, cannot make a binding stipulation to allow the referee an increased rate of compensation. *In re* Currier, 8 Daly (N. Y.) 119.

Fees of Deputy.—On the question whether a referee may charge for the services of a deputy, see *supra*, this title, p. 686, note 5.

1. See Auditors, vol. 1, p. 1009; Master in Equity, vol. 14, p. 919. *Compare supra*, this title, p. 660, note 2.

2. Bouv. L. Dict. (15th ed.), vol. 2, p. 526.

3. Everett *v.* Desborough, 5 Bing. 503; 15 E. C. L. 518. And see Aveson *v.* Kinnaird, 6 East 188; Swete *v.* Fairlie, 6 Car. & P. 1; 25 E. C. L. 249; Williams *v.* Duckett, *cited* in 6 Car. & P. 3; 25 E. C. L. 250; Von Lindenau *v.* Desborough, 3 Car. & P. 353; 14 E. C. L. 343; Maynard *v.* Rhode, 5 D. & R. 266; 1 Car. & P. 360; 11 E. C. L. 418; Rawls *v.* American Mut. L. Ins. Co., 36 Barb. (N. Y.) 357; 27 N. Y. 282. And *compare* Fraternal Mut. L. Ins. Co. *v.* Applegate, 7 Ohio St. 292. See also 1 Greenl. Ev. (14th ed.), § 182.

In Rawls *v.* American Mut. L. Ins. Co., 36 Barb. (N. Y.) 357; 27 N. Y. 282, the court by Wright, J., said: "The court went quite far enough, in instructing the jury, in substance, that, as Marsh had been referred to as an acquaintance of Fish, the plaintiff would be responsible for the truth and honesty of his statements, and if, in point of fact, they were untrue, whether such untruth originated in fraud or mere negligence, or want of recollection, it would avoid the policy."

4. Wheelton *v.* Hardistry, 8 E. & B. 232, 268; 92 E. C. L. 232, 268; reviewing all the earlier authorities. Lord Campbell, C. J., said in this case: "On behalf of the defendants, it has been very powerfully argued before us, that the person whose life is to be insured (as he is usually called, the 'life'), and the referees are always to be considered, if not the agents of the assured to effect the policy, at least the agents of the assured in giving answers to all material questions which may be put to them respecting the matters to which they may properly be interrogated. Although this doctrine has some sanction from language which has been used by judges, it seems to me to be contrary to principle; and the decisions cited in support of it admit of an explanation, which leaves me at liberty to condemn it. A policy may no doubt be framed, which shall make the assured liable for any material misrepresentation or concealment by the

REFINE—(See also RECTIFY; COAL, vol. 3, p. 287).—See note 1.

REFINEMENT—(See also INDICTMENT, vol. 10, p. 552).—A refinement, in stating a criminal charge, is understood to be the verbiage which is frequently found in indictments, in setting forth what is not essential to the constitution of the offense, and therefore not required to be proved on the trial.[2]

REFORMATION OF INSTRUMENTS.—(See also ALTERATION OF INSTRUMENTS, vol. 1, p. 497; EQUITY, vol. 6, p. 683; FRAUD, vol. 8, p. 635; MISTAKE, vol. 15, p. 625; RESCISSION; SPECIFIC PERFORMANCE.)

I. The Rule, 713.
II. Jurisdiction, 719.
III. Pleading, 720.
IV. Evidence (See MISTAKE, vol. 15, p. 649), 720.

I. **THE RULE.**—When an agreement is made and reduced to writing, but through mistake, inadvertence, or fraud, the writing fails to express correctly the contract really made, a court of equity will reform the instrument in conformity with the real intention of the parties.[3]

'life' or the referees; but what we have to consider is, whether, where the policy contains no express condition for this purpose, and is made on a declaration, by the assured, that they believe the statements of the 'life' and the referees to be true, the 'life' and the referees are still the agents of the assured in the manner contended for. In the first place it seems rather strange, if they are employed, not in any respect to negotiate or to effect the insurance, but only to give information as to facts exclusively known to themselves, they should be denominated agents. It often happens that the assured have never seen the 'life,' and are wholly unacquainted with the state of his health and with his habits. But an agent is supposed to do what could be done by the principal, were the principal present. A more serious objection arises from the consideration that this doctrine would entirely prevent a life policy from being a security on which a man could safely rely as a provision for his family, however honestly and however prudently he may have acted when the policy was effected. But, the assurer and assured being equally ignorant of material facts to influence their contract, if the assurer asks for information, and the assured does his best to put the assurer in a situation to obtain the information, and to form his own opinion as to whether the information is sincere can it be permitted, where the assurer, without any blame being imputable to the assured, has allowed himself to be deceived, that he shall be able to say to the assured: 'You warranted all the information I receive to be true; and, having received your premiums for many years, now the life drops, I tell you I was incautious, and the policy I gave you is a nullity.' The *uberrima fides* is to be observed with respect to life insurances as well as marine insurances. The assured is always bound, not only to make a true answer to the questions put to him, but spontaneously to disclose any fact exclusively within his knowledge which it is material for the assurer to know; and any fraud by an agent employed to effect the insurance is the fraud of the principal; but there is no analogy between the statements of the 'life' or the referees in the negotiation of a life insurance and the statements of an insurance broker to underwriters, by which he induces them to subscribe the policy." *Compare* May on Ins., § 123.

1 **Refined Coal.**—See COAL, vol. 3, p. 287.

2. State *v.* Gallmon, 2 Ired. (N. Car.) 377.

3. To reform an instrument in equity is to decree that it shall be read and construed in conformity with the in-

tention of the parties. Adams *v.* Stevens, 49 Me. 362.

Reformation is appropriate when an agreement has been made, or transaction entered into or determined upon, as intended by all the parties interested; but, in reducing such agreement or transaction to writing, either through mistake common to both parties, or through the mistake of the plaintiff, accompanied by the fraud, knowledge and procurement of the defendant, the written instrument fails to express the real agreement or transaction. In such a case the instrument may be corrected so that it shall truly represent the agreement or transaction actually made or determined upon according to the real purpose and intention of the parties. Pomeroy's Eq. Jur., § 870.

Reformation and re-execution are in fact one and the same remedy, depending upon the same rules. Pomeroy's Eq. Jur., § 1375, n. 1.

Remedy by reformation is obviously one which is necessary to the complete and exact administration of justice, and which, moreover, can be attained by equity proceedings alone.

Courts of law may construe and enforce an instrument as it stands; or refuse for cause to give it effect, or treat it as a nullity. But if the instrument is not so drawn as to express the true intention of the parties, to enforce it so would simply be to carry out the very mistake or fraud complained of; while to set it aside altogether might deprive the plaintiff of the advantages of a contract to which he is lawfully entitled. The true measure of justice is by reforming the instrument according to the intention of the parties, and enforce as reformed. Story's Eq. Jur., § 468.

Lord Hardwicke, speaking of the reformation of instruments, said: "No doubt but this court has jurisdiction to relieve in respect of a plain mistake in contracts in writing as well as against frauds in contracts, so that if reduced into writing contrary to the intent of the parties, on proper proof that would be rectified." Henkle *v.* Royal Assur. Co., 1 Ves. 314.

Equity has jurisdiction to reform written instruments in but two well-defined cases: 1. Where there is a mutual mistake—that is, where there has been a meeting of the minds, an agreement actually entered into, but the contract, deed, or settlement or other instrument in its written form, does not express what was really intended by the parties thereto; and, 2. Where there has been a mistake of one party accompanied by fraud or other inequitable conduct of the remaining parties. In such cases the instrument may be made to conform to the intention of the parties. Almost all written instruments may be reformed when a proper occasion is furnished. Pomeroy's Eq. Jur., § 1376.

Where the parties to an agreement have determined to embody their common intention in the appropriate and conclusive form, and the instrument meant to affect this purpose is by mistake so framed as not to express the real intention which it ought to have expressed, it is possible in many cases to correct the mistake by means of a jurisdiction formerly peculiar to courts of equity and still reserved as a matter of procedure in the chancery division. Wald's Pollock on Contracts, p. 470.

Mistake Defined.—Mistake, within the meaning of equity, and as the occasion of jurisdiction, is an erroneous mental condition, conception, or conviction, induced by ignorance, misapprehension or misunderstanding of the truth, but without negligence, and resulting in some act or omission done or suffered erroneously by one or both the parties to a transaction, but without its erroneous character being intended or known at the time. Pomeroy's Eq. Jur., § 839.

Where it is clear that a written instrument fails to express some material element of the contract, which the parties mutually intended should be inserted, or expresses it different from the intention of the parties, a court of chancery will reform the instrument in conformity with the true intention of its makers. But the court cannot add terms the parties did not intend to employ. Clark *v.* Hart, 37 Ala. 390; Pickett *v.* Merchants' Nat. Bank, 32 Ark. 346; Thompsonville Scale Mfg. Co. *v.* Osgood, 26 Conn. 19.

Where some terms of an agreement are omitted, by the mistake of the draftsman in reducing it to writing, equity will reform it, and enforce it as reformed. Murphy *v.* Rooney, 45 Cal. 78; Reese *v.* Wyman, 9 Ga. 430; Stricker *v.* Tinckham, 35 Ga. 177.

Equity will correct a mistake in the draft of a deed, or even in its execution, if the mistake clearly appears. Holabird *v.* Burr, 17 Conn. 559; Sanford *v.* Washburn, 2 Root (Conn.) 503; Knapp *v.* White, 23 Conn. 539.

When the writing speaks the true agreement between the parties, it cannot be reformed. Robertson *v.* Walker, 51 Ala. 484.

Equity will not contravene positive enactments or requirements of law, or defeat its policy by supplying, under the guise of amending a defective instrument, deficient elements of form, without which the instrument is void. Dickenson *v.* Glenney, 27 Conn. 111. See White *v.* Port Huron & M. R. Co., 13 Mich. 356.

Nor will a court of equity supply important conditions in a lease which the parties never fully assented to. Ladwig *v.* Haase, 54 Wis. 311. See also Townsend *v.* Stangroom, 6 Ves. 228.

Equity has no power to supply an agreement that was never made. Graves *v.* Boston Ins. Co., 2 Cranch (U. S.) 419. But equity will afford relief in written instruments where the parties have omitted any acts necessary to give validity and effect, and will supply omissions from conveyances by mistake. Com. *v.* Reading Bank, 137 Mass. 431. 443; Batesville Institute *v.* Kauffman, 18 Wall. (U. S.) 58; Morris *v.* Bacon. 123 Mass. 58.

Doubtful Meaning.—Where the meaning of a deed, apart from its effect according to the ordinary rules of construction, is conjectural, the court cannot take upon itself to declare that there is a mistake arising from ignorance of the draftsman. Williams *v.* Houston. 4 Jones Eq. (N. Car.) 277.

Mistake of One Party.—A mistake of one party to a deed in the absence of fraud by the other, does not warrant its reformation Ranney *v.* McMullen, 5 Abb. N. C. (N. Y.) 246.

Form of Relief.—The form of relief depends upon circumstances. Courts of equity have a wide discretion, their object being to give the parties the benefits of the contract, the same as if no mistake were made. Lestrade *v.* Barth, 19 Cal. 660.

Relief by reformation is not effected by erasures or interlineations of the former deed. but by injunctions, and orders for necessary and proper releases. Smith *v.* Greeley, 14 N. H. 378; Craig *v.* Kittridge, 23 N. H. 236.

Alteration.—The authority of a court of equity to reform an instrument does not extend to any alteration of it, but only to correcting one, in which a mistake has been made, by conforming it to what was actually agreed upon. Garnar *v.* Bird, 57 Barb. (N. Y.) 277.

A court of equity may set aside a settlement, and reform a deed given in furtherance thereof, for a mutual mistake or fraud of the grantor by embracing in the deed land to which he had no title, although an action at law would lie upon the covenants in the deed. Hancock *v.* Cossett, 45 Fed. Rep. 754.

An instrument may be rectified, although the property conveyed thereby is held adversely at the time, and an insufficient attestation in a conveyance will not prevent its reformation. Thompson *v.* Marshall, 36 Ala. 504.

A deed made *pendente lite* between parties to a divorce suit, in consideration of not defending the suit, will not be reformed in equity. Phillips *v.* Thorp, 10 Oregon 494.

A deed will not be reformed so as to insert a condition of forfeiture, and declaring and enforcing a forfeiture under such condition. Mills *v.* Evansville Seminary, 47 Wis. 354.

Where an instrument was designed to effect a certain object, but by a mistake it does not have the contemplated operation at law, chancery will so reform it as to effectuate the intention of the parties. Wyche *v.* Green, 11 Ga. 159.

Alabama.—Where written instruments, through mistake, express more or less than the parties intended, a court of equity has jurisdiction to reform them. But such relief will not be granted unless the proof of the mistake is full and satisfactory, because the writing should be considered as the sole expositor of the intent of the parties, until the contrary is established beyond reasonable controversy. Larkins *v.* Biddle, 21 Ala. 252.

Arkansas.—Where, through mistake or misapprehension, a contract does not embody the true intention of the parties, the power of a court of equity to reform it and make it conform to the intention of the parties is unquestionable. Pickett *v.* Merchants' Nat. Bank, 32 Ark. 346.

California.—Where a contract is reduced to writing, and through a mistake of the draftsman, some of the terms are omitted, it should be reformed by a court of equity, and enforced as reformed. Murphy *v.* Rooney, 45 Cal. 78.

Colorado.— Where a party acted under the impression that he has no title to property, equity will relieve him from the consequences of an

instrument which, through misapprehension, surrenders such unsuspected title. Morgan *v.* Dod, 3 Col. 551.

Connecticut.—A mistake in the draft of a deed, or in its execution, may be corrected by a court of equity, upon clear proof. Holabird *v.* Burr, 17 Conn. 559; Knapp *v.* White, 23 Conn. 539.

District of Columbia.—A trust deed which erroneously contains the word "west" instead of "east" in the description of the property conveyed will be corrected in equity, not only against grantors, but against parties to a prior deed of trust upon the same premises, of which said grantees had no knowledge or notice. Fenwick *v.* Bruff, 1 McArthur (D. C.) 107.

Delaware.—A settlement of mutual accounts between parties based upon a statement obviously incorrect upon its face, will be reformed, and the collection of a judgment for the balance restrained. McMullen *v.* Lockwood, 4 Del. Ch. Rep. 568.

Florida.—Equity will reform a deed where it fails to express the real intention of the parties, if the proof is clear. Franklin *v.* Jones, 22 Fla. 526; Jackson *v.* Magbee, 21 Fla. 622.

Georgia.—Where an instrument is drawn and executed for the purpose of carrying into effect a written or parol agreement, but by a mistake of the draftsman either of law or fact, does not effectuate the object of the parties, equity will make it conform to the true agreement. Rogers *v.* Atkinson, 1 Ga. 12; Collins *v.* Lanier, 1 Ga. 238.

Illinois.—A court of chancery will correct a written instrument where it clearly appears that the instrument was executed under a mistake. McCloskey *v.* McCormick, 44 Ill. 336.

Indiana.—A court of equity will afford relief for mistake as well as fraud in a deed or other contract; and parol evidence is admissible to prove a mistake. Gray *v.* Woods, 4 Blackf. (Ind.) 432; Connell *v.* Ewill, 4 Blackf. (Ind.) 67.

Iowa.—Upon an application to reform a written instrument upon the ground of mistake, the court will not reform it or impair its validity in other particulars than that to which knowledge or mistake are alleged to exist. Rump *v.* Schwartz, 56 Iowa 611.

Kansas.—A deed which, by mistake, contains a wrong description, may be corrected. Critchfield *v.* Kline, 39 Kan. 721.

Maine.—Jurisdiction in equity to correct mistakes is expressly conferred by statute. Such jurisdiction is not in terms limited to mistakes of fact. Jordan *v.* Stevens, 51 Me. 78.

Massachusetts.—The court has jurisdiction to reform a deed of real estate, upon clear oral proof that it does not conform to the intention of the parties, although the words used by the scrivener were those really intended. Canedy *v.* Marcy, 13 Gray (Mass.) 373.

Michigan.—A court will correct a misdescription in a deed of real estate. Rowley *v.* Townsley, 53 Mich. 329.

Minnesota.—A court of equity will reform a deed or written contract which, through fraud or mistake, fails to express the intention and meaning of the parties, although the contract contains the very language the parties agreed upon. Smith *v.* Jordan, 13 Minn. 264.

Mississippi.—Courts of equity have jurisdiction to reform a written instrument for mistake, and at the same time specifically enforce the instrument as reformed. Mosby *v.* Wall, 23 Miss. 81.

Missouri.—A court of equity will correct an error in the description in a deed in favor of a *bona fide* purchaser of the vendee against a creditor of the vendor who bought under an execution against the latter. Davis *v.* Briscoe, 81 Mo. 27.

Montana.—In the absence of a statute conferring it, a court of equity has no power to reform a mortgage to which a married woman was a party, on account of a mistake in the description of land therein. Bank *v.* Schmidt, 6 Mont. 609.

Nevada.—Mistakes in deeds and other written instruments will be reformed in equity, so as to conform to the real intention of the parties.

New Hampshire.—Mistakes in conveyances will be corrected upon oral evidence, so as to make the instrument conform both in form and effect to the intention of the parties. Kennard *v.* George, 44 N. H. 440.

New Jersey.—A mistake in a deed, whether caused by the scrivener or by the inadvertence of the parties, will be corrected in equity in conformity with the intention of the parties. Hendrickson *v.* Ivins, 1 N. J. Eq. 562; Wintermute *v.* Snyder, 3 N. J. Eq. 489.

North Carolina.—An instrument executed in accordance with a previous agreement, which, through a mistake of law or fact, does not effectuate the

The mere statement of this rule is sufficient to indicate the close relation of this title to other articles in which are explained what constitute fraud[1] and mistake[2] in law. The fact may not be equally obvious, however, that the proportion of the instances in which the reformation of instruments is applied for on the ground of mistake, is so large as to leave practically nothing for treatment under this title which would not duplicate either one of the two articles mentioned. For this reason the subjects herein con-

contemplated object by passing the estate or thing bargained for, will be corrected and a proper instrument ordered to be executed. McKay *v.* Simpson, 6 Ired. Eq. (N. Car.) 452.

New Mexico.—Where a mortgage is expressly intended to secure the payment of a note, but is defective in the power of sale, in providing only for payment of the costs of the trust and interest, without provision for the principal, it will be foreclosed in equity, without waiting for a reformation of the instrument. Milligan *v.* Cromwell, 1 N. Mex. Eq. 327; Seewald *v.* Raynolds, 1 N. Mex. Eq. 344.

New York.—Where a defect in a written instrument is caused by accident or mistake, and there would be a failure of justice, a court of equity will supply the defect or furnish a remedy, when this can be done without prejudice to those having prior equities. Quick *v.* Stuyvesant, 2 Paige (N. Y.) 84.

Ohio.—Where, by fraud or mistake a written instrument does not contain the agreement intended by the parties thereto, such agreement will be carried out in equity. Hunt *v.* Freeman, 1 Ohio 490.

Oregon.—A written instrument may be reformed where the evidence is clear and satisfactory. Newsome *v.* Greenwood, 4 Or. 119.

Pennsylvania.—A trust deed executed under an evident misapprehension of the facts, and at variance with the intention of the grantor, will be canceled in equity, and a new one executed by a master in conformity with the actual intention of the grantor. Ginschio *v.* Ley, 1 Phila. (Pa) 383.

Rhode Island.—To secure the payment of a note, a paper was executed and recorded which would have been valid as a mortgage had it been sealed. A bill was filed alleging that the failure to seal was caused by an accident, and praying reformation by affixing seal. *Held*, that a demurrer to the bill must be overruled. Bullock *v.* Whipp, 15 R. I. 195.

Tennessee.—Where, through mistake or fraud, a written instrument does not contain a parol condition agreed to by the parties, a court will reform the instrument in accordance with the intention of the makers. But the parol condition must be sustained by full, clear, and unequivocal proof. Perry *v.* Pearson, 1 Humphrey (Tenn.) 431.

Texas.—A party seeking to reform a contract upon the ground of an important omission, must establish satisfactorily a mistake, and the terms of the contract which he alleges the parties intended to make when the instrument was executed. Waco Top. R. Co. *v.* Shirley, 45 Tex. 357.

Vermont.—Chancery will correct a mistake in a conveyance, if well proved, in conformity with the intention of the parties. And it matters not whether the mistake is in regard to a statute or common-law requisite; or whether the parties failed to execute such an instrument as they intended, or to comprehend the effect of its operation. Beardsley *v.* Knight, 10 Vt. 185.

Virginia.—Equity will correct a mistake in an agreement for the sale of land, where the mistake is clearly proved. Where the contract has been reduced to writing, parol evidence of contemporaneous oral statements of the parties varying the written instrument, is inadmissible. Shirley *v.* Rice, 79 Va. 442.

West Virginia.—A contract for the sale of land may be reformed in equity, and specifically enforced as reformed. Creigh *v.* Boggs, 19 W. Va. 240.

Wisconsin.—Equity will reform a deed for mistake or fraud, but only upon the most clear and satisfactory evidence. Newton *v* Holley, 6 Wis. 592.

And see generally, MISTAKES, vol. 15, p. 625.

1. See FRAUD, vol. 8, p. 635; DECEIT, vol. 5, p. 318.

2. See MISTAKE, vol. 15, p. 625.

sidered will be found to relate exclusively to the reformation of instruments as a remedy, to certain matters of jurisdiction or practice, while the principles upon which it depends are elsewhere considered.

The jurisdiction extends to almost all kinds of papers or documents employed in commercial enterprises.[1]

1. Pomeroy's Eq. Jur., § 870.

Cause of Action Assignable. — The cause of action for the reformation of a contract on account of fraud or mutual mistake is assignable, and passes by the assignment of the contract. Bently *v.* Smith, 1 Abb. App. Dec. (N. Y.) 126; 2 Keyes (N. Y.) 342.

Custom.—Where evidence of custom is admissible at law to explain a contract, an action in equity cannot lie to reform the contract by the insertion of a provision founded in such custom. Mackenzie *v.* Schmett, 13 Am. L. Reg., N. S. 448.

Covenants.—A contract cannot be reformed by the insertion of an implied warranty as an express contract. Cassidy *v.* Begoden, 38 N. Y. Super. Ct. 180.

Words of Inheritance.—Where words of inheritance are omitted by mistake from a conveyance, contrary to the intention of the parties, a trust in the fee may be considered as created, which a court of equity will execute according to the conscience of the parties. Truesdell *v.* Lehman, 47 N. J. Eq. 218.

Bridge.—Where a deed was executed under such misinformation in connection with an obligation on the part of a company to maintain a bridge, it was held that the deed would be reformed. Green *v.* Morris, etc., R. Co., 12 N. J. Eq. 165.

Road.—Plaintiff and others agreed in writing to convey to the defendant a strip of land for a road, with a reservation of a right of the grantors to use it, but by mistake this reservation was omitted from the deed. Plaintiff used the road from 1871 to 1881, when he was ousted by the defendant. Plaintiff discovered the mistake in his deed in 1879. The deed was reformed to state the land conveyed and the plaintiff's right to use it. Stines *v.* Hays, 36 N. J. Eq. 364; 38 N. J. Eq. 654. See also Grossbach *v.* Brown, 72 Wis. 458.

Status Quo.—The right to reform a contract supposes that the situation has remained substantially unchanged. If, on the contrary, the parties cannot be put *in status quo*, substantially, equity will generally refuse relief. Crosier *v.* Acer, 7 Paige (N. Y.) 137, 143. See also Grymes *v.* Sanders, 93 U. S. 55; Beauchamp *v.* Winn, L. R., 6 H. L. 223.

Stock Subscription.—A written contract for subscription will not be reformed in equity by inserting a condition therein, except upon proof that the parties intended, at the time of the execution of the contract, to insert it, and that it was omitted through fraud, accident, or mistake; and the mistake must have been mutual. Bell *v.* The Americus, etc., R. Co., 76 Ga. 754.

Warranty.—A slave was sold without a warranty, the vendor procuring a friend to draw a bill of sale without a warranty. He inserted a clause which he supposed would exclude such warranty, but which in truth was such a warranty, and the court relieved against the mistake. Clopton *v.* Martin, 11 Ala. 187.

Lost Instruments—Deed.—A bill for the re-execution of a deed of land lost or destroyed while in the possession of the grantee, cannot be sustained unless there be some additional grounds for relief. Hoddy *v.* Hoard, 2 Ind. 474. See Adams Equity, p. 166 (8th ed.) and cases cited.

So the re-execution of a lost deed has been ordered in equity in cases where the title is in danger of being rendered unmarketable by the absence of one of the links in the chain. Adams' Equity, p. 167.

Lost Bond.—When the strictness of the common law in regard to *profert* had not been relaxed, reformation in equity in a case of a lost bond extended not only to re-execution, but for the purpose of avoiding circuity of action, to a decree for the payment of the debt. Bispham's Principles of Equity, § 467; Adams' Equity 167.

Public Works.—The person to whom the board of public works of the District of Columbia awarded a contract, after seeing the officers of the District in regard to the work, engaged in the work, and rendered bills therefor, and received payment at less than board

II. Jurisdiction.—At common law, the reformation or correction of written instruments was unknown. Courts of law could enforce or reject a written contract, but not reform it,[1] hence, the reformation of instruments is a subject which has always been within the exclusive cognizance of courts of equity.[2] Reformation will not be decreed in equity where the applicant has an adequate remedy at law.[3]

rates, and at the same rates stated in the contract, held, that on the mere evidence of the claimant, the court could not, against this evidence, reform the contract so as to introduce the board rates on the ground of mistake. Shipman *v.* District of Columbia, 119 U. S. 148.

Public Sale.—Where a purchaser at a public sale, thinking he has a fee simple, whereas he buys only the equity of redemption, the court set aside the sale on the ground of the mistake, but ordered him to account for the rents while in possession. Lowndes *v.* Chisholm, 2 McCord Eq. (S. Car.) 455.

Tender.—Equity will correct a mistake of a trivial nature in the time for making a tender to save a forfeiture. Atkins *v.* Chilson, 11 Met. (Mass.) 112.

Intention.—An instrument when corrected, should express what was understood and agreed to by both parties. Ledyard *v.* Hartford Fire Ins. Co., 24 Wis. 456.

A person seeking reformation must show that the part omitted or inserted in the instrument, was omitted or inserted contrary to the intent of both parties. Nevins *v.* Dunlop, 33 N. Y. 677.

Adding to the Instrument.—The leading cases of Hunt *v.* Rousmaniere, 8 Wheat. (U. S.) 174, and Townshend *v.* Stangroom, 6 Ves. 228, establish firmly the rule that a contract may be rectified in accordance with the intention of the parties, but not for the purpose of making it in accord with an intention which it is alleged they would have had, if better informed, so an accidental omission may be supplied; but a stipulation which has been designedly omitted on the ground that it would have been introduced, if the parties had known the law, cannot be added.

Reason for Reformation.—The reason why an instrument is rectified, so as to enlarge its operation, or to convey or enforce rights not found in the instrument itself, and make it conform to the agreement as proved by parol evidence on the ground of omission by mutual mistake in writing it, is that in equity the previous oral agreement is held to subsist as a binding contract, notwithstanding the attempt to put it in writing, and upon clear proof of its terms, the court will compel the incorporation of the omitted clause, or the modification of that inserted, so that the whole agreement as actually intended to be made, shall be truly expressed and executed. Hunt *v.* Rousmaniere, 1 Pet. (U. S.) 1; Oliver *v.* Mut. Ins. Co., 2 Curt. (U. S.) 277.

1. Story's Equity Jur., § 468; Wald's Pollock on Contracts, p 470; Cunningham *v.* Wrenn, 23 Ill. 54; Ivison *v.* Hutton, 98 U. S. 79; Trout *v.* Goodman, 7 Ga. 833; Jordan *v.* Stevens, 51 Me. 78; Hamnel *v.* Queen Ins. Co., 50 Wis. 340.

2. Paper Co. *v.* Eaton, 64 N. H. 234.

3. Jordan *v.* Stevens, 51 Me. 78.

Where the instrument is offered in evidence, and the same is unsealed, a mistake therein may be corrected in an action at law. Gray *v.* Roden, 24 Miss. 667.

Where a bill is filed to correct a mistake in an instrument constituting a link in a chain of title, a Federal court of equity will not pass upon the validity of the title itself. Freehold Land Mortg. Co. *v.* Walker, 31 Fed. Rep. 103.

Since the English Judicature Act of 1873, the court has jurisdiction, in one and the same action, to rectify a written agreement, upon parol evidence of mistake, and to order the instrument as rectified, to be specially performed. Olley *v.* Fisher, 34 Ch. Div. 367.

When a court of equity has once obtained jurisdiction of the parties and subject-matter of a suit, it will retain it for the purpose of doing complete justice between the parties. Hayden *v.* Snow, 14 Fed. Rep. 70.

III. **Pleading.**—In an action to reform a written instrument, the complainant should allege the mistake,[1] and set forth the agreement actually made,[2] and that which it is alleged the parties intended to make.[3]

IV. **Evidence.**—See MISTAKE, vol. 15, p. 649.

1. McMinn *v.* Patton, 92 N. Car. 57.

In a suit by the owners of the fee to recover lands after the termination of a life estate therein, the defendant claimed that the intention of the parties to a deed under which he held was to give a fee, but by mistake the word "heirs" had been omitted from the proper place. It was held that he could not invoke the equitable power of reformation without formally pleading the mistake. Anderson *v.* Logan, 105 N. Car. 266.

2. Thompsonville Scale Mfg. Co. *v.* Osgood. 26 Conn. 19.

A married woman, in a suit against her husband to have a certain deed executed by him to her reformed, alleged that, for a valuable consideration, the defendant sold to her certain land; that he agreed that he would execute a deed conveying the property to her during her natural life, and then to her heirs and assigns forever, and that by mutual mistake the words "and then to her heirs and assigns forever" were omitted from the deed; that defendant directed the person who wrote the deed to insert the said words, but he through mistake omitted them; that plaintiff did not find out the mistake until a short time before bringing the suit. It was held that the complaint was faulty in not stating the terms of the agreement between the parties which the deed was given to effectuate, and that defendant waived the defect by filing an answer. Hyland *v.* Hyland (Ore.), 23 Pac. Rep. 811.

3. Marshall *v.* Drawhorn, 27 Ga. 275.

Courts will reform mistakes in written instruments, but not if the mistake appears incidentally in the trial of an action purely legal in its character, and to which all parties whose rights would be affected by the proposed reformation are not parties. Cadell *v.* Allen, 99 N. Car. 542.

To secure reformation, a plaintiff must show that the alleged mistake was that of the parties to the contract, and was mutual. Evarts *v.* Steger, 5 Oregon 147.

A complainant should show distinctly what the original agreement was and the understanding of the parties thereto, and point out with clearness and precision wherein the mistake lies and show that the mistake was not due to gross negligence of the plaintiff. Lewis *v.* Lewis, 5 Oregon 169; 26 Wend. (N. Y.) 169.

An instrument will not be reformed where the complaint alleges a mistake only. Stephens *v.* Murton, 6 Ore. 193.

Where the reformation of a written instrument is asked for upon the ground of mistake, the complainant must so allege the mistake as to put the fact in issue in the cause. Burley *v.* Weller, 14 W. Va. 264.

A court of equity cannot reform a mistake in a written instrument except in a direct suit for that purpose. It must be alleged and proved that there was an accident or mistake in the instrument, so that it does not express the intention of the parties. Leavitt *v.* Palmer, 3 N. Y. 19.

Since the code, a plaintiff claiming under a defective deed, and showing sufficient ground to reform it, may have the same remedy as if he had brought two actions, one to reform the instrument and the other to enforce it as reformed. Laub *v.* Buckinider, 17 N. Y. 620; Bartlett *v.* Judd, 21 N. Y. 200.

The rule is well established by the courts that where the answer admits that the writing does not contain the whole agreement, or that it is subject to conditions or stipulations which are not set forth, the door is thrown open for parol evidence, and testimony may be adduced on either side. Thomas *v.* McCormick, 9 Dana (Ky.) 108; Moses *v.* Murgatryoid, 1 Johns. Ch. (N. Y.) 119.

Where one seeks to avoid a conveyance for a mistake against a subsequent grantee, he must allege that the grantee was a volunteer or that he purchased with notice. Malony *v.* Rourke, 100 Mass. 199.

Reformation of an instrument will be granted to a defendant who sets up a mistake therein, as well as at the instance of the plaintiff. Phœnix Ins. Co. *v.* Hoffheimer, 46 Miss. 645. See also MISTAKE, vol. 15, p. 625.

REFORMATORY—(See also PARENT AND CHILD, vol. 17, p. 400).—This word, used as a noun, includes all institutions and places in which efforts are made, either to cultivate the intellect, instruct the conscience, or improve the conduct; places in which persons voluntarily assemble, receive instruction, and submit to discipline, or are detained therein for either of these purposes by force.[1]

REFRESHMENT.—See RESTAURANT.

REFUSE.—The ordinary signification of the word "refuse" is to deny a request or demand.[2]

REGISTRATION—(See also ELECTION, vol. 6, p. 287; RECORDING ACTS; RECORDS).—Recording, in full or in substance, and in due form of law in an official book or register. The act of making a list, catalogue, schedule or register. In its ordinary generic sense, when applied to voters, means

1. Hughes *v.* Daly, 49 Conn. 34.

2. Burns *v.* Fox, 113 Ind. 205. In that case the appellee alleged in her complaint that there was an oral agreement with her father, whereby he bound himself to convey a certain tract of land to her, upon a valuable consideration; that she entered upon the land and made valuable improvements; "that her father failed, neglected, and refused to convey according to the agreement;" and, further, that after his death his heirs, the appellants, "refused" to make a conveyance to her. It was held, as the complainant alleged, "that both the father, in his lifetime, and the appellants, who succeeded to the legal title of the land as heirs refused to convey in compliance with the contract, that a sufficient excuse was shown for not having made a further demand."

Refusal of Property.—A son agreed to give his father the "refusal" of a piece of land, and afterwards, without further communication on the subject, executed a deed of the land to the father, had it recorded, and mailed it to him. Plaintiff levied an attachment on the land, after the execution of the deed, and before its receipt by the father. The court, by Adams, C. J., said: "The filing of the deed for record could not be considered as a delivery, unless it was filed in pursuance of a previous agreement. Day *v.* Griffith, 15 Iowa 104; Cobb *v.* Chase, 54 Iowa 253. The defendant, James Nelson, relies upon the conversation, which occurred in *Vermont* as constituting such an agreement; but it seems to us very clearly that no agreement for the purchase was consummated at that time. The most that can be said is, that L. H. Nelson agreed to give his father the preference as a purchaser; that is, the right to purchase in preference to any one else, if he should see fit; or, taking what is said in a more literal sense, the right to refuse the land. Without question, we think that it was James Nelson's right when he received the deed, to refuse to accept on the terms mentioned. This being so, the delivery did not take place until the actual receipt of the deed by James Nelson in *Vermont*, and acceptance by him. In the mean time, the plaintiff's lien had attached, and we do not think that the court erred in holding the plaintiff's lien paramount." Deere *v.* Nelson, 73 Iowa 186.

Where a lessor agrees with the lessee that, at the expiration of the term, "he shall have the refusal of the premises for another year," the lessor is bound to renew the lease upon the same terms as the previous year. Such a provision, while not a renewal, gives such an equity as will be a defense to summary proceeding in ejectment on the part of the landlord. McAdoo *v.* Callum, 15 Chic. Leg. News 472; 16 Cent. L. J. 18; Tracy *v.* Albany Exchange Co., 7 N. Y. 472; 57 Am. Dec. 538. See also LEASES, vol. 12, p. 1006.

Object and Refuse.—See OBJECT, vol. 17, p. 2.

Neglect and Refuse.—See NEGLECT, vol. 16, p. 385.

Refuse Distinguished from Fail.—See FAIL, vol. 7, p. 659.

Refusal of an Application.—See APPLICATION, vol. 1, p. 631.

any list, register or schedule, containing names, the being on which list, register or schedule constitutes a prerequisite to voting.[1]

REGULAR—(See also IRREGULARITY, vol. 11, p. 843; RAILROADS; GENERAL, vol. 8, p. 1292).—According to rule. And this may be in two senses: that of according to rule in distinction from contrary to or regardless of rule, in which sense it is opposed to irregular;[2] and according to rule, in distinction from exceptional, or not subject to the general rule, in which sense it is opposed to special.[3]

1. Anderson's L. Dict., *citing* Appointment of Supervisors, 1 Fed. Rep. 5.

Registered Voters.—In statutes relating to elections, "registered voters" uniformly refers to persons whose names are placed upon the registration books provided by law as the sole record or memorial of the duly qualified voters. Chalmers *v.* Funk, 76 Va. 719.

2. Abb. L. Dict.

3. Abb. L. Dict.

Regular Depot, Stopping Place, Station.—A place not on a public road, where a railroad company was in the habit of stopping its trains for the sole purpose of taking on or putting off passengers who had notified those in charge of trains to do so—held, not to be a "regular depot or crossing," within *Alabama* Code, § 1699, requiring bell or whistle to be sounded within a quarter of a mile thereof. Cook *v.* Central R. etc. Co., 67 Ala. 533. And such a stopping place was held not to be a "regular station" within the meaning of the Code of *North Carolina*, § 1964, imposing a penalty for refusal to receive and forward freight, when tendered at a "regular station," though the evidence showed that conductors frequently stopped trains there, to receive and let off freight. Kellogg *v.* Suffolk etc. R. Co., 100 N. Car. 158; 35 Am. & Eng. R. Cas. 529. And see for definitions of these terms, as used in statutes regulating the ejection of passengers from trains, RAILROAD.

"Regular Proceeding," as Used in the Definition of a Civil Action in New York Code of Civil Procedure.—Upon the question of whether a proceeding in partition is a "regular judicial proceeding," as these words are used in the definition of a "civil action" in the *New York* Code Civ. Proc., §§ 2, 4, 6, in Myers *v.* Rasback, 4 How. Pr. (N. Y.) 82, the court by Parker, J., said: "I think an interpretation much too narrow and restricted has been given to the word 'regular.' The word is derived from *regula*, a rule; and its first and legitimate signification, according to Webster is, 'conformable to a rule; agreeable to an established rule, law or principle; to a prescribed mode; or according to established customary forms.' I cannot think it material that the writ of partition, at common law, only lay between parceners, and that it was extended by statute to joint tenants and tenants in common. An action given by statute may be just as 'regular' as an action of common-law origin. The action of ejectment has been extended by statute to a great number of cases, to which it once had no application; and it cannot admit of a doubt that, since the change effected by the statute, an action of ejectment, in the cases in which it has been extended, has been just as 'regular' a proceeding as a writ of right or a writ of dower was before. So, too, it seems to me that a suit in equity may be just as 'regular' a judicial proceeding as an action at common law. The word 'regular' seems to have been used by the legislature as opposed to special, and to have been designed to distinguish 'actions' from 'special proceedings.' The action for partition, therefore, prosecuted under the code in lieu of the old suit in equity, is a 'regular' proceeding, inasmuch as it is prosecuted by and against regular parties, and according to the same forms of proceeding and rules of practice with other actions under the code."

Regular Election.—A *Missouri* statute provides that, upon a vacancy in the office of county judge of St. Louis Co., or in certain other offices, "it shall be the duty of the Governor of the State to appoint, until the next regular election." In State *v.* Conrades, 45 Mo. 45, the governor had appointed a person as judge of the county court of St. Louis Co. to fill a vacancy. It was contended that in passing the above

REGULATE—(See also LICENSE, vol. 13, p. 529, *et seq.;* MARKETS, vol. 14, p. 462; INTERSTATE COMMERCE, vol 11, p. 540; POLICE POWER).—To adjust by rule, method, or established mode; to direct by rule or restriction; to subject to governing principles or laws.[1] A power to "regulate" does not properly include a power to "suppress" or "prohibit," "for the very essence of regulation is the existence of something to be regulated."[2] But the power to "regulate" a business, trade,

statute, the legislature meant that the executive appointee should continue to hold his office until the next regular election of county judges. The court by Wagner, J., said: "But this construction, we think, is founded in misconception, and is not maintainable. It was the obvious intention to give the people an opportunity to elect this officer at the earliest practical moment, without incurring the expense of a special election. When applied to elections, the terms 'regular' and 'general' have been used interchangeably and synonymously. The word 'regular' is used in reference to the general election occurring throughout the State."

The constitution of *Kansas* provided that "in case of vacancy in any judicial office, it shall be filled by appointment of the governor, until the next regular election which shall occur more than thirty days after such vacancy shall have happened." In State *v.* Cobb, 2 Kan. 27, it was claimed by the respondent that the term "regular election" meant the election held at the proper time for filling the next regular term of the particular office vacant. The court refused to give the statute this construction saying: "The word 'regular' means comformable to an established rule, law or principle, and the exact literal signification of the phrase 'next regular election' is the next election held comformable to established rule or law. The constitution provides for two such elections in each year, one in March, and one in November. Each of them are regular elections, because, each is in conformity with the established rule laid down in the constitution. At the March election, justices of the peace are to be chosen; at the November election judges of the district, and judges of the supreme court are to be chosen. So that the next regular election is the one next occurring at which the particular class of judicial officers is to be chosen." See also Smith *v.* Holt, 24 Kan. 773; People *v.* Wilson, 72 N. Car. 155. See generally, GENERAL, vol. 8, p. 1292.

Regular Sessions.—Within the meaning of a statute, prescribing that certain petitions should be presented at a "regular session" of the county commissioners, it was held, in Bethel *v.* Oxford Co., 60 Me. 535, that a session held by adjournment from a regular session, was a "regular session," as a session of the commissioner's court includes all its adjournments, which are but parts of its session. See also Waterville *v.* Kennebec Co., 59 Me. 80.

Regularly.—The words "regularly employed," in the statutes of *Massachusetts*, of 1873, ch. 284, § 1, exempting a vessel "regularly employed in the coasting trade" from compulsory pilotage, include the case of a vessel actually and legally so employed at the time the services of a pilot are tendered, even though the vessel is sailing under a register, and is not continuously so employed. Wilson *v.* Gray, 127 Mass. 98.

"Regularly" in a statute requiring evidence that a debt has been "regularly given in for taxes," means given in according to rule; conformably to the law applicable to taxation of rights in action; not necessarily given in each such successive year. Macon etc. R. Co. *v.* Little, 45 Ga. 370.

1. Webster followed in State *v.* Ream, 16 Neb. 683. In which case it was held that an authority to regulate includes the power to control.

2. FREIGHT, vol. 8, p. 917; *Ex parte* Byrd, 84 Ala. 17; Miller *v.* Jones, 80 Ala. 89; Ward *v.* Folkestone Waterworks Co., 24 Q. B. Div. 334; People *v.* Gadway, 61 Mich. 285; *In re* Hauck, 70 Mich. 396; Cantiel *v.* Sainer, 59 Iowa 26; Bronson *v.* Oberlin, 41 Ohio St. 478; 52 Am. Rep. 90; Sweet *v.* Wabash, 41 Ind. 7; Austin *v.* Murray, 16 Pick. (Mass.) 121.

"To 'regulate' is the expression most frequently used to define the degree of power that it shall be lawful to exercise

etc., authorizes a municipality to confine the exercise of such business to certain localities, to certain hours of the day, etc.[1]

over the subject under local supervision. It means to govern, to control, to subject to governing laws, and in this connection the determination and enforcement of the condition and restriction under which certain things may be done, or certain public or private rights exercised. The word itself implies that the act controlled is lawful, but that certain restrictions are necessary to preserve the public free from harm. It can never be extended to include prohibition, for the very essence of regulation is the existence of something to be regulated." Horr & Bemis on Mun. Police Ord., § 30.

The constitution of *New Jersey* prohibits the passage of any private, local or special law regulating the internal affairs of towns and counties. *Held*, that "the repeal of a charter does not regulate the internal affairs of a city. It extinguishes it, leaving no internal affairs to be regulated." Tiger *v.* Ct. of Common Pleas, 42 N. J. L. 631. See also Gloucester Land Co. *v.* Mayor etc. of Gloucester City, 43 N. J. L. 544.

A charter authorized the board of aldermen to pass an ordinance to "regulate and control" the driving of cattle through the streets. It was held that "to regulate and control the driving of cattle, cannot mean to prevent such driving altogether, but to establish rules and limits according to and within which it may be done." McConvill *v.* Mayor etc. of Jersey City, 39 N. J. L. 44.

Regulate Bawdy-Houses.—The city council of St. Louis was empowered by the municipal charter "to regulate bawdy houses" by ordinance not inconsistent with any general law of the State. By former charters the city only had authority to "suppress" such houses. It was held that a city ordinance licensing bawdy houses was valid, under this charter, notwithstanding that there was a general statute prohibiting them throughout the State. The court laid great stress upon the fact that the former charters only empowered the city to suppress such houses, saying: "The change in 1870 was a significant one, and undoubtedly meant a change in the policy of the legislature—very easily accounted for from the fact, that St. Louis had become a large city with nearly half a million of inhabitants—and the Legislatue then deemed it advisable to throw upon the authorities of the city the responsibility of deciding what legislation would best promote the morals and health of the city, and therefore virtually said to them: 'You are more competent to decide this matter, which concerns you so nearly, than we are. We therefore authorize you to enforce the general laws of the State on this subject and suppress these houses, or to regulate them, as you may think best.'

"The meaning of the word 'regulate' has been discussed in this case; but it is a word from which its Latin origin needs no explanation. It certainly implies the continued existence of the subject-matter to be regulated.

"'To regulate commerce,' are words found in our Federal Constitution, and which have received a judicial interpretation, and they certainly conceded, that the commerce, concerning which Congress was allowed to make regulations, was to be allowed under some rules. It did not mean to annihilate or suppress, or to prohibit under all and every circumstance. No regulations or rules are necessary concerning an evil absolutely prohibited." State *v.* Clarke, 54 Mo. 34. See also State *v.* Vic De Bar, 58 Mo. 395.

But *In re* Garza, 28 Tex. App. 381; 29 Am. & Eng. Corp. Cas. 551, the court held an ordinance of like character void. The court remarked upon the dissenting opinion in State *v.* Clarke, 54 Mo. 17, approvingly. And also observed that the opinion of the majority of the court in that case was largely influenced by the fact that several previous charters of St. Louis did not grant the power to the city to regulate such houses but only granted the power to suppress them, whereas the charter of San Antonio under which the ordinance in question had been passed, was the original one of the city. Judge Dillon also lays stress upon the omission of the power to regulate in the previous charters in the St. Louis case, saying of State *v.* Clarke, 54 Mo. 17: "In view of the legislation recited in it, the opinion seems to be sound." Dill. Mun. Corp., § 88, n. 2.

1. *Ex parte* Byrd, 84 Ala. 17; Cronin

REHEARING.—The second consideration which a court gives to a cause on a second argument.[1]

REIMBURSE.—To "reimburse" is to "pay back."[2]

REINSCRIPTION.—See INCUMBRANCES, vol. 10, p. 397.

REINSTATE—(See also FIRE INSURANCE, vol. 7, p. 1052).—To restore to a state from which one has been removed.[3]

REINSURANCE.—See INSURANCE, vol. 11, p. 343; MARINE INSURANCE, vol. 14, p. 352.

REJOIN.—See note 4.

REJOINDER.—The name in common-law pleading of the answer made by the defendant to the plaintiff's replication. It is,

v. People, 82 N. Y. 18; 37 Am. Rep. 564; *In re* Wilson, 32 Minn. 145; State *v.* Beattie, 16 Mo. App. 131.

"The power to regulate includes power to restrain so long as the restraint imposed is reasonable. The restraint must not so confine the exercise of any occupation as to amount to a prohibition." Horr & Bemis Mun. Police Ord., § 30, *citing* Piqua *v.* Zimmerlin, 35 Ohio St. 507; Thomas *v.* Mt. Vernon, 9 Ohio 290.

Regulating the Use of Water for Irrigation.—A *California* statute was entitled "an act to regulate the use of water for irrigation, etc." It was held that the words "regulating the use of water" were not confined to the forbidding of injustice in the distribution, the prevention of waste, or the apportionment in times of scarcity, but were broad enough to include the fixing of reasonable rates; and that the statute, in providing for this latter object, did not infringe the constitutional rule that the objects of a statute shall be expressed in its title. Golden Canal Co. *v.* Bright, 8 Colo. 144.

Regulate Commerce.—In *United States* Constitution, see INTERSTATE COMMERCE, vol. 11, p. 540, *et seq.*

Regulation—The phrase, regulations of a department, in acts of Congress, should be understood as meaning general rules relating to the subject upon which a department acts, made by the head of a department under some act of Congress conferring power to make such regulations, and thereby giving to them the force of law. It does not include a mere order of the President or of a secretary. Harvey *v.* U. S., 3 Ct. of Cl. 42.

1. Bouvier's L. Dict.

No attempt has been made to describe the circumstances under which the courts in the different States will grant rehearings, as these depend upon rules of court, and statutes, varying widely in the different jurisdictions.

2. Philadelphia Trust etc. Co. *v.* Audenreid, 83 Pa. St. 264. And in that case it was held that this, the primary meaning of the word, is to be imputed to it when the meaning is not controlled by contract stipulations. See also Fuller *v.* Atwood, 13 R. I. 316.

3. Webster's Dict. *followed* in South *v.* Commissioners (Ala.), 5 S. W. Rep. 568.

Reinstate or Replace in a Policy of Insurance.—When a fire insurance policy gives the insurers an option to "reinstate or replace" the insured property instead of making payment for damage, "the word 'reinstate' applies to property which is damaged, and the word 'replace' to that which is destroyed," and "when one is dealing with property in the nature of chattels, the term 'reinstate' means to replace (qy., restore) the chattels not *in situ*, but *in statu;* and all that the insurers are bound to do is to make the chattels as good as they were before the fire." Accordingly it was held in that case that the insurer's option, as regards machinery, would not be affected by the mere fact that the building in which it was had been destroyed, or that the term of the assured had been determined. Anderson *v.* Commercial Union Assur., 55 L. J., Q. B. 149. See generally FIRE INSURANCE, vol. 7, p. 1052.

4. **Rejoining Gratis (in Pleading).**—The term "rejoining gratis" means only that the defendant will rejoin

therefore, the fourth in order of the pleadings which may be interposed in a common-law action. No such pleading is in use in equity, or under the reformed codes.[1]

RELATION.—(See JUDICIAL SALES, vol. 12, p. 221; JUDGMENTS, vol. 12, p. 113; ESCROW, vol. 6, p. 870.)

I. Definition, 726.
II. Application of Doctrine in General, 726. [727.
III. Application in Execution Sales,
IV. Doctrine of Relation as Affecting Possession, 730. [730.
1. *Sheriff's Deed Necessary*,
V. Relation as Affecting Admissibility of Deed Executed Subsequent to the Commencement of an Action Involving the Title, 731.
VI. Relation as Affecting the Operation of the Statute of Limitations, 731.
VII. Application in Foreclosure Sales, 733.
VIII. Application in Attachment Cases, 734.
IX. Doctrine Will be Applied to Escrows, 734.
X. Government Patents for Land Will Relate, 735.
XI. Doctrine of Relation as Applied to Extending Executions in the New England States, 735.
XII. Other Illustrations of the Application of the Doctrine of Relation, 736.

I. **DEFINITION.**—Relation is a fiction of law resorted to for the promotion of justice and for promoting the lawful intention of parties, by giving effect to acts or instruments, which, without it would be invalid.[2]

II. **APPLICATION OF DOCTRINE IN GENERAL.**—The doctrine of relation is based on broad equitable principles, and while there is no rule better founded in law, reason and convenience, than that all the several parts and ceremonies necessary to complete a conveyance, shall be taken together as one act, and operate from the substantial part by relation,[3] the doctrine is never applied when it would defeat the rights of third persons.[4] And where strangers

without putting the plaintiff to the necessity of obtaining a rule to rejoin. Adkins *v.* Anderson, 10 M. & W. 14.

1. Abbott's L. Dict.

2. Jackson *v.* Bard, 4 Johns. (N. Y.) 230; 4 Am. Dec. 267; Johnson *v.* Stagg, 2 Johns. (N. Y.) 510; Heath *v.* Ross, 12 Johns. (N. Y.) 140; Jackson *v.* Dickenson, 15 Johns. (N. Y.) 315; 8 Am. Dec. 236; Jackson *v.* Stevens, 16 Johns. (N. Y.) 110; Doe *v.* Howland, 8 Cow. (N. Y.) 280; Jackson *v.* Douglass, 5 Cow. (N. Y.) 458; Hawley *v.* Cramer, 4 Cow. (N. Y.) 717; Butler's Case, 3 Coke 23; Menvill's Case, 13 Coke 19.

Illustration.—An illustration of the application of the doctrine of relation, will be found in execution sales where the sheriff's deed of conveyance is not delivered to the execution purchaser for sometime after the sale. In such case, the deed when delivered takes effect, by the doctrine of relation, back to the time of the sale, for the purpose of protecting the purchaser from intermediate incumbrances and conveyances by the execution debtor

3. Landes *v.* Brant, 10 How. (U. S.) 348; Rogers *v.* Brent, 10 Ill. 573; 1 Am. Rep. 422; Barr *v.* Gratz, 4 Wheat. (U.S.) 213; Cavender *v.* Smith, 5 Iowa 157; 5 Cruise on Real Property, 510.

4. Menvill's Case, 13 Coke 19; Case *v.* DeGoes, 3 Cai (N. Y.) 261; Jackson *v.* Douglass, 5 Cow. (N. Y.) 458; Jackson *v.* Bard, 4 Johns. (N. Y.) 230; 4 Am. Dec. 267; Reynolds *v.* Darling, 42 Barb. (N. Y.) 418; Fite *v.* Doe, 1 Blackf. (Ind.) 127; Samson *v.* Thornton, 3 Met. (Mass.) 275; Wickham *v.* Freeman, 12 Johns. (N. Y.) 183; *Compare* Morgan *v.* Varick, 8 Wend. (N. Y.) 587.

would be prejudiced, if applied at all, its application will be entirely confined to parties and privies,[1] and never to defeat collateral acts which are lawful,[2] for it is said, relations are fictions in law which will never do wrong and can never be applied to a void act.[3]

III. **Application in Execution Sales.**—The doctrine of relation has its most frequent application in execution sales, where the sheriff's deed is not executed for some time after the sale, in which case, the deed relates back to the commencement of the lien of the judgment, not only for the purpose of determining what title passes to the purchaser, but also for the purpose of defeating intermediate conveyances and incumbrances by the execution debtor. In most of the States the defendant is not divested of his title until the execution of a conveyance to the purchaser, consequently this conveyance when made, must, for the protection of the purchaser, take effect as though executed at some period antecedent to its date. No uniform rule, applicable to all the States, as to the time when the lien is created, can be stated. In some it dates from the docketing of a judgment; in others, from the issuing of execution; in others again it may be created by attachment, and sometimes by levy. But, however created, the deed, when executed, takes effect by relation from the time when the lien attached.[4] Statutory enactments

As against a purchaser for value and without notice of an execution sale, a sheriff's deed made in pursuance of the sale but not acknowledged till thirteen years afterwards, will not be allowed to take effect as of the time of the sale. Lincoln *v.* Thompson, 75 Mo. 613.

But the doctrine will be applied as against third persons having notice. Vancourt *v.* Moore, 26 Mo. 92; Thompson *v.* Leach, 2 Vent. 200.

1. Fite *v.* Doe, 1 Blackf. (Ind.) 127; Hawley *v.* Cramer, 4 Cow. (N. Y.) 717; Evertsen *v.* Sawyer, 2 Wend. (N. Y.) 507; Wright *v.* Douglass, 2 N. Y. 373.

A purchaser at an execution sale acquires no title until the deed is executed. But when executed, a sheriff's deed, as to defendant in execution and his privies, and as to strangers purchasing with notice, relates back to the date of the sale, and vests the title in the execution purchaser from that time. Leach *v.* Koenig, 55 Mo. 451.

And from that time notice of the sale is virtually notice of the deed. Shumate *v.* Reavis, 49 Mo. 333; See also Strain *v.* Murphy, 49 Mo. 337.

2. Menvill's Case, 13 Coke 19.

3. Butler and Baker's Case, 3 Coke 23; Berrington *v.* Parkhurst, 13 East 489; Jackson *v.* Stevens, 16 Johns. (N. Y.) 110; Williamson *v.* Field, 2 Sandf. Ch. (N. Y.) 533, 568.

A void act will not be made good by relation, nor can a subsequent act relate to it. Dow *v.* Howland, 8 Cow. (N. Y.) 277. In this case the court by Savage, J., said: "In all cases where a subsequent is held to relate back to a thing antecedent, there must be something to which relation may be had; something inchoate, imperfect, but still something."

The doctrine of relation cannot be applied to sustain an action not authorized when it was commenced. Gilbert *v.* Sharp, 2 Lans. (N. Y.) 412.

4. Freeman on Executions, § 333; Jackson *v.* Ramsay, 3 Cow. (N. Y.) 75; 15 Am. Dec. 242, note; Leach *v.* Koenig, 55 Mo. 451; Crowley *v.* Wallace, 12 Mo. 143; Bank of Missouri *v.* Wells, 12 Mo. 361; 51 Am. Dec. 163; Lackey *v.* Seibert, 23 Mo. 85; Strain *v.* Murphy, 49 Mo. 337; Shumate *v.* Reavis, 49 Mo. 333; Durrett *v.* Hulse, 67 Mo. 201; Wilhelm *v.* Humphries, 97 Ind. 520; Shirk *v.* Wilson, 13 Ind. 129; Smith *v.* Allen, 1 Blackf. (Ind.) 22; Doe *v.* Horn, 1 Ind. 363; 50 Am.

Dec. 470; Hollenback *v.* Blackmore, 70 Ind. 234; Elliott *v.* Cale, 80 Ind. 285; Riley *v.* Davis, 83 Ind. 1; Shanklin *v.* Franklin L. Ins Co., 77 Ind. 268; Bellows *v.* McGinnis, 17 Ind. 64; Ashley *v.* Eberts, 22 Ind. 55; Hibberd *v.* Smith, 67 Cal. 546; Huff *v.* Morton, 94 Mo. 405; Howard *v.* Daniels, 2 N. H. 137; Clement *v.* Garland, 53 Me. 427; Fitch *v.* Tyler, 34 Me. 463; French *v.* Allen, 50 Me. 437; Savage *v.* Best, 3 How. (U. S.) 111; Barr *v.* Gratz, 4 Wheat. (U. S.) 213; Tabb *v.* Harris, 4 Bibb (Ky.) 29; 7 Am. Dec. 732; Daniel *v.* Cochrane, 4 Bibb (Ky.) 532; Kilby *v.* Haggin, 3 J. J. Marsh. (Ky.) 208; Million *v.* Riley, 1 Dana (Ky.) 360; 25 Am. Dec. 149; Addison *v.* Crow, 5 Dana (Ky.) 274; Greer *v.* Wintersmith, 85 Ky. 510; Ferguson *v.* Miles, 8 Ill. 358; 44 Am. Dec. 702; Ryhiner *v.* Frank, 105 Ill. 326; McClure *v.* Eugelhardt, 17 Ill. 47; Sweezey *v.* Chandler, 11 Ill. 445; Kirk *v.* Vonberg, 34 Ill. 440; Rogers *v.* Brent, 10 Ill. 573; 1 Am. Rep. 422; McCormick *v.* McMurtrie, 4 Watts (Pa.) 192; Bellas *v.* McCarty, 10 Watts (Pa.) 13; Morrison *v.* Wurtz, 7 Watts (Pa.) 437; Pennsylvania etc. R. Co. *v.* Cleary, 125 Pa. St. 442; Cockey *v.* Milne, 16 Md. 200; Campbell *v.* Lowe, 9 Md. 500; 66 Am. Dec. 339; Wilson *v.* Miller, 30 Md. 82; 96 Am. Dec. 568; Martin *v.* Martin, 7 Md. 368; 61 Am. Dec. 364; Kane *v.* Mackin, 9 Smed. & M. (Miss.) 387; Kingman *v.* Glover, 3 Rich. (S. Car.) 27; 45 Am. Dec. 756; Testerman *v.* Poe, 2 Dev. & B. (N. Car.) 103; Pickett *v.* Pickett, 3 Dev. N. Car.) 6; Hoke *v.* Henderson, 3 Dev. (N. Car.) 12; Davidson *v.* Frew, 3 Dew. (N. Car.) 3; 22 Am. Dec. 708; Woodley *v.* Gilliam, 67 N. Car. 237; Connor *v.* Long, 63 Iowa 295; Bell *v.* Hall, 4 Greene (Iowa) 68; Cavender *v.* Smith, 5 Iowa 157; Wood *v.* Turner, 7 Humph. (Tenn.) 517; McClain *v.* Easly, 4 Baxt. (Tenn.) 520; Dobson *v.* Murphy, 1 Dev. & B. (N. Car.) 586; Johnson *v.* Stagg, 2 Johns. (N. Y.) 520; Jackson *v.* Dickenson, 15 Johns. (N. Y.) 309; Snedeker *v.* Snedeker, 18 Hun (N. Y.) 355; Holman *v.* Holman, 66 Barb. (N. Y.) 215; Nellis *v.* Lathrop, 22 Wend. (N. Y.) 121; 34 Am. Dec. 285; Haywood *v.* Hildreth, 9 Mass. 393; Hall *v.* Hoxie, 3 Met. (Mass.) 251; Brown *v.* Maine Bank, 11 Mass. 153; Adams *v.* Higgins, 23 Fla. 13; Mansfield *v.* Gregory, 8 Neb. 432; Miles *v.* Wilson, 3 Harr. (Del.) 383; Hackensack Sav. Bank. *v.* Morse; 46 N. J. Eq. 161; Boyd *v.* Longworth, 11 Ohio 236, and cases cited and reviewed in opinion of the court; Miner *v.* Wallace, 10 Ohio 404.

Where Levy in Different County.—The levy of an execution in a different county from that in which the judgment is rendered, creates a lien, and when followed by a sale, will take effect by relation back to the levy, unless the rights of creditors and purchasers have intervened. Reichert *v.* McClure, 23 Ill. 516.

Relation Back to Levy.—The execution from a justice, binds lands from the time of the levy, and an order of sale subsequently made has relation back to that period. Lash *v.* Gibson, 1 Murph. (N. Car.) 266; Ellar *v.* Ray, 2 Hawks (N. Car.) 568; Parker *v.* Swan, 1 Humph. (Tenn.) 80; 34 Am. Dec. 619.

Upon the delivery of an execution, with directions to levy it on the judgment debtor's real estate, the officer, without entering on the land, immediately made a memorandum on a separate paper (noting the day and hour) that he then took the land in execution. He afterwards caused the land to be set off by appraisement, according to law, and dated his return on the execution as of the day and hour when he made said memorandum; and set forth in the return that he had seized the land, etc. *Held*, that the return was not false, and the levy took effect, by relation, from the time when such memorandum was made. Hall *v.* Crocker, 8 Met. (Mass.) 251.

A purchaser at sheriff's sale may have even a better title than the debtor had at the time of the sale, for his title dates in many respects, from the lien of the judgment; he holds discharged of latent trusts and of intervening conveyances, leases and incumbrances made by the debtor. McCormick *v.* McMurtrie, 4 Watts (Pa.) 192.

It has been held, that a purchaser at sheriff's sale acquires the interest of the defendant at the date of the judgment although he may have been adjudged a bankrupt before the sale. Fehley *v.* Barr, 66 Pa. St. 196.

But possession under a sheriff's deed is not adverse to the dower right of one who was wife of the judgment debtor before the judgment. Cowan *v.* Lindsay, 30 Wis. 586.

In Conrad *v.* Atlantic Ins. Co., 1 Pet. (U. S.) 386, the court by Story, J., observes: "It is not understood that

in several states give the judgment debtor a certain period of time in which to redeem his property sold at execution sale. Under these statutes the relation of the sheriff's deed to the day of the sale only protects the purchaser's title from intermediate incumbrances. For most other purposes, the deed relates back only to the expiration of the period of redemption.[1]

a general lien by judgment on land, constitutes, *per se*, a property or right in the land itself. It only confers a right to levy on the same, to the exclusion of other adverse interests, subsequent to the judgment; and when the levy is actually made on the same, the title of the creditor for this purpose relates back to the time of his judgment, so as to cut out intermediate incumbrances. But, subject to this, the debtor has full power to sell, or otherwise dispose of the land. His title is not divested or transferred by the judgment to the judgment creditor. It may be levied upon by any other creditor, who is entitled to hold it against every other person except such judgment creditor; and even against him unless he consummates his title by a levy on the land, under his judgment. In that event, the prior levy is, as to him, void; and the creditor loses all right under it."

In *Illinois* a purchaser at sheriff's sale acquires only a lien; no new title vests until the period of redemption has passed. But his deed will relate back to the beginning of his lien, in order to cut off intervening incumbrances. The title only becomes absolute when the right to a deed accrues. Stephens *v.* Illinois Mut. F. Ins. Co., 43 Ill. 327.

In levying an execution upon land, interest on the judgment may be computed to the time when the levy is completed. Taylor *v.* Robinson, 2 Allen (Mass.) 562.

Where judgments are liens, the deed of the sheriff in an execution sale, relates back to the date of judgment. McCormick *v.* McMurtrie, 4 Watts (Pa.) 192; Martin *v.* Martin, 7 Md. 368; 61 Am. Dec. 364.

Ejectment Suit.—Where ejectment suit was commenced after the sale but before the execution of sheriff's deed. Winston *v.* Affalter, 49 Mo. 263.

Amended and Lost Deed.—See Dollarhide *v.* Parks, 92 Mo. 178.

An amended deed will relate back to the date of the judgment lien. Bush *v.* White, 85 Mo. 339.

Time When Deed Should be Procured.—In the late case of Ryhiner *v.* Frank, 105 Ill. 326, the court held that, where land was sold on execution on Aug. 10, 1871, and the sheriff's deed was not taken out until Dec. 21, 1878, under the act of March 22, 1872, which went into effect July 1, 1872, that the certificate of purchase given at the time of the sale, became void, because the deed thereon was not executed within five years from the expiration of the time of redemption, and the sheriff's deed thereon was a nullity, passing no title.

Title Acquired by Debtor Subsequent to Levy.—Where an execution debtor at the time of the levy had no title, but subsequently acquired title. Such subsequently acquired title will not inure to the benefit of the purchaser at execution sale by relation, for said purchaser could only acquire such title as the debtor had at the inception of the lien. McArthur *v.* Oliver, 60 Mich. 605. See also Freeman *v.* Thayer, 33 Me. 76.

Intermediate Conveyance by Sheriff.—A sheriff's deed takes full effect only from the time of delivery, and does not relate back to the time of sale, so as to sustain an intermediate sale and conveyance by the sheriff of the lands therein mentioned. Den *v.* Steelman, 10 N. J. L. 193.

1. Stephens *v.* Illinois Mut. F. Ins. Co., 43 Ill. 327; Thomas *v.* Crofut, 14 N. Y. 474; Everston *v.* Sawyer, 2 Wend. (N. Y.) 507; Cook *v.* Travis, 20 N. Y. 400; Nellis *v.* Lathorp, 22 Wend. (N. Y.) 121; 34 Am. Dec. 285; Reynolds *v.* Darling, 42 Barb. (N. Y.) 418; Holman *v.* Holman, 66 Barb. (N. Y.) 215; Wilson *v.* Davol, 5 Bosw. (N. Y.) 619; Conner *v.* Long, 63 Iowa 295.

Where the right of redemption exists, the execution by the sheriff of a deed to land sold on a decree, before the expiration of the year allowed for redemption will not invalidate such sale. Rucker *v.* Steelman, 73 Ind. 396.

In Bissell *v.* Payn, 20 Johns. (N. Y.) 3, it was held, that where land of a debtor is sold under an execution, pending a lease by the debtor, and

IV. Doctrine of Relation as Affecting Possession.—The title which vests in a purchaser at execution sale is not such as will entitle him to possession before the sheriff's deed is executed, consequently between the time of the sale and the execution of the deed, he cannot resort to an action of trespass, or assert any rights founded on possession,[1] though he may maintain an action for waste against the debtor.[2] While the execution purchaser is not entitled to rents and profits before his title is complete by the execution of the deed, it has been held, that he may recover rents falling due after the deed is executed, although part accrued during the possession of the debtor, on the ground that the debt is not apportionable.[3] And this is true even though anticipated by the debtor, who has drawn orders accordingly, which were accepted by the tenant.[4]

1. Sheriff's Deed Necessary.—Although it has been held in some States that the execution of a deed by the sheriff to a purchaser at an execution sale is not actually necessary, provided, the judgment and execution be valid and regular, and the purchaser properly identified as the purchaser under the execution,[5] the

before the rent has accrued, and a certificate is given to the purchaser, pursuant to the statute passed Apr. 12, 1820 (§ 43, ch. 184), the debtor, notwithstanding the sale and certificate, is entitled, until the time for redemption allowed him by the statute has expired and the sheriff's deed is executed, to receive and sue for the rents which have in the meantime accrued; for the possession and enjoyment of the land remains in the same state, after the sale and until the time for redemption has expired, as before the sale; and the sheriff's deed does not retrospect, but must be dated after the time for redemption has expired. Such a sale is conditional merely, and the purchaser, until the sheriff's deed is executed, has a *lien* only on the land.

1. Rich *v.* Baker, 3 Den. (N. Y.) 80; Thomas *v.* Crofut, 14 N. Y. 474; Hawk *v.* Stouch, 5 S. & R. (Pa.) 157; Scheerer *v.* Stanley, 3 Rawle (Pa.) 276; Gorham *v.* Wing, 10 Mich. 486; Whipple *v.* Farrar, 3 Mich. 447; 64 Am. Dec. 99; Swift *v.* Agnes, 33 Wis. 228; McMillan *v.* Haftey, 2 Law Repos. (N. Car.) 89; Thomas *v.* Connell, 5 Pa. St. 13; Sands *v.* Pfeiffer, 10 Cal. 259; Davis *v.* Evans, 5 Ired. (N. Car.) 525; Hall *v.* Renner, 1 P. & W. (Pa.) 402.

Where a man, who purchases land at an execution sale enters upon the premises, the original owner being in possession, he cannot justify his trespass, on the mere ground that he was the purchaser at the sale, when he had not received the sheriff's deed till after the time of the alleged trespass. Presnell *v.* Ramsour, 8 Ired. (N. Car.) 505; but see Kingman *v.* Glover, 3 Rich. (N. Car.) 27; 45 Am. Dec. 756.

2. Thomas *v.* Crofut, 14 N. Y. 474.

Ground Rents.—Since the purchaser is not entitled to possession before the conveyance is completed by the sheriff's deed, he will not be liable for ground rents accruing in the meantime. Thomas *v.* Connell, 5 Pa. St. 13.

Waste.—In Rich *v.* Baker, 3 Den. (N. Y.) 80, the court by Bronson C. J. observes: "While the debtor has the use and enjoyment of the property during the period of redemption he is answerable to the grantee in the sheriff's deed, for any waste he may have committed after the sale, and the grantee is deemed vested with the legal estate from the time of the sale for the purpose of maintaining an action for any injury to the land. The purchaser may also bring trover for timber cut, but cannot maintain replevin in the *cepit*, for that action, like trespass, can only be sustained by a party in possession.

3. Bank of Pa. *v.* Wise, 3 Watts (Pa.) 394.

4. Martin *v.* Martin, 7 Md. 368, 61 Am. Dec. 364.

5. Boring *v.* Lemmon, 5 Har & J. (Md.) 223; Remington *v.* Linthicum,

weight of authority is decidedly to the effect that the conveyance is not complete, as to all purposes, until the deed is executed by the proper officer in pursuance of the prior levy and sale.[1]

V. Relation as Affecting Admissibility of Deed Executed Subsequent to the Commencement of an Action Involving the Title.—There seems to be some conflict among the authorities as to whether or not a sheriff's deed, executed after an action involving the title, is commenced, is admissible in evidence, in such action under the general issue without a supplemental complaint, or answer, or a plea of *puis darrien continuance.*

The courts in some States have held that it is,[2] while others have held that it is not, on the ground that the doctrine of relation should never be extended beyond the actual necessity of the case, for, while the title of the execution purchaser is protected by relation back to the day of the sale or the inception of the lien, as regards intermediate incumbrances it does not give him the right of possession, and his title is not complete, as to all other purposes, until the sheriff's deed is executed.[3]

VI. Relation as Affecting the Operation of the Statute of Limitations.—Whether or not the doctrine of relation will be applied to protect the purchaser at an execution sale, by preventing the bar of the Statute of Limitations from attaching in favor of the adverse possessor until after the execution of the deed by the sheriff, is a question upon which few authorities can be found and one upon which the authorities are in seemingly direct conflict. While the purchaser at an execution sale does not

14 Pet. (U. S.) 92; Leland *v.* Wilson, 34 Tex. 91; Flemming *v.* Powell, 2 Tex. 225; Joret *v.* Mortimer, 29 La. Ann. 206; Monroe *v.* Stephens, 80 Ky. 155.

1. Robinson *v.* Garth, 6 Ala. 204; Spoor *v.* Phillips, 27 Ala. 193; Kelly *v.* Governor, 14 Ala. 541; Smith *v.* Houston, 16 Ala. 111; Schermerhorn *v.* Merrill, 1 Barb. (N. Y.) 511; Smith *v.* Colvin, 17 Barb. (N. Y.) 157; Duprey *v.* Moran, 4 Cal. 196; Anthony *v.* Wessel, 9 Cal. 103; People *v.* Mayhew, 26 Cal. 655; Edwards *v.* Miller, 4 Heisk. (Tenn.) 314; Crutsinger *v.* Carton, 10 Humph. (Tenn.) 24; Rogers *v.* Cawood, 1 Swan (Tenn.) 142; 55 Am. Dec. 729; Dufour *v.* Camfrane, 11 Mart. (La.) 607; Leger *v.* Doyle, 11 Rich. (S. Car.) 109; 70 Am. Dec. 240; Holmes *v.* McMaster, 1 Rich. Eq. (S. Car.) 340; Childress *v.* Allin, 17 La. 37; Curtis *v.* Millard, 14 Iowa 128; 81 Am. Dec. 460; Warfield *v.* Woodward, 4 Greene (Iowa) 386; Young *v.* Withers, 8 Dana (Ky.) 165; Doe *v.* Douston, 1 B. & Ald. 230; Doe *v.* Miller, 10 U. C. Q. B. 65; Hayes *v.* New York Gold Min. Co., 2 Colo. 273; Goss *v.* Meadors, 78 Ind. 528.

2. Jackson *v.* Ramsay, 3 Cow. (N. Y.) 75; 15 Am. Dec. 242; Nellis *v.* Lathrop, 22 Wend. (N. Y.) 121; 34 Am. Dec. 285; Crowley *v.* Wallace, 12 Mo. 143; Winston *v.* Affalter, 49 Mo. 263; Wallace *v.* Lawrence, 1 Wash. (U. S.) 503; Gorham *v.* Wing, 10 Mich. 486; Hayes *v.* New York Gold Min. Co., 2 Col. 273.

3. Bagley *v.* Ward, 37 Cal. 121; 99 Am. Dec. 256; Moss *v.* Shear, 30 Cal. 472; McMinn *v.* O'Connor, 27 Cal. 247; Presnell *v.* Ramsour, 8 Ired. (N. Car.) 505; Richardson *v.* Thornton, 7 Jones (N. Car.) 458. In Davis *v.* Evans, 5 Ired. (N. Car.) 525, the court by Ruffin, C. J., said: "Whatever relation to the time of the sale a conveyance from the sheriff may have for some purposes, it cannot be carried to the unreasonable extreme of proving the title in an action, that was brought before the deed was made."

acquire the legal title until the sheriff's deed is executed, and until then is not vested with a right of possession, he is undoubtedly entitled to a deed immediately after the sale, and upon its execution and delivery, the right of possession at once accrues. On these grounds the weight of authority is to the effect that the Statute of Limitations will operate by relation, from the day of the sale, if not in fact from the inception of the lien.[1] On the other hand it has been held, that since the legal title does not pass to the execution purchaser until the execution of the deed by the sheriff, there is nothing to put the Statute of Limitations

1. In Keaton *v.* Thomasson, 2 Swan. (Tenn.) 138; 58 Am. Dec. 55, the court by McKinney, J., observes: "It is true, that the effect of an execution sale, of real property, is very different from that of personal property. The levy of an execution upon personal chattels, divests the title of the debtor, and vests it in the sheriff; and by the mere force of the sale and delivery of possession to the purchaser, he becomes vested with a legal title to the property purchased. But such is not the legal result in the case of real estate. The levy of an execution upon land does not divest the title of the judgment debtor. It vests the sheriff with no interest in the property, neither the legal title or possession is transferred to the purchaser by force of the sale. The sheriff's deed, by operation of law, transfers the legal title to the purchaser, and he is left to resort to an action of ejectment to gain the possession, if withheld by the former owner. By virtue of the levy and sale alone, the purchaser acquires, at most, only an equitable title to the land purchased. But, as the sheriff's deed is founded on the levy and sale, and vests the purchaser, by such relation, with the legal title, at least from the date of the sale, if not from the levy, which is the inception of the title. From the date of the sale, at least, the judgment debtor, in possession of the land sold, is in a condition to assert a claim adverse to that of the purchaser. The latter is immediately entitled to a deed, and to the possession of the land, if it can be acquired peaceably. But whether he obtains a conveyance from the sheriff or not, is wholly immaterial, so far as respects the operation of the Statute of Limitations, in favor of the judgment debtor remaining in possession, and claiming to hold adversely, in point of fact to the title acquired by the purchaser; for although it be true, that until the execution of the sheriff's deed, the purchaser has only an equitable interest or title, and therefore could not sue in ejectment to recover possession of the premises; still, it is no less true, that the Statute of Limitations of 1819, has precisely the same effect and operation upon equitable as upon legal titles, and alike protects the right of the person in possession holding adversely, as against both. It would be absurd to suppose, that the mere delay or negligence, of the purchaser in procuring a deed from the sheriff, could have the effect of preventing the bar of the statute from attaching in favor of the adverse possessor. It is true, that the judgment debtor, if he remain in possession after the sale, is regarded in the absence of all evidence to the contrary, as occupying the relation of *quasi* tenant at will to the purchaser. But, this is a mere presumption of law, which may be rebutted, by showing that, in fact, he was holding adversely to the right of purchaser."

In Pickett *v.* Pickett, 3 Dev. (N. Car.) 6, the court by Ruffin, J., observes: "The sheriff can convey immediately after the sale; and if the purchaser will delay taking his deed, it is his own folly. It is immaterial whether the sheriff's deed operates by way of passing a title that was in himself, or by way of executing an authority to pass that title which was in the debtor. The title is somewhere; and be it where it may, the possession of another under a distinct title, is adverse to it." And so, if a purchaser at such sale, neglect to take a deed for seven years, a possession with color of title, adverse to the title conveyed by the sheriff, will bar the purchaser under the execution.

See also Cowles *v.* Coffee, 88 N. Car. 340; Brown *v.* Baldridge, Meigs (Tenn.) 1.

in motion until said deed is executed and delivered.[1] Lengthy citations from the cases on this point will be found in the notes.

VII. Application in Foreclosure Sales.—The rule regulating the application of the doctrine of relation in foreclosure sales is in accordance with the rule regulating its application in other sales, and the title of a purchaser at a judicial sale under a

1. **Ejectment.**—In March, 1865, a sale was made by the sheriff. In September of the same year the time for redemption expired. In November the sheriff signed, sealed and acknowledged a deed in pursuance of the sale, and placed it in a pigeon-hole in his office. Afterwards, during the year 1865 and 1866 the holder of the certificate of purchase was several times notified that the deed was ready at the sheriff's office, and requested to call for it. On each occasion he replied "that it was all right, he would call and get it." He did not, however, get the deed until 1873. In 1874 he commenced an action of ejectment, based on this deed. The defendant pleaded the Statute of Limitations, which in *California*, bars real actions after five years. The district court rendered judgment for the defendant. Plaintiff appealed.

Per Curiam: The court below held that the Statute of Limitations had operated to bar the plaintiff's claim. This was put upon the ground that in 1865 or 1866 there was a delivery of the sheriff's deed to the plaintiff. But, it is apparent that no deed was delivered to the plaintiff until June, 1873, and the action was commenced in 1874. Judgment reversed and cause remanded for a new trial. *Remittitur* forthwith. Jefferson *v.* Wendt, 51 Cal. 575.

A note on Jefferson *v.* Wendt in 4 Cent. L. J. 197, is as follows; "The meagerness of the foregoing opinion is such that we should forbear making any report of the case, were it not evident, from the transcript now before us that the court had decided a question which is both novel, difficult and important. It is this: Can the purchaser at an execution sale, through his own failure to call for his deed, prevent the Statute of Limitations, for an indefinite period, from operating upon his claim? This question is here answered, as we believe, for the first time; and the answer is in the affirmative. There is nothing in the opinion of the court to disclose the reasoning on which it is based; nor is there sufficient to show that the court was conscious of the full scope of its decision. But in the subordinate and in the appellate court, the question apparently considered was whether, under the facts proved, the deed had been delivered in 1865; and we think there can be no doubt that those facts did not establish any delivery. But, it was unquestionably true that plaintiff had for nearly eight years, been entitled to such delivery. Statutes of Limitation are commonly called statutes of repose. Their most beneficial operation is in preventing the assertion of state claims. But, in harmony with the result reached in this case, the purchaser at an execution sale may, by delaying to call for his deed, choose his own time to assert his title. This result, however startling, is perhaps the logical consequence of two undisputed rules of law, viz.: 1st. That until the actual reception of his conveyance, the purchaser at an execution sale is not invested with the legal title, nor with any right to the possession of the property sold (Freeman on Executions § 323). 2nd. That prescription does not begin to run against anyone until he has a right of action. (Angell on Limitation, § 42). This last rule, we have always thought, ought not to extend to those persons who, as in the case under consideration, through their own choice or laches, delay obtaining some formal muniment of title essential to the transformation of an inchoate right into a perfect cause of action. Negligence ought not to be rewarded and diligence condemned."

In a later case Barroilhet *v.* Allspacher, 68 Cal. 116, the court held, that the Statute of Limitation does not begin to run against a purchaser of real estate at an execution sale before he becomes entitled to a deed. Whether or not the statute commences to run then, or at the time when the deed is actually executed and delivered to the purchaser, was not decided.

See also in this connection Paxton *v.* Meyer, 67 Tex. 96.

And see generally, Limitations of Actions, vol. 13, p. 724.

decree of foreclosure takes effect by relation back to the date of the mortgage and defeats any subsequent lien or incumbrance. He cannot, of course, before his right to a deed accrues, maintain ejectment or other possessory action.[1]

VIII. Application in Attachment Cases.—And it may also be stated that, in cases of attachment, a sale on execution is held to relate back to the levy of the attachment, and pass such title to the execution purchaser as the debtor had at the time of the inception of the lien.[2]

IX. Doctrine Will Be Applied to Escrows.—The doctrine of relation will be applied to escrows where it is necessary, in order to do justice and to carry out the intention of the maker of the deed, that it should take effect from the first delivery.[3]

1. Fuller *v.* Van Geesen, 4 Hill (N. Y.) 171; Bennett *v.* Matson, 41 Ill. 332; O'Brian *v.* Fry, 82 Ill. 274; Stephens *v.* Ill. Mut. F. Ins. Co., 43 Ill. 327; Johnson *v.* Baker, 38 Ill. 99; Sweezey *v.* Chandler, 11 Ill. 445; Rockwell *v.* Servant, 63 Ill. 424; Bell *v.* Hall, 4 Greene (Iowa) 68; Sands *v.* Pfeiffer, 10 Cal. 258; Barnard *v.* Wilson, 74 Cal. 512; Patton *v.* Varga, 75 Iowa 368; Wilson *v.* Giddings, 28 Ohio St. 554; The morgagor though entitled to possession, is liable for cutting and carrying away growing timber. Stout *v.* Keyes, 2 Dougl. (Mich.) 184; 43 Am. Dec. 465.

He can be restrained from committing waste by injunction. Phœnix *v.* Clark, 6 N. J. Eq. 447.

A purchaser at foreclosure sale upon receipt of deed may maintain replevin for fixtures placed on the premises by the mortgagor after the mortgage. Sands *v.* Pfeiffer, 10 Cal. 258. But see Hill *v.* Gwin, 51 Cal. 47.

A lien for taxes attaching after the mortgage will not be displaced by a foreclosure sale, the claim being against the property and not against the mortgagor. Osterberg *v.* Union Trust Co., 93 U. S. 424.

Application in Case of Previous Contract.—A deed executed in pursuance of a previous contract, for the sale of the same premises, is good by relation, from the time of the making of the contract, so as to render valid any intermediate sale or disposition by the grantee. Jackson *v.* Bull, 1 Johns. Cas. (N. Y.) 81; Jackson *v.* Raymond, 1 Johns. Cas. (N. Y.) 85.

In Johnson *v.* Stagg, 2 Johns. (N. Y.) 510, the court held that a lease for nineteen years and nine months, executed Aug. 1, 1795, pursuant to a prior parol agreement for a lease of twenty years, was considered as relating back to May 1st in the same year, so as to make valid a demise by way of mortgage made by the lessee on the 6th of May, 1795.

2. Cockey *v.* Milne, 16 Md. 200; Martin *v.* Martin, 7 Md. 377; 61 Am. Dec. 364; Farmers' Bank *v.* Beaston, 7 Gill. & J. (Md.) 421; Lackey *v.* Seibert, 23 Mo. 85.

In *Indiana* under 2 R. S., p. 66, § 165, upon a levy of attachment by one creditor, other creditors may have the benefit of it by filing their claims, and such claims will relate back to the beginning of the attachment so as to have precedence of a judgment recovered by another creditor before the filing of said claims, but after the attachment. Shirk *v.* Wilson, 13 Ind. 129.

In Lackey *v.* Seibert, 23 Mo. 92, the court by Leonard, J., observes: "Although there has been a good deal of discussion in the courts of justice (*Ex parte* Foster, 2 Story (U. S.) 139; Davenport *v.* Tilton, 10 Met. (Mass.) 320; Kittredge *v.* Warren, 14 N. H. 509; Fisher *v.* Vose, 3 Rob. (La.) 457; 38 Am. Dec. 243) as to the character and extent of the lien acquired by an attachment, upon mesne process, it is agreed upon all hands to be a valid charge upon the land from the moment the attachment is levied, so that a sale upon the execution relates back to that time, and passes the title to the purchaser, discharged of all incumbrances and dispositions subsequently made by the debtor."

See also, as to chattels levied upon under attachment. Gaar *v.* Hurd, 92 Ill. 315.

3. Wheelwright *v.* Wheelwright, 2 Mass. 447; 3 Am. Dec. 66, and cases

X. Government Patents for Land Will Relate.—It is well settled that a Government patent for land will relate back to the time of the purchase, or land office certificate, and that a purchaser holding such certificate may sell the land before the issuing of the patent, or the land may be sold in execution, and the execution defendant cannot defeat such sale on the ground that his patent for the land bore date subsequent to the sale.[1]

XI. Doctrine of Relation as Applied to Extending Executions in the New England States.—Under the statutes of *New Hampshire*, *Connecticut*, *Maine*, *Massachusetts* and *Vermont* the remedy of a creditor in execution against the lands of his execution debtor, so far as the legal title is liable, is by extent, and not by execution sale, and under this system of extending lands under execution, the doctrine of relation is applied as in execution sales.[2]

cited in note. Buffum *v.* Green, 5 N. H. 71; 20 Am. Dec. 562; Hulick *v.* Scovil, 9 Ill. 176; Hathaway *v.* Payne, 34 N. Y. 92; Foster *v.* Mansfield, 3 Met. (Mass.) 414.

"A deed delivered as an escrow, takes effect only from the time of the performance of the condition, and the actual delivery to the grantee; except in cases where a relation back to the first delivery is necessary to give effect to the deed, or to the intermediate conveyances of the grantee; but not as between third persons." Frost *v.* Beekman, 1 Johns. Ch. (N. Y.) 288. See also Butler's Case, 3 Coke 35, and cases cited.

In O'Kelly *v.* O'Kelly, 49 Mass. 436, the court by Shaw, C. J., observes: "A deed was made, executed and acknowledged by the ancestor. The question was, whether it was delivered so as to take effect and pass the estate. If it was delivered by the grantor to any person, in his lifetime, to be delivered to the grantee after his decease, it was a good delivery, upon the happening of the contingency, and related back so as to divest the title of the grantor, by relation from the first delivery." See also Foster *v.* Mansfield, 3 Met. (Mass.) 412; Hatch *v.* Hatch, 9 Mass. 307; 6 Am. Dec. 67; Stephens *v.* Rinehart, 72 Pa. St. 440; Viner's Ab. Relation, E.

1. Cavender *v.* Smith, 3 Greene (Iowa) 349; 56 Am. Dec. 541; Carrall *v.* Safford, 3 How. (U. S.) 441; Rogers *v.* Brent, 10 Ill. 573; 1 Am. Rep. 422; Hammond *v.* Warfield, 2 Har. & J. (Md.) 151; Landes *v.* Brant, 10 How. (U. S.) 348; Heath *v.* Ross, 12 Johns. (N. Y.) 140; Levi *v.* Thompson, 4 How. (U. S.) 17; Goodlet *v.* Smithson, 5 Port. (Ala.) 245; Land *v.* Hopkins, 7 Ala. 115; Lindsey *v.* Henderson, 27 Miss. 502; Martin *v.* Nash, 31 Miss. 324; Hamblen *v.* Hamblen, 33 Miss. 455; 69 Am. Dec. 358; Jackson *v.* Spink, 59 Ill. 404; Lee *v.* Crassna, 6 Humph. (Tenn.) 281; Heffly *v.* Hall, 5 Humph. (Tenn.) 581; Jackson *v.* Williams, 10 Ohio 69; Land's *v.* Perkins, 12 Mo. 254; Stark *v.* Barrett, 15 Cal. 361; Walbridge *v.* Ellsworth, 44 Cal. 354; Huntingdon *v.* Grantland 33 Miss. 453.

Generally a patent or grant of lands by the state takes effect only from the time when it is approved by the commissioners of the land office and passes the secretary's office. Jackson *v.* Douglass, 5 Cow. (N. Y.) 458.

"A grant for escheat land will relate back to the original grant." Howard *v.* Moale, 2 Har. & J. (Md.) 250. See also Jackson *v.* Ramsay, 3 Cow. (N. Y.) 75; 15 Am. Dec. 242.

Relation as Affecting After-Acquired Legal Title.—Where the judgment debtor is a pre-emptioner of public lands, after the levy of an execution by the sheriff, and before the sale, he pays for the land levied upon and obtains a certificate of purchase, the purchaser at the sheriff's sale succeeds only to the equitable title of the judgment debtor, who, when he obtains the legal title by means of the patent, holds it in trust for the purchaser at sheriff's sale. Kenyon *v.* Quinn, 41 Cal. 325.

2. Clement *v.* Garland, 53 Me. 427; Colburn *v.* Pomeroy, 44 N. H. 19; Allen *v.* Portland Stage Co., 8 Me. 207; Hall *v.* Crocker, 8 Met. (Mass.) 251; French *v.* Allen, 50 Me. 437; First Nat. Bank *v.* Redman, 57 Me. 405; Morse *v.* Sleeper, 58 Me. 329;

In *Massachusetts* land may now be levied upon by execution sale instead of by extent.[1]

XII. Other Illustrations of the Application of the Doctrine of Relation.—Instances will be found in the notes, where the doctrine of relation has been applied to Recording Acts;[2] Trusts;[3] Receivers;[4] Mechanics' Liens;[5] Filing of Executor's Bond;[6] Acts of Foreign Administrators;[7] Leases;[8] Policies of

Brown *v.* Williams, 31 Me. 404; Hanly *v.* Sidelinger, 52 Me. 138; Benson *v.* Smith, 42 Me. 414; 66 Am. Dec. 285; Kelly *v.* Burnham, 9 N. H. 20; Wendell *v.* New Hampshire Bank, 9 N. H. 404; Hovey *v.* Bartlett, 34 N. H. 278; Freeman on Executions, 2nd ed., vol. 2, § 372.

Time to Which Extent Relates.—The extent of an execution on real estate cannot be considered as commenced till the appraisers are sworn. Allen *v.* Portland Stage Co., 8 Me. 207. *Denied* in Hall *v.* Crocker, 3 Met. (Mass.) 245; French *v.* Allen, 50 Me. 437; Clement *v.* Garland, 53 Me. 427. See also Heywood *v.* Hildreth, 9 Mass. 393; Brown *v.* Maine Bank, 11 Mass. 153; Waterhouse *v.* Waite, 11 Mass. 207.

The time named in the officer's return when he "seized and took in execution," the lands, was the commencement of the service of the execution, and all subsequent proceedings relate back to that time. French *v.* Allen, 50 Me. 437; Fitch *v.* Tyler, 34 Me. 463.

In Hall *v.* Crocker, 8 Met. (Mass.) 251, the date of relation is stated to be the time when the debtor is notified to select an appraiser.

"If an attempted attachment of real estate be void, but the succeeding levy valid, the creditor's title will, in the absence of intervening claims, take date from the time of the levy; and the officer's reference to the attachment, in his return upon the execution, will not affect the validity of the levy." Brackett *v.* Ridlon, 54 Me. 426.

1. Statute of 1874, ch. 188; Hackett *v.* Buck, 128 Mass. 369. See also Woodward *v.* Sartwell, 129 Mass. 210.

2. **Recording Acts.**—The date of a grant, not that of its registration, designates its commencement as a muniment of title, whenever registered, a grant relates to, and has full and complete existence, for all purposes, from its date, the registration not being intended to give it existence, but to preserve and perpetuate the evidences that it already exists, and being itself as good without as with a date. Brown *v.* Baldridge, Meigs (Tenn.) 1; Beers *v.* Hawley, 2 Conn. 467; Van Pelt *v.* Pugh, 1 Dev. & B. (N. Car.) 210.

3. **Trusts.**—If a trust be created for the benefit of a third person, though without his knowledge at the time, he may subsequently adopt it and enforce its execution and the adoption in such case well relate back to the creation of the trust, and overreach all claims of the original parties which are contrary to the right and justice of the case. Berly *v.* Taylor, 5 Hill. (N. Y.) 577. See also Duke of Cumberland *v.* Codrington, 3 Johns. Ch. (N. Y.) 261; Church *v.* Gilman, 15 Wend. (N. Y.) 656; 30 Am. Dec. 82, and cases cited.

4. Guggenheimer *v.* Stephens, 17 Civ. Pro. N. Y. 383; 26 N. Y. St. Rep. 245; Robinson *v.* Wood (Supreme Ct.), 15 N. Y. Supp. 169.

In Peters *v.* Carr, 2 Dem. (N. Y.) 22, the court held, that the authority of a receiver appointed in proceedings supplementary to execution relates back from the time of filing the bond to the time of the order of appointment, although the bond was not filed until after the death of the debtor and the appointment of an administrator.

See generally Receivers.

5. See Mechanics' Liens, vol. 15, pp. 11, 83, 178.

6. **Filing of Executor's Bond.**—Where an executor was by statute required to execute a bond before executing a mortgage on the trust estate, he executed said bond but did not file it in the office of the surrogate, in accordance with the provisions of the statute until seven days after the date of the mortgage, the court *held*, that the bond when filed took effect by relation from the day of its date. Fox *v.* Lipe, 24 Wend. (N. Y.) 164.

7 Jackson *v.* Scanland, 65 Miss. 481.

8. The subsequent ratification of a lease made by an agent relates back to the original transaction. Lawrence *v.* Taylor, 5 Hill (N. Y.) 113; Frost *v.* Deering, 21 Me. 156.

Insurance;[1] Occupancy of Homestead Land;[2] Judicial Sales;[3] Deeds;[4] Officer's Return;[5] English Bankrupt Laws;[6] Insolvent Debtors.[7]

[For notes 6 and 7 see page 738.]

1. **Policies of Insurance.**—A policy of insurance dated on the day the premium was paid, takes effect by relation from that day, although not delivered for several days afterwards. Lightbody *v.* North American Ins. Co., 23 Wend. (N. Y.) 18; Richland Co. Mut. Ins. Co. *v.* Simpson, 48 Ohio St. 672.

Survivorship in Life Policies.—The question of survivorship relates to the date of the death of the insured and not to the date fixed for payment. Union Mut. Aid. Ass'n *v.* Montgomery, 70 Mich. 587; Thomas *v.* Leake, 67 Tex. 469.

2. Finnegan *v.* Prindeville, 83 Mo. 517.

3. **In Judicial Sales.**—The sale confers no right until confirmed by the court, but when confirmation is made, it relates back to the time of sale. Cockey *v.* Cole, 28 Md. 276; 92 Am. Dec. 684; Koehler *v.* Ball, 2 Kan. 160; 83 Am. Dec. 451; Williamson *v.* Berry, 8 How. (U. S.) 546; Evans *v.* Spurgin, 6 Gratt. (Va.) 107; 52 Am. Dec. 105; Wagner *v.* Cohen, 6 Gill. (Md.) 97; 46 Am. Dec. 660; Harrison *v.* Harrison, 1 Md. Ch. 331. See also in this connection, Townsend *v.* Tallant, 33 Cal. 45; 91 Am. Dec. 617; Shriver *v.* Lynn, 2 How. (U. S.) 43; Bethel *v.* Bethel, 6 Bush (Ky.) 65; 99 Am. Dec. 655; Osterberg *v.* Union Trust Co., 93 U. S. 424; Demmy's Appeal, 43 Pa. St. 155; Leshey *v.* Gardner, 3 W. & S. (Pa.) 314; 38 Am. Dec. 746; Overdeer *v.* Updegraff, 69 Pa. St. 110; Hamilton's Estate, 51 Pa. St. 58; Farmer's Mut. Ins. Co. *v.* Graybill, 74 Pa. St. 17.

4. **Deeds.**—In Judd *v.* Seekins, 62 N. Y. 266, the court held, that in the furtherance of justice and in order to support an intermediate conveyance made by the grantee, a deed executed and acknowledged sometime prior to its delivery, would relate back and take effect from the time of its date, or its acknowledgment.

Where A executed deeds of gift to B and C, his two sons, and the deed to B was lost before registration, and afterward by arrangement C conveyed his land to B and A, executed a deed to C, for the land originally conveyed to B, and in substitution for the first deed, reserving to himself a life estate therein, it was held, that if the original deeds to B and C were valid as to creditors when made, no subsequent exchange between them would affect the rights of creditors; and further, that the deed to C relates back to the date of the deed to B, which was lost, notwithstanding the reservation therein of a life estate by A. Hodges *v.* Spicer, 79 N. Car. 223.

Corrective Deed.—A second deed executed by an administrator to heal defects in a first deed was held to relate back to the time of sale. Sheldon *v.* Wright, 7 Barb. (N. Y.) 39. See also, in Attachment, Kruse *v.* Wilson, 79 Ill. 233.

Defective Deed.—Where a sheriff's deed is defective, as in failing to state the date and amount of the judgment, he may make another, even after the expiration of his term of office; and the amended deed relates back to the date of the judgment lien and transfers the title as of that time. Bush *v.* White, 85 Mo. 339. See also Lamb *v.* Sherman, 19 Neb. 681.

Where deed was executed by sheriff while in office, but not acknowledged until he had retired from office, *held*, that acknowledgment related back to the execution. Doe *v.* Dugan, 8 Ohio 87.

Deed Not Recorded Until After Ejectment Brought.—Where deed was not recorded until after ejectment brought, the court held that the title of purchase related to him when deed was executed by sheriff. Wallace *v.* Lawence, 1 Wash. (U. S.) 503.

Where Sheriff's Deed was Dated Before Sale.—*Held*, it would relate to date of sale where executed after sale. Dobson *v.* Murphy, 1 Dev. & B. (N. Car.) 586.

A jury may infer mistake where deed is dated before the sale. Frazier *v.* Moore, 11 Tex. 755.

5. **Relation of Officer's Return.**—In Frith *v.* Haskell, 148 Mass. 501, land was duly levied on and sold, and the deputy sheriff making the sale, after delivering the deed, which was duly recorded, prepared a certificate of his doings, and died seven years later leaving it unsigned and not returned into court. Soon after his death, the sheriff of the county, who was a deputy sheriff at the time of the issue of

RELATION OR RELATIVE—(See also FAMILY, vol. 7, p. 803; KINDRED, vol. 12, p. 521; NAMED, vol. 16, p. 142; WILLS; NEXT OF KIN, vol. 16, p. 703).—The definition commonly given of "relation" is "a person connected with another by consanguinity or affinity;"[1] but in view of the decisions, it would seem that the word has not, technically, so extensive a meaning as this, and is more properly confined to connections by consanguinity alone.[2]

execution and sale, completed the return. *Held*, that the validity of the levy and sale was unaffected by the delay in making the return.

6. Doe *v.* Mitchell, 2 M. & S. 446.

7. Doe *v.* Telling, 2 East 256.

1. Esty *v.* Clark, 101 Mass. 36; 3 Am. Rep. 320; And. L. Dict.

Relation is a very general word, and takes in any kind of connection, but the most common use of it is to express some sort of kindred, either by blood or affinity, though properly by blood. Davies *v.* Bailey, 1 Ves. 84.

The word "relations," in its widest extent, embraces persons of every degree of consanguinity. When not restricted in its meaning by other words, it extends to all persons who are descended from the same common ancestors. It is synonymous with "kindred," and is expressed also by the word "family," in its largest sense. Huling *v.* Fenner, 9 R. I. 411.

2. Ennis *v.* Pentz, 3 Bradf. (N. Y.) 385; Anonymous, 1 P. Wms. 327; Thomas *v.* Hill, Cas. temp. Talbot, 251; Harding *v.* Glyn, 1 Atk. 469, n.; Attorney-Gen'l *v.* Burkland, apparently not reported but cited in Goodinge, 1 Ves. 231, and in note to Edge *v.* Salisbury, Ambl. 70; Davies *v.* Bailey, 1 Ves. 84; Worseley *v.* Johnson, 3 Atk. 758; Whithorne *v.* Harris, 2 Ves. 527; Isaac *v.* Defriez, Ambl. 595; Green *v.* Howard, 1 Bro. C. C. 31; Hands *v.* Hands, apparently not reported, cited in Phillips *v.* Garth, 3 Bro. C. C. 69, and in other cases; Spring *v.* Biles, 1 T. R. 435; Stamp *v.* Cooke, 1 Cox 234; Raynor *v.* Mowbray, 3 Bro. C. C. 234; Maitland *v.* Adair, 3 Ves. 231; Devisme *v.* Mellish, 5 Ves. 529; Jones *v.* Colbeck, 8 Ves. 38; Mahon *v.* Savage, 1 Sch. & Lef. 111; Cruwys *v.* Colman, 9 Ves. 319; Doe *v.* Over, 1 Taunt. 263; Pope *v.* Whitcombe, 3 Mer. 689; Smith *v.* Campbell, Cooper 275; 19 Ves. 400; Wright *v.* Atkyns, T. & R. 143; Harvey *v.* Harvey, 5 Beav. 134; McNeilledge *v.* Barclay, 11 S. & R. (Pa.) 103; Storer *v.* Wheatley, 1 Pa. St. 506.

"The phrases 'related to,' 'relations,' and 'next of kin,' whether used in a statute, will, or contract have, by a perfectly uniform course of decision, been held to include only relations by blood, and not connections by marriage, not even a husband and wife." Supreme Council *v.* Bennett, 47 N. J. Eq. 39.

In Harvey *v.* Harvey, 5 Beav. 134, it was decided that the widow of a deceased brother did not come within the terms of a power to appropriate for the benefit of "relations."

Wife no "Relation" of Her Husband.—It has been frequently held that the word "relation" in its strict legal and technical sense, does not include husband and wife.

In Esty *v.* Clark, 101 Mass. 36; 3 Am. Rep. 320, upon the construction of a *Massachusetts* statute, which provides that "when a devise of real or personal estate is made to a child or other relation of the testator, and the devisee dies before the testator, leaving issue who survive the testator, such issue shall take the estate so devised" etc., the court by Ames, J., said: "It certainly cannot be said that there is no relation between husband and wife, but the question is whether there is such a relationship as is intended by the statute. If relationship includes consanguinity as a necessary element, they are not relations of each other. The supreme court of *Pennsylvania* has decided that in a will, the terms 'my nearest relations or connections', do not include the testator's wife. Storer *v.* Wheatley, 1 Pa. St. 506. The court in that case says: 'A wife is not related to her husband in any respect. Of his connection with her family, she is the link or *commune vinculum*; but so far is she from being connected with him as a relation, that her civil existence is melted into his, and they together form one person. A wife is, therefore, no more a relation of her husband than he is of himself. It was said *arguendo* in Garrack *v.* Lord Camden, 14 Ves. 372, that she

RELEASE.—(See for cross-references the various subtitles of this analysis.)

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owes her provision under the statute of distributions. not to the supposition that she is one of her husband's kindred, but to the respect that was felt for her title to the customary share which she had previously enjoyed.' Whatever may be thought of the reasoning of the court in that case, there seems to be no authority for holding that the word 'relation' in its strict legal and technical sense, includes husband and wife. On the contrary authorities are found very direct and explicit to the point that they are not 'relations'." See also Kimball *v.* Story, 108 Mass. 382. And, upon the construction of the same or similar provisions "relation" was held not to include husband and wife in the following cases: Cleaver *v.* Cleaver, 39 Wis. 96; 20 Am. Rep. 30; Wells *v.* Wells, L. R. 18 Eq. 504; Worseley *v.* Johnson, 3 Atk. 758; Drew *v.* Wakefield, 54 Me. 291; Keniston *v.* Adams, 80 Me. 290.

Does Not Include a Step-Child.—"Relation" as used in the provision quoted above does not include a step-child. Kimball *v.* Story, 108 Mass. 302; see also *In re* Pfuelb, 48 Cal. 643; see also CHILD. vol. 3. p. 232.

In Wills.— While "relations," in its widest sense, includes all the kindred of the person spoken of, it has long been settled that in the construction of wills it

I. **Definition.**—A release is the act or writing by which some claim or interest is surrendered to another;[1] the giving up or abandoning a claim or right to the person against whom the claim exists or the right to be exercised or enforced.[2] The common-law definition of a release is that it "is a discharge or a conveyance of a man's right in lands or tenements to another that held some former estate in possession.[3]

Release may be express or implied, and may be implied from the acts of the parties or by operation of law.[4]

II. **Form.**—No set form of words is necessary to constitute a release; such words should be used as will express the intention: and such intention will be recognized in law and in equity.[5]

includes those persons who are entitled as next of kin under the statutes of distribution. Bouv. Law Dict.; 2 Jarm. Wills 661; Handley *v.* Wughtson, 60 Md. 198; Varrell *v.* Wendell, 20 N. H. 431; Drew *v.* Wakefield. 54 Me. 291; see also WILLS; NEXT OF KIN, vol. 16, p. 703; STATUTES OF DISTRIBUTION.

Infant's Relations.—It was the practice of the court of chancery, where a guardian was applied for, to refer the application to a master to report the circumstances, etc., of the infant "and what relations he has." In this connection "the term 'relations' is said to mean those who would, if he died intestate, be entitled to a distributive share of the infant's estate." Taff *v.* Hosmer, 14 Mich. 257.

In a Statute Providing for the Maintenance of a Patient in an Insane Asylum.—Section 1433 of the code of *Iowa* enacts that "the provisions herein made for the support of the insane at the public charge shall not be construed to release the estate of such persons, nor their relatives from liability for their support," and further provides that the supervisors of the county may relieve the "relations" of a patient from the burden of his support, if it shall seem to them reasonable or just. It was held, that the words "relatives" and "relations" as here used may be construed to mean, the persons legally bound for the support of the insane person, and could not be extended to include all his relations; and that a county could not recover from a father for the support of his adult son at an asylum. Monroe Co. *v.* Teller, 51 Iowa 670.

1. And. L. Dict. 871. "In the most general sense of the word, 'a release is the giving or discharging of the right or action which a man hath or may have or claim against another man or that which is his.' (Shep. Touch. 320; Litt., § 444)." Rapalje and Lawrence's L. Dict. 1090. See Bac. Abr., tit. Release.

2. 2 Bouv. L. Dict. (14th ed.) 434. In releases of interest in lands or tenements, the words generally used are remised, released, and forever quit claimed. Litt., § 445.

3. 2 Bl. Com. 324.

4. An express release is one directly made in term by deed or other suitable means. An implied release is one which arises from acts of the creditor or owner without express agreement. A release by operation of law is one which, though not expressly made, the law presumes in consequence of some act of the releasor. 7 Wait's Actions and Defenses, p. 452. See also 2 Bouv. L. Dict. (14th ed.) 434.

5. Gray *v.* McCune, 23 Pa. St. 447; Fee *v.* Orient G. Mfg. Co., 44 Fed. Rep. 430; Lemaster *v.* Burckhart, 2 Bibb (Ky.) 25. It has been said that a release of all demands is the strongest release. Litt., § 508. Coke says: "Claims" is the stronger word. Co. Litt. 291 (B). A release operates presently and absolutely; therefore, an agreement to forbear to claim dower is not a release. Croade *v.* Ingraham, 13 Pick. (Mass.) 33; Pixley *v.* Bennett, 11 Mass. 298. A writing, to wit: "We, creditors of H & Co. to the amount," etc, "for value received of S," etc., "covenant and agree with S that we will, upon payment," etc., "of a sum equal to twenty-five per cent. of all our claims against H & Co., sell and convey to the said S, free of all incumbrance all our claims against H & Co."—was held to be a release of, and

III. Kinds of Releases — 1. Express Release — *a.* Release Under Seal. — A release under seal is good without further proof of consideration than the seal imports.[1] If not under seal a consideration must be shown.[2] While at common law, a release of one of several obligors bound jointly and severally discharges the others, and may be pleaded in bar by all; to have such effect, it must be a technical release under seal.[3] A release

not an assignment of the debt. Bowen *v.* Holley, 38 Vt. 574. An agreement, "not to sue and to indemnify one" of several joint obligors is not a release. Bozeman *v.* State Bank, 7 Ark. 328; 46 Am. Dec. 291. The payee of a note gave to the maker a bill of sale of certain notes (particularly describing them) and "all other debts, notes and accounts of whatever nature due me." It was held that the bill of sale did not release the maker of the note. Morrill *v.* Morrill, 26 Cal. 288. Legal terms used in a release will be understood according to their legal meaning. Knott *v.* Burleson, 2 Greene (Iowa) 600. A receipt in full may operate as a release, if the amount of the debt was doubtful at the time it was made. Chesnut *v.* Strong, 1 Hill Eq. (S. Car.) 122. A receipt "in full of all demands, notes, and accounts to date" executed pending a suit, is not necessarily a release of that suit, but it will be construed according to the parties' intent, as explained by testimony *aliunde*. Learned *v.* Bellows, 8 Vt. 79. A writing, setting forth a valuable consideration, and reciting that the maker "exonerates" the mortgagor from all notes or papers of such mortgagor, held by the maker or indorsed by him, has been held to be a release of the notes. Strong *v.* Dean, 55 Barb. (N. Y.) 337. An acknowledgment in a deed by the vendor that the purchase money has been paid, and that the vendor is herewith fully satisfied, is a release. Fawcus *v.* Porter, 3 C. & K. 309. An agreement not to sue, without any limitation of time is a release of the debt. Line *v.* Nelson, 38 N. J. L. 358; Stebbins *v.* Niles, 25 Miss. 267; Phelps *v.* Johnson, 8 Johns. (N. Y.) 54; Millett *v.* Hayford, 1 Wis. 401; Jones *v.* Quinnipiack Bank, 29 Conn. 25; Hastings *v.* Dickinson, 7 Mass. 153; 5 Am. Dec. 34; Thurston *v.* James, 6 R. I. 103. A bond conditioned that the obligee "shall forever peaceably hold, occupy and enjoy" a piece of land conveyed to him by another is a release of the obligor's right to the land. Kelly *v.* Greenfield, 2 Har. & M. (Md.) 121. A stipulation that "such payment of $300, or the *pro rata* share thereof as aforesaid, shall be a release and discharge," etc., of a claim, is conditional on payment, and the claim is not merged in the writing. Hicks *v.* Clark, 41 Vt. 183. See, generally, Southwick *v.* Hopkins, 47 Me. 362.

A release is not affected by an informal official certificate appended to it. Robinson *v.* Moon, 56 Ala. 241.

As to sealed and parol releases, see *infra*, this title, *Kinds of Releases.*

1. Union Bank *v.* Call, 5 Fla. 409. The general rule is that a sealed instrument can be released only by a release under seal. Leake on Contracts, 922; Pratt *v.* Morrow, 45 Mo. 404; 100 Am. Dec. 381. It has been held that a release is an executed contract and must be under seal. Dillingham *v.* Estill, 3 Dana (Ky.) 21; Davis *v.* Bowker, 1 Nev. 487; White *v.* Walker, 31 Ill. 422; Farmers' Bank *v.* Blair, 44 Barb. (N. Y.) 641; Thomason *v.* Dill, 30 Ala. 444. It has been said that a mere release, if upon a consideration, is valid without seal, but that if it is intended to operate as a grant of an interest in land, it must be under seal. Leviston *v.* Junction R. Co., 7 Ind. 597; Benjamin *v.* McConnell, 9 Ill. 536. It has been held that a writing, purporting to release one of the parties to an action for assault and battery from claim on him in the suit, but not sealed, cannot operate as a release. Smithwick *v.* Ward, 7 Jones (N. Car.) 64; 75 Am. Dec. 453.

See generally, Illinois Cent. R. Co. *v.* Read, 37 Ill. 484; 13 Am. Dec. 514; First Nat. Bank *v.* Marshall, 73 Me. 79; Seymour *v.* Minturn, 17 Johns. (N. Y.) 169; 8 Am. Dec. 380.

2. Kidder *v.* Kidder, 33 Pa. St. 268; Miller *v.* Hemler, 5 W. & S. (Pa.) 486; Seymour *v.* Minturn, 17 Johns (N. Y.) 169; 8 Am. Dec. 380; Jackson *v.* Stackhouse, 1 Cow. (N. Y.) 122, 13 Am. Dec. 514.

3. 7 Wait's Action and Defenses 460, *citing* Line *v.* Nelson, 38 N. J. L. 358;

under seal is conclusive upon the parties if obtained without fraud.[1] In some States the use of private seals is abolished, and the addition of a private seal to an instrument in writing does not affect its character in any respect.[2]

b. RELEASE NOT UNDER SEAL.—It was a maxim of the common law that an obligor could only be released by an instrument of as high dignity as that by which he was bound; being obligated by a seal, he could be released only by an instrument under seal. While technically this may be said to be the rule now, practically it is relaxed. In contracts for chattel interests, evidenced by sealed instruments, performance *in pais* will generally release.[3]

c. PAROL RELEASE.—It may be safely said that, in States where the "new procedure" prevails, especially in States where the use of a private seal is abolished,[4] and in some other States also, a parol release will be respected by the courts.[5]

Berry *v.* Gillis, 17 N. H. 9; 43 Am. Dec. 584; Ayer *v.* Ashmead, 31 Conn. 447; 83 Am. Dec. 154; McAllister *v.* Dennin, 27 Mo. 40; Armstrong *v.* Hayward, 6 Cal. 183; Frink *v.* Green, 5 Barb. (N. Y.) 455; Shaw *v.* Pratt, 22 Pick. (Mass.) 305; Irvine *v.* Millbank, 56 N. Y. 635; Morgan *v.* Smith, 70 N. Y. 537; DeZeng *v.* Bailey, 9 Wend. (N. Y.) 336.

1. Perkins *v.* Fourniquet, 14 How. (U. S.) 313; Sherburne *v.* Goodwin, 44 N. H. 271; Ellsworth *v.* Fogg, 35 Vt. 355; West *v.* Morris, 98 Mass. 353. As to binding residuary legatees, see Sherburne *v.* Goodwin, 44 N. H. 271, A release under seal cannot be impeached for want of consideration. Russell *v.* Rogers, 15 Wend. (N. Y.) 351; Gray *v.* Barton, 55 N. Y. 68; 14 Am. Rep. 181; Torry *v.* Black, 58 N. Y. 185; Ryan *v.* Ward, 48 N. Y. 204; 8 Am. Rep. 539. And is an estoppel against the maker of it. Harding *v.* Hambler, 3 M. & W. 279.

2. In *Kansas*, for example. *Kansas* Gen. Stat. (1889), § 1103; and see Bradley *v.* Rogers, 33 Kan. 126; Goff *v.* Russell, 3 Kan. 212; Gross *v.* Deller, 33 Minn. 127.

See SEAL.

3. White *v.* Walker, 31 Ill. 422; Farmers' Bank *v.* Blair, 44 Barb. (N. Y.) 641; Thomason *v.* Dill, 30 Ala. 444. See Dickerson *v.* Ripley Co., 6 Ind. 128.

A mere release if on consideration, is valid without seal, Leviston *v.* Junction R. Co., 7 Ind. 597; Benjamin *v.* McConnell, 9 Ill. 536; 46 Am. Dec. 474. Heckman *v.* Manning, 4 Colo. 543. A written promise to pay the debt of a third person will not release him from his creditors unless the creditors agree to release him in consideration of the promise. Snyder *v.* Kirtley, 35 Mo. 423. But a parol release does not operate without payment or satisfaction of the debt. Sigourney *v.* Sibley, 21 Pick. (Mass.) 101; 32 Am. Dec. 248. An indorsement, not under seal, by the holder, does not release the obligation, being without consideration or delivery. Albert *v.* Ziegler, 29 Pa. St. 50.

4. See Bradley *v.* Rogers, 33 Kan. 126; Goff *v.* Russell, 3 Kan. 212; *Kansas* Gen. Stat. (1889), §§ 1103, 1104; Scott *v.* Scott, 105 Ind. 584.

A mere parol agreement by a creditor with a debtor that he will not collect the debt, is not a release of the debt. Palmer *v.* Green, 6 Conn. 14. A consideration is necessary. Kidder *v.* Kidder, 33 Pa. St. 268.

5. Harris *v.* Brooks, 21 Pick. (Mass.) 195; 32 Am. Dec. 254; Reid *v.* Nunnelly, 24 Ark. 356. But there must be a consideration. Goodman *v.* Griffin, 3 Stew. (Ala.) 160. A parol release of a contract under seal is valid. Lattimore *v.* Harsen, 14 Johns. (N. Y.) 330; Dearborn *v.* Cross, 7 Cow. (N. Y.) 48; Albert *v.* Ziegler, 29 Pa. St. 50. It is held that a parol release without payment or satisfaction is no extinguishment of the debt. Sigourney *v.* Sibley, 21 Pick. (Mass.) 101; 32 Am. Dec. 248. It has been decided that a sealed chattel mortgage may be released by parol agreement

But the mere expression of an intention to release is not a release.[1]

2. Implied Releases.—A release may be implied from the acts of the parties,[2] or by operation of law, where a release arises out of a presumption of law from acts of the releasor, as, when one of several joint obligors is expressly released, the others are also released by operation of law.[3]

A covenant not to sue, if general and without a limitation as to time, amounts to a release of the debt;[4] otherwise if the cove-

of the mortgagee, though the debt be unpaid. Acker *v.* Bender, 33 Ala. 230; Wallis *v.* Long, 16 Ala. 738. See also Howard *v.* Gresham, 27 Ga. 347; Stevenson *v.* Adams, 50 Mo. 475; and see Brandt on Suretyship & Guaranty, §§ 327, 330. A parol release of a judgment for less than the full amount is inoperative. Weber *v.* Couch, 134 Mass. 26; 45 Am. Rep. 274. It is held that while a parol agreement is not sufficient, of itself, to release an instrument under seal, yet an executed parol agreement may have that effect, as it is not the agreement alone that is relied on, but the agreement coupled with acts done under it. Dickerson *v.* Ripley Co., 6 Ind. 128. But a mere parol agreement between creditors and debtor to collect no part of the debt is not a release of the debt. Palmer *v.* Green, 6 Conn. 14. In equity a parol release, if expressing clearly the intention of the parties, will be carried out, even if the effect of it be to release a lien on real estate. Stribeling *v.* Splint Coal Co., 31 W. Va. 82; Cleere *v.* Cleere. 81 Ala. 581.

1. Myers *v.* Malcom, 20 Ill. 621. See also Whatley *v.* Tricker, 1 Camp. 35; Daggett *v.* Whitney, 35 Conn. 366; Jackson *v.* Stackhouse, 1 Cow. (N. Y.) 122; 13 Am. Dec. 514.

2. The destruction of the bond in forgiveness of the debt releases it. Booth *v.* Smith, 3 Woods (U. S.) 19; Gardner *v.* Gardner, 22 Wend. (N. Y.) 526; 34 Am. Dec. 340; or the voluntary delivery by the creditor to the debtor of the evidence of the claim. Kent *v.* Reynolds, 8 Hun (N. Y.) 559; Beach *v.* Endress, 51 Barb. (N. Y.) 579; Vanderbeck *v.* Vanderbeck, 30 N. J. Eq. 265. But where the debtor has possession merely of the evidence of the debt, and the payee testifies that the debt is not paid, and when the debtor has had access to the payee's papers, the release is not implied. Grey *v.* Grey, 47 N. Y. 552. See Green *v.* Wells, 2 Cal. 584; Wheeden *v.* Fiske, 50 N. H. 125; Murray *v.* Harway, 56 N. Y. 337; Springstein *v.* Schermerhorn, 12 Johns. (N. Y.) 357; Clark *v.* Bush, 3 Cow. (N. Y.) 151; McGlynn *v.* Billings, 16 Vt. 329; Randolph on Com. Paper, § 1837, and cases there cited.

An executed agreement to do some act may be equivalent to a release. Terre Haute etc R. Co. *v.* Flanigan, 94 Ind. 336.

3. Rowley *v.* Stoddard, 7 Johns. (N. Y.) 207; Line *v.* Nelson, 38 N. J. L. 358; McAllister *v.* Dennin, 27 Mo. 40; Armstrong *v.* Hayward, 6 Cal. 183; Shaw *v.* Pratt, 22 Pick. (Mass.) 305; Ayer *v.* Ashmead, 31 Conn. 447; 83 Am. Dec. 154; Berry *v.* Gillis, 17 N. H. 9; 43 Am. Dec. 384. To effect this, however, the release must be under seal. Morgan *v.* Smith, 70 N. Y. 537. This is the strict rule of law, but in equity it is otherwise. State *v.* Matson, 44 Mo. 305. See generally, 8 Bac. Abr., 253, for a statement of the common law doctrine. Bequeathing a debt to a debtor releases it. Hobart *v.* Stone, 10 Pick. (Mass.) 215. But where a creditor leaves a legacy to his debtor, it does not release the debt. Strong *v.* Williams, 12 Mass. 391; 7 Am. Dec. 81; Clarke *v.* Bogardus, 12 Wend. (N. Y.) 67. *Compare* Williams *v.* Crary, 8 Cow. (N. Y.) 246; Ward *v.* Coffield, 1 Dev. Eq. (N. Car.) 108. If an obligee makes the principal in his bond his executor, this releases principal and surety. Winship *v.* Bass, 12 Mass. 199; Eichelberger *v.* Morris, 6 Watts (Pa.) 42. But appointing the debtor executor does not extinguish the debt, as against creditors or legatees. Stevens *v.* Gaylord, 11 Mass. 256; Bigelow *v.* Bigston, 4 Ohio 147; Gardner *v.* Miller, 19 Johns. (N. Y.) 188; Page *v.* Patten, 5 Pet. (U. S.) 304; Bacon *v.* Fairman, 6 Conn. 121; Hall *v.* Pratt, 5 Ohio 81; Hobart *v.* Stone, 10 Pick. (Mass.) 215.

4. Lane *v.* Owings, 3 Bibb. (Ky.) 247;

nant is not to sue within a given time,[1] or not to sue one of the several obligors.[2] Such a covenant does not release the others.[3] A parol release of a sealed instrument may be treated in equity as a covenant not to sue.[4]

IV. **Consideration.**—The rule that a consideration is necessary to support a contract applies to releases as to contracts generally. Beyond what has been said above[5] it need be said only that it is essential to the validity of a release, that there be a consideration and that a seal imports a consideration,[6] that there are no degrees of validity among valuable considerations;[7] that it requires

Reed *v.* Shaw, 1 Blackf. (Ind.) 245; Shed *v.* Pierce, 17 Mass. 628; Jackson *v.* Stackhouse, 1 Cow. (N. Y.) 123; 13 Am. Dec. 514; Phelps *v.* Johnson, 8 Johns. (N. Y.) 54; Garnett *v.* Macon, 6 Call (Va.) 308; Clopper *v.* Union Bank, 7 Har. & J. (Md.) 92; 16 Am. Dec. 294; Jones *v.* Quinnipiack Bank, 29 Conn. 25; Thurston *v.* James, 6 R. I. 103; Millett *v.* Hayford, 1 Wis. 401; Stebbins *v.* Niles, 25 Miss. 267; Line *v.* Nelson, 38 N. J. L. 358. A covenant never to sue releases the debt. Harvey *v.* Harvey, 3 Ind. 473; Stebbins *v.* Niles, 25 Miss. 267; Walker *v.* McCulloch, 4 Me. 421.

1. Thimbleby *v.* Barrow, 3 M. & W. 210; Perkins *v.* Gilman, 8 Pick. (Mass.) 229; Gibson *v.* Gibson, 15 Mass. 112; 8 Am. Dec. 94; Hoffman *v.* Brown, 6 N. J. L. 429; Winans *v.* Huston, 6 Wend. (N. Y.) 471; Walling *v.* Warren, 2 Colo. 434.

2. Line *v.* Nelson, 38 N. J. L. 358. See also Guard *v.* Whiteside, 13 Ill. 7; Howland *v.* Marvin, 5 Cal. 501; Thurston *v.* James, 6 R. I. 103; Millet *v.* Hayford, 1 Wis. 401. *Compare* Blair *v.* Reid, 20 Tex. 310.

But a covenant not to sue within a limited time does not apply to any new cause of action arising between the parties. Brigham *v.* Eveleth, 9 Mass. 538. And a covenant not to sue will not be held to be a release, contrary to the manifest intention of the parties. Parker *v.* Holmes, 4 N. H. 97. A bond conditioned not to sue except on a future contract is an absolute release of all existing demands at the time the bond is executed. Cuyler *v.* Cuyler, 2 Johns. (N. Y.) 186.

3. Hutton *v.* Eyre, 6 Taunt. 289; Winston *v.* Dalby, 64 N. Car. 299; Aylesworth *v.* Brown, 31 Ind. 270; Matthey *v.* Gally, 4 Cal. 62; 60 Am. Dec. 595; Carondelet *v.* Desnoyer, 27 Mo. 36; Shed *v.* Pierce, 17 Mass. 623; Durell *v.* Wendall, 8 N. H. 369. In order to discharge the joint debtors on account of payment by one of them, it must be full payment, or a release under seal. Snow *v.* Chandler, 10 N. H. 92; 34 Am. Dec. 140; Walker *v.* McCulloch, 4 Me. 421. And a writing in form of a receipt for money paid by one, is construed to be a covenant not to sue rather than a release. Russell *v.* Adderton, 64 N. Car. 417.

4. Albert *v.* Ziegler, 29 Pa. St. 50.

5. See *supra*, this title, *Kinds of Releases*.

6. Kidder *v.* Kidder, 33 Pa. St. 268; Benjamin *v.* McConnel, 9 Ill. 536; 46 Am. Rep. 474; Leviston *v.* Junction R. Co., 7 Ind. 597; Thomason *v.* Dill, 30 Ala. 444; Nesbitt *v.* McGehee, 26 Ala. 748; Snyder *v.* Kirtley, 35 Mo. 423; Jones *v.* Perkins, 29 Miss. 139; 64 Am. Dec. 136; Bender *v.* Been, 78 Iowa 283; Purdy *v.* Rome etc. R. Co., 125 N. Y. 209. A release not under seal is valid, if, within itself, it shows a consideration. Heckman *v.* Manning, 4 Colo. 543. And see Taylor *v.* Manners, L. R., 1 Ch. App. 48; Heaslet *v.* Spratlin (Ark., 1891), 15 S. W. Rep. 461. See Kennerty *v.* Etiwan Phosphate Co., 17 S. Car. 411; 43 Am. Rep. 607; Thompkins *v.* Clay St. R. Co., 66 Cal. 163; Hobbs *v.* Brush Electric Light Co., 75 Mich. 550; Rose *v.* West Philadelphia R. Co. (Pa., 1888), 12 Atl. Rep. 78; Carlton *v.* Western etc. R. Co., 81 Ga. 531. A release cannot cut off a promise of which it was the consideration. Allen *v.* Frisbee, 2 Root (Conn.) 76.

7. Corkins *v.* Collins, 16 Mich. 478. The defendant's abandonment of his right of appeal on plaintiff's promise to release the judgment, is a valuable consideration, and plaintiff may be enjoined from collecting the payment thereon. Wray *v.* Chandler, 64 Ind. 146. See Hathaway *v.* Lynn, 75 Wis. 186; Averill *v.* Wood, 78 Mich. 342; Traphagen *v.* Voorhees, 44 N. J. Eq. 21.

but a slight consideration to support a release;[1] that it is not necessary that the consideration pass to the releasor;[2] or come from the releasee;[3] and that unless there is a consideration, the attempted release is *nudum pactum.*[4]

V. Delivery.—So, as in the case of written contracts generally, a release, when in writing, to become effective, must be delivered.[5] It may be placed in escrow, in which case the law of escrow applies.[6]

VI. General Rules of Construction.—A release operates upon matters and things mentioned in it which existed at the time of its execution and delivery, and will not be construed out of its general terms to defeat a cause of action arising afterwards.[7] Though general in its terms, it will be limited to those

1. Jones *v.* Perkins, 29 Miss. 139; 64 Am. Dec. 136. If a debtor is discharged from civil arrest by the assent of a creditor, it releases the judgment, and it is not necessary to prove a consideration. Bunker *v.* Hodgdon, 7 N. H. 263.

2. Averill *v.* Wood, 78 Mich. 342.

3. Compton *v.* Elliott, 48 N. Y. Super. Ct. 211.

4. Where partners buy goods and give their acceptance therefor, then dissolve their partnership, one taking all the property and assuming all the indebtedness of the firm, a promise by the payee of the acceptance to release the retiring partner from further liability and look to the other partner alone for payment, is not binding, unless it be founded on some new consideration. And when the promise is made after the dissolution, and is no inducement to or consideration for the dissolution, and no new partner is introduced into the firm or assumes the liability, nor different or additional security given, and the acceptance is not taken up and new paper given, and no other fact appears than the dissolution and the agreement, the promise is *nudum pactum.* Eagle Mfg. Co. *v.* Jennings, 29 Kan. 657; 44 Am. Rep. 668.

5. Where the testimony of a subscribing witness was that he saw the release executed on the day it was dated, and saw it delivered, without stating when, it was presumed to have been delivered on the day it was dated. Crager *v.* Reis, 12 N. Y. Supp. 729. If acts show an intention to deliver, formality is not necessary. Goodrich *v.* Walker, 1 Johns. Cas. (N. Y.) 250. Delivery may be presumed when the release is written on the back of the original contract, though it is in the releasor's hands. Fitch *v.* Forman, 14 Johns. (N. Y.) 172.

6. Walcott *v.* Coleman, 1 Conn. 375. See Escrow, vol. 6, p. 857.

7. Ashton *v.* Freestun, 2 M. & G. 1; Hartley *v.* Manton, 5 Q. B. 247; Allen *v.* Frisbee, 2 Root (Conn.) 76; Cocke *v.* Stuart, 1 Peck (Tenn.) 137; Francis *v.* Boston etc. Mill Corp., 4 Pick. (Mass.) 368; Sherburne *v.* Goodwin, 44 N. H. 271; Gross *v.* Deller, 33 Minn. 127.

A condition may be released by a release in general terms. Hoyt *v.* Ketcham, 54 Conn. 60; McGlynn *v.* Billings, 16 Vt. 329. Legal terms will be understood to have their legal meaning. Knott *v.* Burleson, 2 Greene (Iowa) 600. A release of all causes of action against A is not a release of a cause of action against a firm of which A is a member. Reading R. Co. *v.* Johnson, 7 W. & S. (Pa.) 317. A release of all demands will not release claims held by the releasor as executor. Wiggins *v.* Norton, R. M. Charlt. (Ga.) 15. A release by an heir of all his present or future interest in his father's estate, etc., is a bar of any such claim either in law or equity. Curtis *v.* Curtis, 40 Me. 24; 63 Am. Dec. 651. But a release of all damages for constructing a railroad over the releasor's land does not cover damages caused to land not taken by building a railroad over another's land. Eaton *v.* Boston etc. R. Co., 51 N. H. 504; 12 Am. Rep. 147. An antenuptial agreement releasing all claims as widow does not extend to a year's support under the statute. Murphy *v.* Avery, 1 Dev. & B. (N. Car.) 25.

things contemplated by the parties at the time it is made,[1] and will not be construed to include particular things then unknown and uncontemplated.[2] General words coming before particular ones are not restricted by the latter.[3] But the circumstances surrounding the parties at the time the release was made should be kept in view, as well as the purpose for which it was executed. General words are taken most strongly against the releasor.[4] General words may be limited by particular recitals.[5] A release will not be so construed as to include rights of which the lessor was ignorant when he executed it.[6]

A deed of release may be treated as a grant, if necessary to carry out the intention of the parties;[7] or may operate as a confirmation of title.[8]

1. Lyall *v.* Edwards, 6 H. & N. 337; Wait's Actions & Defenses 462; Seymour *v.* Butler, 8 Iowa 304; Rich *v.* Lord, 18 Pick. (Mass.) 322; Boyes *v.* Bluck, 13 C. B. 563; Law *v.* Bentley, 25 Ill. 52; Pierce *v.* Sweet, 33 Pa. St. 151; Codding *v.* Wood, 112 Pa. St. 371; McEvoy *v.* Mayor etc. of Baltimore, 3 Har. & J. (Md.) 193; Gross *v.* Deller, 33 Minn. 127; Hoyt *v.* Ketcham, 54 Conn. 60; and will be restrained to the rights intended to be released and to the purposes of the agreement. Blair *v.* Chicago etc. R. Co., 89 Mo. 383. And this is especially true where there are various parties to the release, standing in various relations, and having different claims. Rich *v.* Lord, 18 Pick. (Mass.) 322; Wiggin *v.* Tudor, 23 Pick. (Mass.) 434; Price *v.* Treat (Neb. 1890), 45 N. W. Rep. 790; Mateer *v.* Missouri Pac. R. Co. (Mo. 1891), 15 S. W. Rep. 970.

2. Moore *v.* Weston, 25 L. T., N. S. 532; Seymour *v.* Butler, 8 Iowa 304; Lemaster *v.* Burckhart, 2 Bibb (Ky.) 25.

It has been held that where a condition is disjunctive, releasing one alternative releases the other. Smith *v.* Durell, 16 N. H. 344; 41 Am. Dec. 732.

A general release of all demands does not release claims held by the releasor as executor. Wiggins *v.* Norton, R. M. Charlt. (Ga.) 15. But a release of all debts, dues, and demands, releases a note given for interest due on another note excepted in the release. Howel *v.* Seaman, 1 Root (Conn.) 383. For the effect of a general release, see Little Rock etc. R. Co. *v.* Page, 35 Ark. 304. The owner of land through which a company wished to construct its railroad took a position with the company made under a parol contract "to drop the question of damages." *Held*, a release of damages, and a bar to a subsequent suit for damages to the land. Corey *v.* Chicago etc. R. Co., 100 Mo. 282.

A lessor and lessee agreed to release each other from all the terms and obligations of the lease, and that they should "stand for naught from this time." This was held to release the lessee from payment of taxes assessed but not due. Henry *v.* Crisinger, 76 Iowa 126.

3. As where a husband released to his wife "all his right and interest of every kind and nature whatsoever, and especially his contingent right of dower and homestead." Crum *v.* Sawyer, 132 Ill. 443; Dunbar *v.* Dunbar, 5 Gray (Mass.) 103.

Legal terms will be construed according to their legal meaning. Knott *v.* Burleson, 2 Greene (Iowa) 600.

4. Jackson *v.* Stackhouse, 1 Cow. (N. Y.) 122; 13 Am. Dec. 514; Rowe *v.* Rand, 111 Ind. 206; Seymour *v.* Butler, 8 Iowa 304. See generally, INTERPRETATION, vol. 11, p. 517.

5. Jackson *v.* Stackhouse, 1 Cow. (N. Y.) 122; Edwards *v.* Varick, 5 Den. (N. Y.) 664; Rich *v.* Lord, 18 Pick. (Mass.) 322; Tuckerman *v.* Newhall, 17 Mass. 581. See also John *v.* Jones, 16 Ala. 454; Hurlbut *v.* Phelps, 30 Conn. 42.

6. Kirchner *v.* New Home S. M. Co., 59 Hun (N. Y.) 186; Moore *v.* Weston, 25 L. T., N. S. 532; Seymour *v.* Butler, 8 Iowa 304; Lemaster *v.* Burckhart, 2 Bibb (Ky.) 25; O'Donnell *v.* Clinton, 145 Mass. 461.

7. Hastings *v.* Blue Hill Turnpike Corp., 9 Pick. (Mass.) 80.

8. When the grantee in a warranty

The thing to be released must be *in esse*, and the release must operate in the present and absolutely.[1]

A release of a contract made and to be executed in a certain State is to be determined, primarily, by the laws of that State.[2]

VII. Conclusiveness and Effect.—As a general rule a release under seal is conclusive upon the parties to it;[3] and especially is this so in courts of law.[4]

In equity more latitude of inquiry will be allowed,[5] though the

deed from a grantor having no title enters upon the land, and, afterwards, the grantor obtains a release from the owner, it inures to the benefit of the grantee and confirms his title. Oakes *v.* Marcy, 10 Pick. (Mass.) 195; Pray *v.* Pierce, 7 Mass. 381; 5 Am. Dec. 59.

1. A naked or remote possibility cannot be released. Needles *v.* Needles, 7 Ohio St. 432. An agreement not to claim dower cannot be a release, as the agreement cannot operate presently and absolutely. Croade *v.* Ingraham, 13 Pick. (Mass.) 33. A release cannot defeat future rights or claims. Francis *v.* Boston etc. Mill Corp., 4 Pick. (Mass.) 365; Gibson *v.* Gibson, 15 Mass. 106; 8 Am. Dec. 34; Cocke *v.* Stuart, 1 Peck (Tenn.) 137; Tiedeman on Real Property, § 800; 3 Washburn on Real Property 348; Bayler *v.* Com., 40 Pa. St. 37. But one entitled to a future executory interest in real estate may release his interest. Coates *v.* Street, 2 Ashm. (Pa.) 12.

2. Holdridge *v.* Farmers' etc. Bank, 16 Mich. 66. See also Seymour *v.* Butler, 8 Iowa 304.

3. Wallace *v.* Chicago etc. R. Co., 67 Iowa 547; Sherburne *v.* Goodwin, 44 N. H. 271; Ellsworth *v.* Fogg, 35 Vt. 355; Perkins *v.* Fourniquet, 14 How. (U. S.) 313; West *v.* Morris, 98 Mass. 353; Franklin *v.* Hart, 7 J. J. Marsh. (Ky.) 338; Langworthy *v.* Woodworth, 13 Iowa 530; Sawyer *v.* Haley, 6 Gray (Mass.) 243; Whipple *v.* Mississippi etc. Co., 34 Fed. Rep. 54; Leith *v.* Carter (Va. 1888), 5 S. E. Rep. 584; Kelly *v.* Topsy, 44 Fed. Rep. 631; Hogan *v.* Sartwell, 146 Mass. 33. Even under a statute allowing an inquiry into it, it is conclusive if there is no fraud or duress. Stearns *v.* Toppin, 5 Duer (N. Y.) 294. In admiralty, however, it has been held that a release under seal given by a seaman on payment of his wages is only *prima facie* proof of payment. The David Pratt, 1 Ware (U. S.) 496.

A release "in full" does not always preclude parol testimony to show that it does not cover all that was due. Fuller *v.* Crittenden, 9 Conn. 401; 23 Am. Dec. 364; West *v.* Morris, 98 Mass. 353. See St. Louis etc. R. Co. *v.* Davis, 35 Kan. 464. There is a distinction between a receipt and a release. Stearns *v.* Tappin, 5 Duer (N. Y.) 294; Jenkins *v.* Clyde Coal Co. (Iowa 1891), 48 N. W. Rep. 970. See also Receipt.

4. Ryan *v.* Ward, 48 N. Y. 204; 8 Am. Rep. 539; Perkins *v.* Fourinquet, 14 How. (U. S.) 313; Sherburne *v.* Goodwin, 44 N. H. 271; West *v.* Morris, 98 Mass. 353; Russell *v.* Rogers, 15 Wend. (N. Y.) 351; Torry *v.* Black, 58 N. Y. 185.

5. Barnes *v.* Ward, Busb. Eq. (N. Car.) 93; 57 Am. Dec. 590; State *v.* Matson, 44 Mo. 305; Scott *v.* Scott, 105 Ind. 584. Though a seal be wanting, yet in equity the release, if upon good consideration, may release the debt. Thomason *v.* Dill, 30 Ala. 444; Payne *v.* Allen, 1 Sprague (U. S.) 304. A parol release is effective in a court of equity. Albert *v.* Ziegler, 29 Pa. St. 50. Where a lien for material for thirty houses was filed, and afterwards fifteen houses released by paying full value for material used in them, it was held that the lien was not affected as to the remainder. Hall *v.* Sheehan, 69 N. Y. 618. Equity will sometimes declare a transaction to be in effect a release, although no formal release has been executed. Stribling *v.* Splint Coal Co., 31 W. Va. 82.

It has been held that a contract to release, when entered upon the record by the assent of the parties, under the circumstances there set forth, was equivalent to a release. Workman *v.* Doran (W. Va. 1891), 12 S. E. Rep. 770. In the absence of a consideration a release will not be enforced, when given by a layman, ignorant of the law, to an attorney, even in the absence of fraud, when the attorney leads him to do the opposite of what

general rules of construction of releases are the same in courts of equity as in courts of law.[1]

A release obtained by force or fraud,[2] accident or mistake,[3] will be set aside. So, if the releasor had not sufficient mental capacity to understand the effect of the release.[4]

VIII. WHO MAY RELEASE—1. In General.—As to the capacity of various classes of persons to execute releases, there is little to be said under this title which has not been said under the several titles dealing with the capacity of such persons to enter into and execute contracts generally, the rules of law not especially distinguishing between the contract of release and other contracts.

he expressed as his intention at the time. Mellon *v.* Webster, 5 Mo. App. 449; Price *v.* Treat (Neb. 1890), 45 N. W. Rep. 790; Mateer *v.* Missouri Pac. R. Co. (Mo. 1891), 15 S. W. Rep. 970; Wells *v.* McGeoch, 71 Wis. 196; O'Donnell *v.* Clinton, 145 Mass. 461; Cleere *v.* Cleere, 81 Ala. 581.

1. Lemaster *v.* Burckhart, 2 Bibb (Ky.) 25; Traphagen *v.* Vorhees, 44 N. J. Eq. 21.

2. Wilson *v.* Wilson, 2 Dev. Eq. (N. Car.) 181; Phettiplace *v.* Sayles, 4 Mason (U. S.) 312; Bradshaw *v.* Craycraft, 3 J. J. Marsh. (Ky.) 77. See Citizens' F. etc. Ins. Co. *v.* Wallis, 23 Md. 173; Wells *v.* McGeoch, 71 Wis. 196; Ettinger *v.* Jones (Pa. 1891), 21 Atl. Rep. 137; Pugsley *v.* Sumner, 14 Daly (N.Y.) 427; Averill *v.* Wood, 78 Mich. 342; Carroll *v.* People, 13 Ill. App. 206; Reznor *v.* Maclary, 4 Houst. (Del.) 241.

It has been held that a release obtained by fraud is valid until disaffirmed, and the consideration tendered back. Kreuzer *v.* Forty-second St. etc. R. Co., 13 N Y. Supp. 588. *Compare* Mateer *v.* Missouri Pac. R. Co. (Mo. 1791), 15 S. W. Rep. 970; and that, to set aside a release for fraud, the parties should be put in *statu quo.* McMichael *v.* Kilmer, 76 N. Y. 36.

But it has also been held, that where a release was obtained by fraud, it is not necessary to pay or tender back the money before bringing action after repudiating the release. Chicago etc. R. Co *v.* Lewis, 109 Ill. 120.

It is said that to set aside a release obtained by false and fraudulent statements, it is not necessary that there should have been an unquestioned belief in them when made. Peterson *v.* Chicago etc. R. Co., 38 Minn. 511.

But when one signs a release without reading it, and nothing done to prevent his reading it, and he relies on what he is told that it contains, he is bound by it. Wallace *v.* Chicago etc. R. Co., 67 Iowa 547; Jenkins *v.* Clyde Coal Co. (Iowa 1891), 48 N. W. Rep. 970.

Duress.—A release exacted by duress is void. Harris *v.* Louisville etc. R. Co., 35 Fed. Rep. 116; Spaids *v.* Barrett, 57 Ill. 289; 11 Am. Rep. 10; Mitchell *v.* Pratt, Taney (U. S.) 448; Kelly *v.* Topsy, 44 Fed. Rep. 631.

Heirs of Expectancy.—Releases obtained from heirs in need on coming of age for an inadequate consideration, when they are ignorant of their rights, by representing to them that there is nothing in their claims, will be set aside in equity. Hallett *v.* Collins, 10 How. (U. S.) 174; Wheeler *v.* Smith, 9 How. (U. S.) 55; otherwise, if fairly made, with the consent of the ancestor, and with a covenant not to claim. Trull *v.* Eastman, 3 Met. (Mass.) 121; 37 Am. Dec. 126. See generally Bixler *v.* Kunkle, 17 S. &. R. (Pa.) 298; Huntington's Appeal, 30 Conn. 526; Brooks *v.* First Presbyterian Church, 128 Pa. St. 408; Crum *v.* Sawyer, 132 Ill. 443.

3. Curley *v.* Harris, 11 Allen (Mass.) 112; Cleere *v.* Cleere, 81 Ala. 581; O'Donnell *v.* Clinton, 145 Mass. 461; Chapman *v.* Allen, 56 Conn. 152; Horwitz *v.* Forbes (Md. 1891), 22 Atl. Rep. 267. *Compare In re* Haas' Estate, 2 N. Y. Supp. 119. But where parties by mutual agreement executed mutual releases, and defendant gave up his note to plaintiff it was held that the plaintiff should not be permitted to avoid the effect of the settlement by showing that he labored under a mistake as to the amount of his account. Blackmer *v.* Wright, 12 Vt. 377.

4. Chickering *v.* Brooks, 61 Vt. 554. As to the effect of ignorance of the English language, Rosenberg *v.* Doe, 148 Mass. 560.

For the sake of convenience, cases relating to releases are grouped here, and, for the general principles governing the subject, the reader is referred to other titles.

2. **Attorneys.**—An attorney, without special authority, cannot release a surety on his client's demand without satisfaction,[1] nor an indorser on a note ;[2] nor can he release or discharge his client's claim or judgment without payment, or exchange it for other obligations.[3]

3. **Agents.**—Power given to an agent to release an absolute debt may include authority to release a contingent liability.[4] An agent, unless specially authorized, cannot release his principal's claim or demand, unless full payment is made, nor can he receive anything but money in payment of it.[5]

4. **Joint Tenants and Tenants in Common.**—A release by one tenant in common, of damages for trespass to the land held in common is binding on all.[6] A release of rent by one of the co-tenants will bind the others.[7]

So a release by one of two joint covenantees is binding on both.[8] But a release of one covenantor in a lease, unless under seal, does not release the others.[9]

5. **Executors and Administrators.**—A general release of all demands may release debts due the releasor as executor, though the release is not signed by him as executor.[10] One of two administrators may release the estate without the concurrent

1. Givens *v.* Briscoe, 3 J. J. Marsh. (Ky.) 529; Savings Inst. *v.* Chinn, 7 Bush (Ky.) 539; Stoll *v.* Sheldon, 13 Neb. 207. And see Sharpe *v.* Williams, 41 Kan. 56.

2. Varnum *v.* Bellamy, 4 McLean (U. S.) 87; East River Bank *v.* Kennedy, 9 Bosw. (N. Y.) 543.

3. Herriman *v.* Shomon, 24 Kan. 387; 36 Am. Rep. 261; Harrow *v.* Farrow, 7 B. Mon. (Ky.) 126; 45 Am. Dec. 60; Beers *v.* Hendrickson, 45 N. Y. 665; Gilliland *v.* Gasque, 6 S. Car. 406; Rounsaville *v.* Hazen, 33 Kan. 71; Bigler *v.* Toy, 68 Iowa 687; Dolan *v.* VanDemark, 35 Kan. 304; Chapman *v.* Cowles, 41 Ala. 103; 91 Am. Dec. 508; Bradford *v.* Arnold, 33 Tex. 412; Moye *v.* Cogdell, 69 N. Car. 93; Maddux *v.* Bevan, 39 Md. 485; Spears *v.* Ledergerber, 56 Mo. 465; Beers *v.* Hendrickson, 45 N. Y. 665; Davis *v.* Lee, 20 La. Ann. 248. It has been held that he may take a note secured by mortgage. Dolan *v.* Van Demark, 35 Kan. 304; but not the debtor's note payable to himself. Robinson *v.* Anderson, 109 Ind. 152.

See generally ATTORNEY AND CLIENT, vol. 1, p. 954.

4. Shaw *v.* Berry, 35 Me. 279: 58 Am. Dec. 702. See Evans *v.* Wells, 22 Wend. (N. Y.) 324.

5. Bigler *v.* Toy, 68 Iowa 687; nor can he take the debtor's note payable to the agent. Robinson *v.* Anderson, 106 Ind. 152.

Where an attorney in fact executes a release he must sign it in the name of the principal as attorney, and not in his own name. Wells *v.* Evans, 20 Wend. (N. Y.) 251. *Compare* Evans *v.* Wells, 22 Wend. (N. Y.) 324.

See generally AGENCY, vol. 1, p. 331.

6. Austin *v.* Hale, 13 Johns. (N. Y.) 286; 7 Am. Dec. 376; Decker *v.* Livingston, 15 Johns. (N. Y.) 479.

7. Decker *v.* Livingston, 15 Johns. (N. Y.) 479. *Examine* Spencer *v.* Austin, 38 Vt. 258; Law *v.* Bentley, 25 Ill. 52; McKeon *v.* Whitney, 3 Den. (N. Y.) 452.

And see generally JOINT TENANTS, vol. 11, p. 1057.

8. Fitch *v.* Forman, 14 Johns. (N. Y.) 172.

9. De Zeng *v.* Bailey, 9 Wend. (N. Y.) 336.

10. Sherburne *v.* Goodwin, 44 N. H. 271.

act of the other.[1] But when a note is made to two executors jointly one of them cannot transfer it by indorsement.[2] One of two executors or administrators may release a mortgage.[3]

6. Husband and Wife.—See MARRIED WOMEN, vol. 14, p. 624.

7. Heirs.—An expectant heir, for a sufficient consideration, may release the share which otherwise he would acquire in his ancestor's estate upon the ancestor's death.[4] Unless, however, the release is obtained fairly it is not binding.[5]

8. Landlord.—See LANDLORD AND TENANT, vol. 12, p. 658.

9. Partners.—See PARTNERSHIP, vol. 17, p. 853.

IX. SUBJECT-MATTER OF RELEASE—1. In General.—To the subject-matter upon which a release may operate there is no definable limit or classification. As one who can contract can release, so that which may be the subject-matter of a claim or contract may be the subject of a release and the right to release, mode of release, and effect of the release, naturally receive their principal treatment under various specific titles of the law. A number of instances of the application of the principles of release are collected under the following subdivisions of this section:

a. RELEASE OF MORTGAGEE'S INTEREST IN MORTGAGED PROPERTY.[6]

b. RELEASE OF OTHER LIENS.[7]

c. RELEASE OF DOWER.—See DOWER, vol. 5, pp. 884, 912–915.

d. RELEASE OF LEASES.—See LEASE, vol. 12, pp. 974, 1020, 1032, 1038.

e. RELEASE OF SURETY.—See SURETYSHIP.

f. RELEASE OF GUARANTORS.—See GUARANTY, vol. 9, pp. 67, 68, 80–84.

1. Edmonds *v.* Crenshaw, 14 Pet. (U. S.) 166; Murray *v.* Blatchford, 1 Wend. (N. Y.) 583; 19 Am. Dec. 537.

2. Smith *v.* Whiting, 9 Mass. 334.

3. People *v.* Keyser, 28 N. Y. 235; 84 Am. Dec. 338; Swartz *v.* Leist, 13 Ohio St. 425; Dayton *v.* Dayton, 7 Ill. App. 136; Weir *v.* Mosher, 19 Wis. 311; Story *v.* Kemp, 51 Ga. 399; Griffin *v.* Lovell, 42 Miss. 402; Murray *v.* Blatchford, 1 Wend. (N. Y.) 583, 19 Am. Dec. 537.

And see generally JOINT EXECUTORS AND ADMINISTRATORS, vol. 11, p. 1016.

4. Brands *v.* De Witt, 44 N. J. Eq. 545; 6 Am. St. Rep. 909; Curtis *v.* Curtis, 40 Me. 24; 63 Am. Dec. 651. See Reigart *v.* Ellmaker, 14 S. & R. (Pa.) 121; Crum *v.* Sawyer, 132 Ill. 443. See Trull *v.* Eastman, 3 Met. (Mass.) 121; 37 Am. Dec. 126; Ege's Appeal, 3 Watts (Pa.) 495; Rapp *v.* Rapp, 6 Pa. St. 45; Daniels *v.* Pratt, 143 Mass. 216. *Compare* CATCHING BARGAIN, vol. 3, p. 37.

5. Brooks *v.* First Presbyterian Church, 128 Pa. St. 408.

6. See CHATTEL MORTGAGES, vol. 3, p. 201; MORTGAGES, sub. titles, *Tender and Payment, and Entry on Record of Satisfaction of Mortgage*, vol. 15, pp. 872–878. See also TRUST DEEDS.

Effect of Forged Release.—A forged release is ineffectual for releasing a mortgage, even if recorded, and to counteract it, the mortgagee need only give true information when asked about it. Chandler *v.* White, 84 Ill. 435; Meley *v.* Collins, 41 Cal. 663; 10 Am. Rep. 279.

7. See LIENS, vol. 13, pp. 574, 621; MECHANICS' LIENS, vol. 15, pp. 1, 11, 113, 116, 188; ATTACHMENT, vol. 1, pp. 894, 931; EXECUTION, vol. 7, pp. 117, 157; GARNISHMENT, vol. 8, pp. 1096, 1249, 1250, 1251; HOMESTEAD, vol. 9, pp. 423, 478; JUDGMENT, vol. 12, p. 58;

g. RELEASE OF OBLIGORS ON BONDS.—A release of one of several joint obligors operates as a release of all,[1] unless, it is held, it appears from the release, or the circumstances and relations of the parties, that it cannot reasonably be said to have been so intended,[2] and this is a question for the jury.[3] Where one joint obligor is released by operation of law, and by no act of, and without the consent of obligee, it does not release the others,[4] and a covenant not to sue one of two obligors does not release the other.[5] A receipt under seal by obligee to joint obligor, "in full satisfaction for his liability" releases a co-obligor, if the receipt does not itself show a contrary intention.[6]

h. RELEASE OF INDORSERS OF NEGOTIABLE PAPER.—The indorser of negotiable paper is released by payment,[7] by release,[8] by extension of time to maker,[9] by alteration of indorsement.[10] But an assignment of the maker does not necessarily release the indorser, though its benefits are accepted by the creditor.[11] The holder's release to a joint maker from all liability except such as he is under to the indorser cannot avail the indorser when sued by holder.[12]

LANDLORD AND TENANT, vol. 12, p. 658.

1. Evans *v.* Pigg, 3 Coldw. (Tenn.) 395; Crane *v.* Alling, 15 N. J. L. 423; Walker *v.* McCulloch, 4 Me. 421; Cornell *v.* Masten, 35 Barb. (N. Y.) 157; Booth *v.* Campbell, 15 Md. 569; Heckman *v.* Manning, 4 Colo. 543; Myrick *v.* Dame, 9 Cush. (Mass.) 248. A release by the parties in a replevin suit, of all right to the property and interest in the suit to a joint obligor in replevin bond, releases all obligors. Taylor *v.* Galland, 3 Greene (Iowa) 17.

2. Bonney *v.* Bonney, 29 Iowa 448; Neligh *v.* Bradford, 1 Neb. 451; Richardson *v.* McLemore, 5 Baxt. (Tenn.) 586; Hale *v.* Spaulding, 145 Mass. 482; 1 Am. St. Rep. 475.

3. Richardson *v.* McLemore, 5 Baxt. (Tenn.) 586.

4. Ward *v.* Johnson, 14 Mass. 148; Tooker *v.* Bennett, 3 Cai. (N. Y.) 4.

5. Crane *v.* Alling, 15 N. J. L. 423; Walker *v.* McCullock, 4 Me. 421. See Bozsman *v.* State Bank, 7 Ark. 328; 46 Am. Dec. 29. Where several are jointly liable, a covenant not to sue one of them does not release the others. Catskill Bank *v.* Messenger, 9 Cow. (N. Y.) 37; Durell *v.* Wendell, 8 N. H. 369: Shed *v.* Pierce, 17 Mass. 623; Mason *v.* Jouett, 2 Dana (Ky.) 107; Carondelet *v.* Desnoyer, 27 Mo. 36.

6. Hale *v.* Spaulding, 145 Mass. 482; 1 Am. St. Rep. 475.

7. 2 Randolph on Com. Paper, § 772. But receiving part payment from indorser and releasing him does not release the principal debtor from the remainder. Commercial Bank *v.* Cunningham, 24 Pick. (Mass.) 270; 35 Am. Dec. 322.

8. Story on Promissory Notes, § 423; Farmers' Bank *v.* Blair, 44 Barb. (N. Y.) 641; unless the rights are expressly reserved. 2 Randolph on Com. Paper, § 769. *Examine* Guynemer *v.* Lopez, 11 Rich. (S. Car.) 199.

9. 2 Parsons on Bills and Notes, 242; Hall *v.* Cole, 4 A. & E. 577; Whiting *v.* Western Stage Co., 20 Iowa 555; Hamilton *v.* Prouty, 50 Wis. 592; 36 Am. Dec. 866. Requisites of binding extension. Kittle *v.* Wilson, 7 Neb. 76; Costello *v.* Wilhelm, 13 Kan. 229.

10. See BILLS AND NOTES, vol. 2, p. 313.

A material alteration in the indorsement on negotiable paper, although innocently done, without indorser's knowledge, releases him. Davis *v.* Eppler, Kan. 629.

11. Gloucester Bank *v.* Worcester, 10 Pick. (Mass.) 528. *Compare* Pierce *v.* Parker, 4 Met. (Mass.) 80. But the assignment of the indorser does not release the maker of notes for his accommodation merely, where creditor had no notice of this fact. Commercial Bank *v.* Cunningham, 24 Pick. (Mass.) 270; 35 Am. Dec. 322.

12. Stewart *v.* Eden, 2 Cai. (N. Y.)

i. RELEASE OF PLEDGE.—See PLEDGE, vol 18, p. 585.

j. RELEASE OF INSURANCE.[1]

k. RELEASE OF GUARDIANS.—See GUARDIAN AND WARD, vol. 9, pp. 85, 151, 152.

l. RELEASE OF TRUSTEES—(See also TRUSTS).—A *cestui que trust*, cannot be bound by a release given his trustee in ignorance of his rights, or if obtained from him by false representations or undue influence.[2] A general release by trustee in fraud of his trust is wholly invalid.[3] An assignment of debtor does not carry with it property held in trust that can be distinguished.[4]

m. RELEASE OF RECEIVERS.—See RECEIVERS.

n. RELEASE BY PAYMENT.—See PAYMENT, vol. 18, p. 148.

o. RELEASE BY TENDER.—See TENDER.

p. RELEASE BY ESTOPPEL—(See also ESTOPPEL, vol. 7, p. 1).—When an officer having attached property on a writ that may be served by attachment or arrest, is induced to abandon the attachment by false representations of the defendant that the property is not his, and therefore he serves the writ by arresting him, the defendant is estopped in a subsequent action by himself against the officer for false imprisonment, to say that his property was attached.[5] Some conveyances operate as an estoppel against those who make them. Others have no effect beyond releasing the present interest of the releasor. Others are an estoppel by reason of covenants therein.[6] And when a chattel mortgagee stands by and sees the mortgagor sell the mortgaged property to another without asserting his mortgage when asked to fix the value of the goods, he is estopped to claim under his mortgage.[7]

q. RELEASE BY ACT OF PARTIES.—The act of a party may operate as a release, as where he voluntarily destroys the evi-

121; 2 Am. Dec. 222. See generally BILLS AND NOTES, vol. 2 pp. 313, 362, 363, 364, 367, 387, 407, 412.

1. See INSURANCE, vol. 11, p. 278; ACCIDENT INSURANCE, vol. 1, p. 87; BENEFICIAL ASSOCIATIONS, vol. 2, p. 171; GUARANTY INSURANCE, vol. 9, p. 65; FIRE INSURANCE, vol. 7, p. 1007; LIFE INSURANCE, vol. 13, p. 629; MARINE INSURANGE, vol. 14, p. 319; MUTUAL INSURANCE, vol. 16, p. 16.

2. 3 Wait's Actions and Defenses, 471, and cases cited; Larrabee *v.* Sewall, 66 Me. 376; 1 Story's Eq. Jur. (13th ed.) 234 and 163.

3. Manning *v.* Cox, 7 Moore 617.

4. Chesterfield Mfg. Co. *v.* Dehon, 5 Pick. (Mass.) 7. See generally TRUSTS.

5. Ladrick *v.* Briggs, 105 Mass. 508; *citing* Wallis *v.* Truesdell, 6 Pick. (Mass.) 455; Dewey *v.* Field, 4 Met. (Mass.) 381; 38 Am. Dec. 376. And it is immaterial that the property was still in the officer's custody at the time of the arrest if he releases it within a reasonable time. Ladrick *v.* Briggs, 105 Mass. 508. As to releases which operate as estoppels, see 2 Herman on Estoppel, p. 827, § 695.

6. Herman on Estoppel, §§ 648, 649. Defendant was sued for damages to plaintiff's person and crops by noxious gases from defendant's factory, the action was settled, and, for a valuable consideration under seal covenanted not to sue for future damages from same cause. *Held*, this estopped a suit for an injunction. Kennerty *v.* Etiwan Phosphate Co., 17 S. Car. 411; 43 Am. Rep. 607.

7. Kane Co. *v.* Herrington, 50 Ill. 232. For a full discussion of the law of estoppel as applied to mortgages and equivalent to a release thereof, see 2 Herman on Estoppel, p. 1051, §§ 928, 929 and cases cited. See generally ESTOPPEL, vol. 7, p. 1.

dence of the indebtedness,[1] or where he delivers it to the debtor intending thereby to release the debt,[2] or by an agreement to do some act, carried out.[3] It is held that when A releases C under seal of all causes of action this precludes A from suing B, if the action is the same against both.[4]

2. Realty, Right, Title and Interest In—*a.* RELEASE.—A release at common law was a discharge or a conveyance of a man's right in lands or tenements, to another that had some former estate in possession. It was a secondary or derivative conveyance which presupposed some other conveyance precedent, and served to enlarge, confirm, alter, restrain, restore, or transfer the interest granted by such original conveyance.[5] The words generally used in the release were "remised, released, and forever quitclaimed."[6] The technical principles relating to a release are not generally applicable in this country.[7] Instances of the release of claims against realty will be found in the notes.[8]

1. Booth *v.* Smith, 3 Woods (U. S.) 19.

2. Vanderbeck *v.* Vanderbeck, 30 N. J. Eq. 265.

3. But the agreed act must be done, before the agreement operates as a release. Terre Haute etc. R. Co. *v.* Flanigan, 94 Ind. 336.

4. Leddy *v.* Barney, 139 Mass. 394. A release to a purchaser at a marshal's sale by judgment debtor who holds two titles to the estate conveys both titles to the purchaser. Dexter *v.* Harris, 2 Mason (U. S.) 531. See *supra*, this title, *Express Releases.*

5. 2 Bl. Com., 324; Martindale on Conv., § 49; Willard Real Prop. & Conv. (2nd ed.) 436; Burton Real Prop., 15; Shep. Touch. 320; 2 Washb. Real Prop., 606; Tiedeman on Real Prop., § 773; Devlin on Deeds, § 16; Poor *v.* Robinson, 10 Mass. 131.

For an account of lease and release, as an original mode of conveyancing, operating under the Statute of Uses, see REAL PROPERTY. See also 4 Kent Com., 494; Deane's Princ. of Com., 304.

In every case it was necessary that there should be an actual privity of estate at the time, between the releasor and releasee, who must have an estate actually vested in him capable of enlargement. 2 Bl. Com. 325; Benton on Real Prop., 15; Willard Real Prop. & Conv. (2nd ed.) 436; Branham *v.* Mayor etc. of San Jose, 24 Cal. 606; Kerr *v.* Freeman, 33 Miss. 292; Day *v.* Jackson, 5 Mass. 237; Reformed etc. Dutch Church *v.* Veeder, 4 Wend. (N. Y.) 494; Branham *v.* Mayor etc. of San Jose, 24 Cal. 585.

Releases inured either: 1. By way of enlarging an estate. 2. By way of passing an estate. 3. By way of passing a right. 4. By way of extinguishment. 5. By way of entry and feoffment. 2 Bl. Com. 324; Willard Real Prop. and Conv. (2nd ed.) 436.

For a discussion of lease and release, as a mode of conveyancing under the Statute of Uses, see REAL PROPERTY.

6. Litt., § 445; 2 Bl. Com. 324; Bouvier Inst., § 2070; Willard Real Prop. & Conv., (2nd. ed.) 436; Martindale Conv., § 49.

7. 1 Bouv. Inst., § 2070; Hall *v.* Ashby, 9 Ohio 96; 34 Am. Dec. 4, 24; Doe *v.* Reed, 5 Ill. 117.

This was the usual mode of conveyance in *England* down to the year 1841, because it did not require the trouble of enrollment. It was the mode universally in practice in *New York*, until 1788. The revision of the statute law of the State at that period, removed all apprehension of the necessity of enrollment of deeds of bargain and sale, and left that short and plain mode of conveyance to its free operation. The consequence was, that the conveyance by lease and release which required two deeds or instruments instead of one. fell immediately into total disuse. 4 Kents Com. 494.

8. Where a release is given to one in possession of land, whether right or wrong, Everenden *v.* Beaumont, 7 Mass. 76. A release of damages to crops from gas from factory, and a

b. QUITCLAIM.—The conveyance by quitclaim deed is somewhat like a release at common law. The words which are effective in it are the same as in a release, "release, remise, and quitclaim."[1]

covenant not to sue under seal for a consideration for future damages, estops an injunction. Kennerty *v.* Etiwan Phosphate Co., 17 S. Car. 411; 43 Am. Rep. 607. A release of land to one in possession of it by right or wrong, if made by one having a right to it, will pass the right. Poor *v.* Robinson, 10 Mass. 131.

A release to one out of possession, if for a valuable consideration, will be held to be any lawful conveyance that might pass the estate. Russell *v.* Coffin, 8 Pick. (Mass.) 143; Pray *v.* Pierce, 7 Mass. 381; 5 Am. Dec. 59. *Compare* Mayo *v.* Libby, 12 Mass. 339.

8 Bacon's Abridgment, 260, tit. Releases by Way of *Miller le Droit.* Where the owner of land was disseised and his entry tolled by the descent cast, held, he could release his right of action without words of inheritance. Shinn *v.* Holmes, 25 Pa. St. 142; Flag *v.* Mann, 2 Sumn. (U. S.) 487; see also Watrous *v.* Southworth, 5 Conn. 305; Kennebec Purchase *v.* Springer, 4 Mass. 416.

A release of shares in a turnpike corporation will be construed as a grant in order to carry on the intention of the parties. Hastings *v.* Blue Hill Turnpike Co., 9 Pick. (Mass.) 80.

It is said that tenants in common cannot release to each other and enlarge an estate. Co. Litt. 9, 200. Yet it is held that where mutual releases are agreed upon for partition, the agreement will be enforced in equity after the partition. Jones *v.* Carter, 4 Hen. & M. (Va.) 184; White *v.* Sayre, 2 Ohio 110. And it is held that when tenants in common own both sides of a stream, and appropriate the water for mills, and afterwards one of them releases the mills, that that passes his right to the water. Wetmore *v.* White, 2 Cai. Cas. (N. Y.) 87; 2 Am. Dec. 323.

A grantee by releasing his grantor from liability on a covenant of warranty, does not interfere with his own title. Dawley *v.* Rugg, 35 Hun (N. Y.) 143.

Where one person hired a marsh, mowed it, and took away the hay, but had no other possession, afterwards took a release of the land, it was held his possession was enough to make the release effective. Thacher *v.* Cobb, 5 Pick. (Mass.) 423.

When a release is sufficiently worded in discharging a railroad company of all liability for damages in the "construction thereon of the said railroad and works connected therewith," it will release the railroad company from damages caused by water from a culvert existing at the time the release is given. Hoffeditz *v.* Southern Pa. R. etc. Co., 129 Pa. St. 264. See farther, Updegrove *v.* Pennsylvania etc. R. Co., 132 Pa. St. 540.

But a release of damages to land of releasor by building railroad on it, is not a release of damage to the land not taken by building of the road on another's land. Eaton *v.* Boston etc. R. Co., 51 N. H. 504.

1. A quitclaim deed which simply employed the words "remise, release and forever quitclaim" was held to contain sufficient operative words of conveyance. Wilson *v.* Albert, 89 Mo. 537; Martindale's Conv., § 59.

Where the words, "bargain, sell and quitclaim" are employed, they operate not merely to release, but to transfer any interest which the grantor possesses at the execution of the deed. Touchard *v.* Crow, 20 Cal. 150; 81 Am. Dec. 108.

A deed which "grants, bargains and sells all the right, title and interest" of the grantor is a quitclaim conveyance. Butcher *v.* Rogers, 60 Mo. 138. And notwithstanding the deed contains the words grant, bargain, sell, etc., it may be a quitclaim deed. Wade *v.* Howard, 6 Pick. (Mass.) 492.

An instrument by which the owner of a school-land certificate released and forever quitclaimed the land to the grantee was held a quitclaim deed, notwithstanding the omission of the word remise. Wholey *v.* Cavanaugh, 88 Cal. 132. See 3 Washb. Real Prop. *608.

In Fash *v.* Blake, 38 Ill. 367, the words "assign, transfer and set over" were held sufficient, and equal in potency to "release and forever quitclaim;" further, that "a deed of release and quitclaim, containing no words of

A quitclaim deed is a primary conveyance, in which the grantor does not warrant against a paramount or adverse title, but only against himself and those who claim under him,[1] and the grantee takes the risk of an imperfection in the title, unless some fraud has been practiced upon him.[2]

Though at common law, a deed of release made to one who had neither an estate in, nor the possession of the land would have been void, yet in this country the deed of quitclaim has by long-established practice been held as effective to pass the title to land as any other conveyance.[3] The effect of a conveyance by quitclaim is at present generally regulated by statute.[4]

sale or conveyance, is as effectual for the purpose of transferring title to land as a formal deed of bargain and sale." See, however, Johnson *v.* Bantock, 38 Ill. 111.

1. A release is considered as a primary conveyance in *Connecticut*, and passes all the right of the releasor to the releasee, provided no other person be in possession adversely. It operates as a conveyance without warranty. Dart *v.* Dart, 7 Conn. 250. As a conveyance it is of as much force as a warranty deed, differing from it chiefly in the superadded covenants of the warranty deed, which may operate, by way of estoppel, upon a future-acquired interest, or may secure the covenantee against a bad or defective title. Sherwood *v.* Barlow, 19 Conn. 471.

In Hall *v.* Ashby, 9 Ohio 96, the court regarded a release as a substantive mode of conveyance, adopted equally with the deed of quitclaim, where land is intended to be conveyed without warranting the title. See also Doyle *v.* Knapp, 4 Ill. 334.

But the mere absence of a covenant of warranty does not constitute a quitclaim deed. Taylor *v.* Harrison, 47 Tex 454.

2. Snyder *v.* Laframboise, 1 Ill. 343; 12 Am. Dec. 187; Doyle *v.* Knapp, 4 Ill. 334; Owings *v.* Thompson, 4 Ill. 502; Slack *v.* McLagan, 15 Ill. 242; Stookey *v.* Hughes, 18 Ill. 55; Sheldon *v.* Harding, 44 Ill. 68; Botsford *v.* Wilson, 75 Ill. 132; Chaffin *v.* Chaffin, 4 Gray (Mass.) 280; Coe *v.* Persons Unknown, 43 Me. 432.

A party accepting a quitclaim deed of land runs the risk of an imperfection in the title. And if it fails he cannot recover the purchase money, unless he can show fraud in the sale, or unless the title fails for want of authority in the person who makes the deed to act in the capacity in which he professes to act. Snyder *v.* Laframboise, 1 Ill. 344; 12 Am. Dec. 187; Earle *v.* Bickford, 6 Allen (Mass.) 549; 83 Am. Dec. 651.

Money paid for a quitclaim deed, in the absence of fraud cannot be recovered back. Kellogg *v.* Stockwell, 75 Ill. 68. See also Botsford *v.* Wilson, 75 Ill. 132.

3. Hoyt *v.* Ketcham, 54 Conn. 60; Doe *v.* Reed, 5 Ill. 117; Rowe *v.* Beckett, 30 Ind. 154; 95 Am. Dec. 676; Thornton *v.* Mulquinne, 12 Iowa 549; 79 Am. Dec. 548; Pray *v.* Pierce, 7 Mass. 381; 5 Am. Dec. 59; Russell *v.* Coffin, 8 Pick. (Mass.) 143; Foster *v.* Dennison, 9 Ohio 121.

If the grantor has in fact a good title his deed of quitclaim conveys his title and estate as effectually as a deed of warranty. Kyle *v.* Kavanagh, 103 Mass. 356; 4 Am. Rep. 560.

Where the grantee of land, in a deed with warranty from a person having no title, entered upon land, and afterwards the grantor took a release from the owner, the release was held to operate as a confirmation of the first grantee's title, though neither the releasor nor releasee were in possession at the time of the release. Oakes *v.* Marcy, 10 Pick. (Mass.) 195.

A quitclaim deed conveys the title in fee simple, if the grantor has such title, and does not imply any precedent interest or easement in the releasee. Spaulding *v.* Bradley, 79 Cal. 449.

A release is one out of possession, if for valuable consideration, will be held to be any lawful conveyance that might pass the estate. Russell *v.* Coffin, 8 Pick. (Mass.) 143; Pray *v.* Pierce, 7 Mass. 381; 5 Am. Dec. 59. *Compare*, Mayor *v.* Libby, 12 Mass. 339.

4. In many States a quitclaim has the effect of a bargain and sale. These are *Florida*, *Massachusetts*, *Maine*,

A quitclaim deed is held sufficient to pass whatever title the grantor has, whether legal or equitable, independent of any interest having previously been vested in the grantee or other person,[1] it being the intention of the grantor to devest himself of all the interest that he has at the time; a subsequently acquired

Indiana, Michigan, Minnesota, Mississippi, Oregon, Wisconsin, Wyoming. Kyle *v.* Kavanagh, 103 Mass. 356; 4 Am. Rep. 560; Strong *v.* Lynn, 38 Minn. 315. In *New York* deeds of bargain and sale are continued in use and deemed grants. Jackson *v.* Fish, 10 Johns. (N. Y.) 456; Lynch *v.* Livingston, 6 N. Y. 422. In *Kentucky, Virginia* and *West Virginia* a deed of release is effectual without first executing the lease, and in *Wyoming* the word release is unnecessary in such a deed and a simple quitclaim is effectual. Deeds of bargain and sale and other conveyances "heretofore made and executed according to former laws and usages" remain valid and effectual in *Vermont.* Deeds of bargain and sale, lease and release are recognized as valid in *Rhode Island.* Stimson's Stat. Law, § 1472.

In *Ohio* a deed of release and quitclaim is effectual for the purpose of transferring title, as a deed of bargain and sale. Doe *v.* Reed, 5 Ill. 117, and see Brown *v.* Banner Coal etc. Co., 97 Ill. 214, 37 Am. Rep. 105.

See also BARGAIN AND SALE, vol. 2, p. 124.

1. Martindale on Conv., § 59. Farmers' L. & T. Co. *v.* McKinney, 6 McLean (U. S.) 1; VanRensselaer *v.* Kearney, 11 How. (U. S.) 297; Kountz *v.* Davis, 24 Ark. 590; Sullivan *v.* Davis, 4 Cal. 291; Touchard *v.* Crow, 20 Cal. 150; 81 Am. Dec. 108; Downer *v.* Smith, 24 Cal. 114; Carpentier *v.* Williamson, 25 Cal. 154; Dart *v.* Dart, 7 Conn. 250; Sherwood *v.* Barlow, 19 Conn. 471; Smith *v.* Pendell, 19 Conn. 107; 48 Am. Dec. 146; Butterfield *v.* Smith, 11 Ill. 485; Hamilton *v.* Doolittle, 37 Ill. 473; Rowe *v.* Beckett, 30 Ind. 154; 95 Am. Dec. 676; Thornton *v.* Mulquinne, 12 Iowa 549; 79 Am. Dec. 548; Young *v.* Clippinger, 14 Kan. 148; Carll *v.* Butman, 7 Me. 102; Dorkray *v.* Noble, 8 Me. 287; Wade *v.* Howard, 6 Pick. (Mass.) 492; Hope *v.* Stone, 10 Minn. 141; Gesner *v.* Burdell, 18 Minn. 497; Benton *v.* Nicoll, 24 Minn. 221; Broadwell *v.* Merrett, 87 Mo. 95; Emmel *v.* Headlee (Mo. 1888), 7 S. W. Rep. 22; Durnherr *v.* Rau (Supreme Ct.), 15 N. Y. Supp. 344; Smith *v.* Pollard, 19 Vt. 272.

A plaintiff in an action of ejectment was held to show no title by proof of a quitclaim deed from his grantor before such grantor had himself acquired title. Abel *v.* Brewster, 58 Hun (N. Y.) 605.

Where the grantor had no title to convey in the premises, no title not then *in esse* can pass. McCrackin *v.* Wright, 14 Johns. (N. Y.) 193.

By a deed, which from its terms, conveyed only the right, title and interest of the grantor, the grantor was not held to obtain anything which the grantor had previously parted with. Walker *v.* Lincoln, 45 Me. 67. Such a grant in a deed did not convey the land itself nor any particular estate in it, but the grantor's right, title and interest in it alone. Coe *v.* Persons Unknown, 43 Me. 432.

If it appears that the intention of the grantor was to convey the land itself and not merely a right, title or interest in the land, the deed is not a quitclaim deed in the peculiar sense of the term. Garrett *v.* Christopher, 74 Tex. 453.

In Patterson *v.* Snell, 67 Me. 559, it was held that a quitclaim deed of all the grantor's "right, title, and interest in and to all the real estate situated in the town of V of which my late father was seised at the time of his decease" was sufficient in its terms and furnished a description sufficiently precise to convey whatever estate the grantor had in lands in V as heir of his father.

Where one in possession of lands, without title, conveyed them by quitclaim deed, this was held to pass a possessory title and nothing more. Jackson *v.* Hubble, 1 Cow. (N. Y.) 613.

A quitclaim deed executed by executors as such, only conveyed such an interest as they as executors had power to convey, and did not pass any interest which the executors owned individually although they had no interest to convey as executors. Price *v.* King, 44 Kan. 639.

A quitclaim is *prima facie* a conveyance sufficient to entitle grantee to maintain ejectment. Robinson *v.* Calahan, 91 Ala. 479.

While a quitclaim deed is as effect-

title, however, will not pass by quitclaim deed, but will inure to the grantor.[1]

ual to pass a title as a deed of bargain and sale, still like all other contracts, it must be expounded and enforced according to the intention of the parties, so as to pass only such land as would be properly embraced in the language used. Hamilton *v.* Doolittle, 37 Ill. 473.

A quitclaim deed of all the grantor's right, title, and interest in the land, recited as being three undivided fifths, conveys the grantor's entire interest, although it was four instead of three undivided fifths. Moran *v.* Somes, (Mass. 1891) 28 N. E. Rep. 152.

A conveyance of an equitable contingent remainder by quitclaim deed will be sustained in equity, on the ground that it is good against the grantor as an executory contract. Wilcox *v.* Daniels, 15 R. I. 261.

A release of an equitable estate in lands can only be proved by a deed of conveyance in writing subscribed by the party granting the same. Millard *v.* Hathaway, 27 Cal. 119.

A quitclaim deed from the trustee to the grantor reinvests the grantor with the legal estate, and divests the trustee of it. Huskabee *v.* Billingsly, 16 Ala. 414; 50 Am. Dec. 183.

In Kerr *v.* Freeman, 33 Miss. 292, it was held that a quitclaim deed itself implies a doubtful title, in the party who executes it, and such being its operation, it cannot be treated as passing anything more than a doubtful title.

A quitclaim deed may operate as a discharge of a mortgage. Wade *v.* Howard, 6 Pick. (Mass.) 492.

Where the purchaser of an equity of redemption afterwards took a deed of release and quitclaim from the mortgagee, this was held to be no extinguishment of the mortgage, but only an assignment of the title of the mortgagee. Carll *v.* Butman, 7 Me. 102.

Where land is conveyed in mortgage and no separate obligation is given for payment of the money, a deed of quitclaim and release of the land, from the mortgagee to a stranger, is sufficient to assign the mortgage, and all his rights and interests under it. Dorkray *v.* Noble, 8 Me. 287.

1. Frink *v.* Darst, 14 Ill. 304; Simpson *v.* Greeley, 8 Kan. 586; Bruce *v.* Luke, 9 Kan. 201; 12 Am. Rep. 491; Ott *v.* Sprague, 27 Kan. 620; Johnson *v.* Williams, 37 Kan. 179; Miller *v.* Ewing, 6 Cush. (Mass.) 34; Comstock *v.* Smith, 13 Pick. (Mass.) 116; Fay *v.* Wood, 65 Mich. 390; Smith *v.* Washington, 88 Mo. 475; Butcher *v.* Rogers, 60 Mo. 138; Kimball *v.* Blaisdell, 5 N. H. 535; Bell *v.* Twilight, 26 N. H. 401; Jackson *v.* Hubble, 1 Cow. (N. Y.) 613; Woodcock *v.* Bennet, 1 Cow. (N. Y.) 711; 13 Am. Dec. 568; Smith *v.* Pollard, 19 Vt. 272.

By an act of 1825 regulating conveyances, a quitclaim deed is not sufficient to transfer to grantee the legal title subsequently acquired by the grantor. Bogy *v.* Shoab, 13 Mo. 365.

If a party having the equitable title to land, and being entitled to the legal title, conveys the same by a quitclaim deed, and subsequently acquires the legal title, it will inure to his grantee. Thus the issuing of the patent to W six days after he had executed a quitclaim deed, and his receipt of it, was not the acquisition by him of a new title. It was only in consummation of and in the completion of the title which he had previously conveyed by quitclaim. Welch *v.* Dutton, 79 Ill. 465.

A deed of quitclaim made before but acknowledged subsequently to the date of the title of grantor, would under certain circumstances, be good, on the supposition that the transaction was *bona fide*, the intention being to make a valid deed. Farmer's L. & T. Co. *v.* McKinney, 6 McLean (U. S.) 1.

It will convey land thereafter patented, if the grantor has already bought and paid for it, and obtained a land office certificate that passes everything but the formal title. Frost *v.* Missionary Soc., 56 Mich. 62; Wholey *v.* Cavanaugh, 88 Cal. 132.

A quitclaim deed made by a settler after he has entered a claim but prior to the grant of a United States patent to him, will after the granting of the patent, be held to have passed the legal title as of the date of its execution. Callahan *v.* Davis, 90 Mo. 78.

An ordinary quitclaim deed for certain specifically described land, given by appellee to his grandfather, affords no evidence of an intention on the part of the grantor to release an expected inheritance from the grantee. Long *v.* Long, 118 Ill. 638.

Deeds given by public officers, such as sheriffs, administrators, etc., to purchasers at judicial sales, belong to the class of quitclaim deeds, and the purchaser takes only such interest as the debtor or decedent actually has.[1]

Unless there are particular words limiting the conveyance, covenants running with the land will pass by quitclaim deed.[2]

Whether the grantee under a quitclaim deed is a purchaser within the operation of the recording acts, and whether one taking under a quitclaim deed must, from the very form of the instrument, be deemed to have notice of the prior conveyance, are much disputed questions.[3]

3. **Personalty.**—The most effective way to release personal property is to transfer the possession to the releasee, yet, where one out of possession compromises, or in any other way settles his claim upon the property, he may give a release thereof.[4]

4. **Personal Claims**—*a.* DEBTS.—A mere voluntarily declared intention of a creditor to release his debtor is not an equitable release.[5] Where a debtor surrenders all his property to the use of his creditors, and they covenant to receive it in full of all demands and to release him from all further claims, there is a present release.[6]

A quitclaim deed where it contains a covenant for further assurance, will convey a subsequently acquired title as well as a covenant of warranty. Bennett *v.* Waller, 23 Ill. 97. And a quitclaim deed which contains the words "grant, bargain and sell" which are by statute declared to be an express covenant to the grantee, that the grantor was seised of an indefeasible estate of inheritance in fee simple was held to pass an after acquired title to the grantee. D'Wolf *v.* Haydn, 24 Ill. 525.

1. Love *v.* Jones, 4 Watts (Pa.) 465; Ennis *v.* Leach, 1 Ired. Eq. (N. Car.) 416; Wilson *v.* Cochran, 14 N. H. 397; Dwight *v.* Newell, 3 N. Y. 185; Osterman *v.* Baldwin, 6 Wall. (U. S.) 119; Evans *v.* Dendy, 2 Spears (S. Car.) 9; 42 Am. Dec. 356; White *v.* Brocaw, 14 Ohio St. 339.

2. Bradley *v.* Spurck, 27 Ill. 478; Morgan *v.* Clayton, 61 Ill. 35.

3. See NOTICE, vol. 16, p. 833; RECORDING ACTS.

4. Law *v.* Bentley, 25 Ill. 52.

In this case a distress for rent was levied on goods, then they were replevied, after which the matter was compromised and a release given to the tenant, discharging him from all claims and liabilities for rent provided for in the lease. *Held*, that the release related only to such rents as had accrued up to time of settlement.

An execution creditor gave to the sheriff an indemnifying bond to obtain a levy of execution; the bond recited a levy on all the stock and was to any claimant of the property, etc. A claimant of the goods levied on released the execution creditor. *Held*, that there could be no claim against the sheriff for an excessive levy, as the release of the execution creditor released the sheriff also. Atwood *v.* Brown, 72 Iowa 723.

5. Irwin *v.* Johnson, 36 N. J. Eq. 347.

6. Tuckerman *v.* Newhall, 17 Mass. 581. But a release of all claims on a debtor for the debt does not release a subsisting lien for the same debt, unless so intended. Pierce *v.* Sweet, 33 Pa. St. 151. If the creditor releases one of two jointly bound, with a proviso that the other shall not take advantage of it, the proviso is void. Rice *v.* Webster, 18 Ill. 331.

A and B dissolved partnership. A took B's obligation to pay all the firm debts. D, one of the creditors of the firm, signed with B as his surety to A. *Held*, that this released A from D's claim upon him as a joint debtor with B. McNeal *v.* Blackburn, 7 Dana (Ky.) 170.

A release from one of several joint creditors to their debtor is valid and binding on all.[1]

The general rule is that part payment of a debt does not release the debtor, even though the creditor agrees that it shall have that effect.[2]

The general rule is that a release of one of several joint debtors, or joint and several debtors, is a release of all.[3] Yet there is a tendency on the part of the courts at the present time, in some of the States, to make this rule bend to the intention of the parties.[4] And, to come strictly within the rule, the release

1. Hall *v.* Gray, 54 Me. 230; Myrick *v.* Dame, 9 Cush. (Mass.) 248; Eisenhart *v.* Slaymaker, 14 S. & R. (Pa.) 153; Kimball *v.* Wilson, 3 N. H. 96, 14 Am. Dec. 342. But it does not follow that there is no relief in equity. Upjohn *v.* Ewing, 2 Ohio St. 15. So also a release of a trespasser by one tenant in common is binding on the others. Austin *v.* Hall, 13 Johns. (N. Y.) 286; 7 Am. Dec. 376. See Fitch *v.* Forman, 14 Johns. (N. Y.) 172, even after suit is brought in the absence of fraud a release by one is good. Arton *v.* Booth, 4 Moore, 192; Wild *v.* Williams, 6 M. & W. 490; but where there is fraud it is otherwise. Barker *v.* Richardson, 1 Y. & J. 362. A release by one partner binds the firm. 1 Lindley on Partnership (Ewell) *293, and cases cited; Perry *v.* Jackson, 4 T. R. 519; Bruen *v.* Marquand, 17 Johns. (N. Y.) 58; Morse *v.* Bellows, 7 N. H. 549; 28 Am. Dec. 372; Crutwell *v.* De Rossett, 5 Jones (N. Car.) 263. *Examine* Wells *v.* Evans, 20 Wend. (N. Y.) 251; Wilkinson *v.* Lindo, 7 M. & W. 81; Pierson *v.* Hooker, 3 Johns. (N. Y.) 68, 3 Am. Dec. 467.

2. "It is true that an agreement to accept a less sum, or the actual acceptance, at the place of payment by the terms of the original contract, of a less sum than the amount due is no defense to the debtor. It is, however, said that this rule is entirely technical and not very well supported by reason. Kellogg *v.* Richards, 14 Wend. (N. Y.) 119. Hence we infer that it requires but a slight consideration to support such contracts. While the general rule is as above stated, that a payment of a less sum than the amount due at the place of payment will not discharge the contract, yet if such payment is made or to be made at a place different from that appointed by the contract, this is a sufficient consideration." Jones *v.* Perkins, 29 Miss. 139; 64 Am. Dec. 136, with a valuable note at the end of the case. See generally Warren *v.* Hodge, 121 Mass. 106; Bryan *v.* Brazil, 52 Iowa 350; Lankton *v.* Stewart, 27 Minn. 346; Mordecai *v.* Stewart, 36 Ga. 126; Ryan *v.* Ward, 48 N. Y. 204; 8 Am. Rep. 539; Johnson *v.* Brannan, 5 Johns. (N. Y.) 267.

The plaintiff, at the defendant's request, sent bonds to a bank for collection, instructing the bank to allow a certain sum off if paid at a fixed time. After that the defendant paid a less sum than the bank was authorized to accept, and the bank gave a release. *Held*, that defendant was liable for the balance, it appearing that he knew of the bank's authority. Hammons *v.* Bigelow, 115 Ind. 363.

See generally PAYMENT; DEBTOR AND CREDITOR, vol. 5, pp. 202, 3, 4.

3. American Bank *v.* Doolittle, 14 Pick. (Mass.) 123; Tuckerman *v.* Newall, 17 Mass. 581; Brown *v.* Marsh, 7 Vt. 327; Vandever *v.* Clark, 16 Ark. 331; Elliott *v.* Holbrook, 33 Ala. 659; Rowley *v.* Stoddard, 7 Johns. (N. Y.) 207; Burson *v.* Kincaid, 3 Pa. St. 57; Ayer *v.* Ashmead, 31 Conn. 447; 83 Am. Dec. 154; U. S. *v.* Thompson, Gilp. (U. S.) 614; Crawford *v.* Roberts, 8 Oregon 324; Coonley *v.* Wood, 36 Hun (N. Y.) 559; Campbell *v.* Brown, 20 Ga. 415; Irwin *v.* Scribner, 15 La. Ann. 583; Mitchell *v.* Allen, 25 Hun (N. Y.) 543. *Examine* Dudley *v.* Bland, 83 N. Car. 220; Benjamin *v.* McConnell, 9 Ill. 536; 46 Am. Dec. 474; Taylor *v.* Galland, 3 Greene (Iowa) 17; Booth *v.* Campbell, 15 Md. 569; Cornell *v.* Masten, 35 Barb. (N. Y.) 157. But this is not the rule in equity. State *v.* Matson, 44 Mo. 305.

4. Noble *v.* Burke, 5 Phila. (Pa.) 526; Burke *v.* Noble, 48 Pa. St. 168; Pettigrew Machine Co. *v.* Harmon, 45 Ark. 290; Northern Insurance Co. *v.*

must be a technical one under seal.[1] A release to one partner releases the firm.[2] The release of an infant joint maker of a note after his repudiation of the contract, does not release the other joint maker;[3] nor does an agreement to wait on a joint debtor for his part,[4] nor does the giving by one joint debtor of a note secured by a mortgage, with the agreement that when it is paid it shall be in full of all demands;[5] nor does a promise, on part

Potter, 63 Cal. 157. Where a creditor agreed to save a joint debtor from further payment it was held that the other joint debtors were not thereby released, even if technical words of release were used, it appearing that it was not the intention to release the whole debt. Benton *v.* Mullen, 61 N. H. 125. The holder of a note for a consideration verbally agreed to release one only of the three makers from two-thirds of the debt, and allow him to pay the other third in a certain way. It was held that this released the other two, on payment of the two-thirds, and required the holder to look to his agreement for the other third. Seligman *v.* Pinet, 78 Mich. 50. The release of one joint obligor, in equity, will not be extended beyond justice and the clear intention of the parties. Norris *v.* Ham, R. M. Charlt. (Ga.) 267; Clagett *v.* Salmon, 5 Gill & J. (Md.) 314. One of two or more jointly bound persons may be released by the creditor, and he may preserve his rights against the others with their consent. Campbell *v.* Booth, 8 Md. 107. The release of a joint debtor is sometimes construed into a covenant not to sue him, and in such case the others are not discharged from the debt. Kendrick *v.* O'Neil, 48 Ga. 631. One of several obligors obtained a release, but it showed on its face, in connection with the circumstances, that the parties did not intend to release the co-obligors, and the court was satisfied that the obtaining of the separate release was a scheme to escape the payment of an honest debt. It was construed to be a covenant not to sue, and the others were held liable. Parmelee *v.* Lawrence, 44 Ill. 405. And see Greenwald *v.* Kaster, 86 Pa. St. 45; Bolen *v.* Crosby, 49 N. Y. 183. A receipt under seal by the obligee to a joint obligor "in full satisfaction for his liability" upon the obligation, releases the co-obligors, if the receipt itself does not show a contrary intention. Hale *v.* Spaulding, 145 Mass. 482; 1 Am. St. Rep. 475.

It has been held that, if a creditor releases a joint debtor, with a proviso in the release that the other joint debtors shall not take advantage of his discharge, the proviso is void. Rice *v.* Webster, 18 Ill. 331.

1. Smith *v.* Bartholomew, 1 Met. (Mass.) 276; 25 Am. Dec. 365; Berry *v.* Gillis, 17 N. H. 9; 43 Am. Dec. 584; McAllister *v.* Dennin, 27 Mo. 40; Ayer *v.* Ashmead, 31 Conn. 447; 83 Am. Dec. 154; Armstrong *v.* Hayward, 6 Cal. 183; Frink *v.* Green, 5 Barb. (N. Y.) 455; Shaw *v.* Pratt, 22 Pick. (Mass.) 305; Drinkwater *v.* Jordan, 46 Me. 432. *Examine* Wiggin *v.* Tudor, 23 Pick. (Mass.) 434; Blakey *v.* Blakey, 2 Dana (Ky.) 460; Line *v.* Nelson, 38 N. J. L. 358.

2. Collins *v.* Posser, 1 B. & C. 682; Nicholson *v.* Revill, 4 A. & E. 675; Whitaker *v.* Salisbury, 15 Pick. (Mass.) 534. But this rule does not apply to releases of partners by partners among themselves. Curtis *v.* Monteith, 1 Hill (N. Y.) 356. However, with proper limitations expressed in the release, it may be restricted to one only. Thompson *v.* Lack, 3 C. B. 540; Gray *v.* Brown, 22 Ala. 262; Wood *v.* Goss, 21 Ill. 604; Browning *v.* Grady, 10 Ala. 999; Williams *v.* Hitchings, 10 Lea (Tenn.) 326; Kendrick *v.* O'Neil, 48 Ga. 631. As by an extension of the time of payment to one partner after dissolution of firm. Smith *v.* Sheldon, 35 Mich. 42; 24 Am. Rep. 529. However, it has been held that an unsealed release of a partner for a part payment of a debt to a firm creditor out of the partnership money will not release the firm for the balance. Bemis *v.* Hoseley, 82 Mass. 63.

Releasing J. S. of all actions and causes of action is not a release of an action or a cause of action against a firm of which he is a member. Reading R. Co. *v.* Johnson, 7 W. & S. (Pa.) 317. *Compare* Robinson *v.* McFaul, 19 Mo. 549.

3. Young *v.* Currier, 63 N. H. 419.

4. Pinney *v.* Bugbee, 13 Vt. 623.

5. Tryon *v.* Hart, 2 Conn. 120.

payment by one joint debtor, to look to the other for the remainder.[1] In many of the States this subject is regulated by statute.[2] A judgment against one joint debtor without satisfaction, will not release the other joint debtors.[3] Where a joint obligor is discharged by operation of law without the obligee's consent, this does not release the other joint obligors.[4] The release of one joint debtor from imprisonment on execution releases the other joint debtors.[5] A release by the holder to a joint maker of a note from all liability, except such as he is under to the indorser, is not available to the indorser when the holder sues the indorser.[6] The death of a joint maker of a note, and the receiving of interest afterwards from the surviving joint maker, does not release the decedent's estate.[7]

b. TORTS—(1) *Claims for Personal Injury.*—One who has suffered injury to his person may release any claim for damages on account thereof which he may have against another. The release may operate in favor of private and municipal corporations as well as individuals.[8] A release of this kind, however, is

1. Smith *v.* Bartholomew, 1 Met. (Mass.) 278; 25 Am. Dec. 365; Small *v.* Older, 57 Iowa 326; Rogers *v.* Hemstead, Kirby (Conn.) 44. *Compare* M'Lellan *v.* Cumberland Bank, 24 Me. 566.

2. McCarter *v.* Turner, 49 Ga. 311; Orr *v.* Hamilton, 36 La. Ann. 790; Bolen *v.* Crosby, 49 N. Y. 183. In *Missouri* the statute applies to copartners. Grant *v.* Holmes, 75 Mo. 109. A distinction is made where the obligation is several and not joint, where the statute provides for releasing one joint debtor. Starr *v.* Stiles (Oregon 1888), 19 Pac. Rep. 225. It is held that, where the release of one joint covenantee was unconditional and without any reference to the statute to relieve partners and joint debtors, it did not come within the act, and that the others also were released. Hoffman *v.* Dunlop, 1 Barb. (N. Y.) 185. If it is expressly agreed that the release shall discharge only one, the liability of the others remains, independent of the statute. Northern Ins. Co. *v.* Potter, 63 Cal. 157.

3. McLaurine *v.* Monroe, 30 Mo. 462. But it is held that a joint judgment is released by releasing one of the defendants in it. U. S. *v.* Thompson, Gilp. (U. S.) 614.

4. Ward *v.* Johnson, 13 Mass. 148.

5. Abel *v.* Forgue, 1 Root (Conn.) 502; Gould *v.* Gould, 4 N. H. 173.

6. Stewart *v.* Eden, 2 Cai. (N. Y.) 121; 2 Am. Dec. 222.

7. 3 Randolph Com. Paper, § 1837. And see also, on the general subject, COMPOSITION WITH CREDITORS, vol. 3, p. 385; DEBTOR AND CREDITOR, vol. 5, p. 202.

8. Chapin *v.* Chicago etc. R. Co., 18 Ill. App. 47; Baldwin *v.* New York Central etc. R. Co., 56 N. Y. Super. Ct. 607; Martin *v.* Baltimore etc. R. Co., 41 Fed. Rep. 125; Sobieski *v.* St. Paul etc. R. Co., 41 Minn. 169; Lusted *v.* Chicago etc. R. Co., 71 Wis. 391; Peterson *v.* Chicago etc. R. Co., 36 Minn. 399; Rose *v.* West Philadelphia R. Co. (Pa. 1888), 12 Atl. Rep. 78; Missouri Pac. R. Co. *v.* Brazzil, 72 Tex. 233; Pennsylvania R. Co. *v.* Shay, 82 Pa. St. 198; Chicago etc. R. Co. *v.* Doyle, 18 Kan. 58; Kennerty *v.* Etiwan Phosphate Co., 17 S. Car. 411; 43 Am. Rep. 607; Tompkins *v.* Clay St. R. Co., 66 Cal. 163; Squires *v.* Amherst, 145 Mass. 192; Hobbs *v.* Brush Electric Light Co., 75 Mich. 550; Stuebing *v.* Marshall, 10 Daly (N. Y.) 406; Urton *v.* Price, 57 Cal. 270; Hawes *v.* Burlington etc. R. Co., 64 Iowa 315; 19 Am. & Eng. R. Cas. 220.

The refusal upon the part of a passenger, who has been injured, to pay his fare, and an assent thereto on the part of the carrier, does not amount to a settlement of the passenger's claim of damages for the injury, nor estop the passenger asserting or enforcing such claim. Northwestern Union Packet Co. *v.* Clough, 20 Wall. (U. S.) 528.

scrutinized with great care; to be upheld, it must have been made upon sufficient consideration.[1] If this appears, and there is nothing to show that it was not in all respects a valid legal contract, the release will be an effectual bar to any action for damages.[2] But the injured party must, when he signs the release, have sufficient mental capacity and be made acquainted with its contents, and must intend to sign such an instrument

Nor is the signing of a release and receiving payment for a damaged hat a bar to a suit for personal injury received at the time of the damage to the hat. Roberts *v.* Eastern Counties R. Co., 1 F. & F. 460.

1. Kennerty *v.* Etiwan Phosphate Co., 17 S. Car. 411; 43 Am. Rep. 607; Tomkins *v.* Clay St. R. Co., 66 Cal. 163.

An oral promise to take the injured party again into employment is a sufficient consideration for a release. Hobbs *v.* Brush Electric Light Co., 75 Mich. 550. *Compare* Rose *v.* West Philadelphia R. Co. (Pa. 1888) 12 Atl. Rep. 78. But under a contract stipulating that the measure of damages to an employé for injuries received shall be his regular wages until he is able to work, if not more than six months, an agreement to accept one month's wages in full of all damages, where there is no dispute as to his right to such wages, is without consideration, and will not bar his recovery of wages for a further time during which he is unable to work. Carlton *v.* Western etc. R. Co., 81 Ga. 531. And see Sobieski *v.* St. Paul etc. R. Co., 41 Minn. 169.

Where one during his employment agreed in writing with his employer not to hold him liable for an injury from his negligence, but without agreement as to future employment, or other consideration, this was held not a release, and not to preclude an action for an injury. Purdy *v.* Rome etc. R. Co., 52 Hun (N. Y.) 267; Peterson *v.* Chicago etc. R. Co., 36 Minn. 399.

2. Eccles *v.* Union Pac. R. Co. (Utah), 48 Am. & Eng. R. Cas. 38; Chicago etc. R. Co. *v.* Lewis, 109 Ill. 120; 19 Am. & Eng. R. Cas. 224. Thus, where an employé was a member of a relief association, and in consideration of the railroad company assisting the association, and its guaranty to pay benefits in case of injury, he releases the company from damages for accident while in its employ, such release is a bar to an action by him for injuries received, where it is shown that before bringing suit he obtained money from the association, and gave a receipt releasing the company from all claims. Martin *v.* Baltimore etc. R Co., 41 Fed. Rep. 125. Such a release is not invalid as against public policy. State *v.* Baltimore etc. R. Co., 36 Fed. Rep. 655.

An action under the *New York* Code of 1847, for death caused by the wrongful act of another, cannot be maintained if the claim was settled and paid in the lifetime of the injured party. Dibble *v.* New York etc. R. Co., 25 Barb. (N. Y.) 183.

But taking a release from the person claiming damages is not an admission of any liability by the releasee. Baldwin *v.* New York Cent. etc. R. Co., 56 N. Y. Super. Ct. 607.

A release by a married woman of a right of action for personal injury in the District of Columbia cannot affect her husband's right of action, although by the law of her domicile she had a personal right of action for the injury. Snashall *v.* Metropolitan R. Co. (D. C.), 10 L. R. A. 746.

Where a release is pleaded as an affirmative defense to an action for personal injuries, and it is admitted by the plaintiff, who pleads matter which, if true, avoids it, it is error to instruct the jury that the burden of proof is on the defendant. Hawes *v.* Burlington etc. R. Co., 64 Iowa 315; 19 Am. & Eng. R. Cas. 220.

Release Without Consent of Counsel.—After an action has been commenced and counsel employed, any release obtained from the plaintiff in the absence or without the consent or knowledge of his counsel, is void, unless the utmost good faith is shown on the part of the defendant in obtaining the same. Bussian *v.* Milwaukee etc. R. Co., 56 Wis. 325; 10 Am. & Eng. R. Cas. 716.

In Atchison etc. R. Co. *v.* Johnson, 29 Kan. 218; 11 Am. & Eng. R. Cas. 1, a release of a claim for personal injuries executed after judgment for the plaintiff, and while the defendant was

as is set up as a bar to his action.[1] If the release was procured by fraud, unfair advantage, duress, or mistake, it will not stand.[2] Of course a release procured by fraud, or executed by a person incapable of contracting, may be subsequently ratified; but where the party signing the release was incapacitated, it is not neces-

preparing to take the case to the Supreme Court, but in derogation of a champertous contract between the plaintiff and her attorneys, was held to be valid.

1. Shultz *v.* Chicago etc. R. Co., 44 Wis. 638; Sobieski *v.* St. Paul etc. R. Co., 41 Minn. 169; Eagle Packet Co. *v.* Defries, 94 Ill. 598; 34 Am. Rep. 245; Chicago etc. R. Co. *v.* Mills, 105 Ill. 63; 11 Am. & Eng. R. Cas. 128; George *v.* St. Louis etc. R. Co., 34 Ark. 613; 1 Am. & Eng. R. Cas. 294. But an injured party, who, having the capacity and opportunity to read a release signed by him, and not prevented from so reading it, fails to do so, and relies upon what the other party says about it, is estopped by his own negligence from claiming that the release is not legal and binding upon him according to its terms. Wallace *v.* Chicago etc. R. Co., 67 Iowa 547; Gulliher *v.* Chicago etc. R. Co., 59 Iowa 416.

An infant's release and claim for personal injuries is voidable at his election; and the bringing of suit upon the demand is an unequivocal disaffirmance of the release. St. Louis etc. R. Co. *v.* Higgins, 44 Ark. 293; 21 Am. & Eng. R. Cas. 629. An infant may even disaffirm a release signed by him without restoring the consideration received. St. Louis etc. R. Co. *v.* Higgins, 44 Ark. 293; 21 Am. & Eng. R. Cas. 629.

The question as to the validity of a release, where the plaintiff claims that at the time it was signed he was mentally incompetent to appreciate its character, should be left to the jury. Dixon *v.* Brooklyn City etc. R. Co., 100 N. Y 170; 26 Am. & Eng. R. Cas. 203.

An instruction that a release of a claim for personal injuries is void if the person executing such release was unconscious and not in his right mind, or was incapacitated to comprehend the character of the contract, is not misleading on the ground that it does not charge as to the effect of a subsequent ratification of such release, where the jury has been already fully instructed upon that point. International etc. R. Co. *v.* Brazzil, 78 Tex. 314; 44 Am. & Eng. R. Cas. 437.

Person Under Influence of Drugs.—If a person while under the influence of drugs or opiates to such an extent as to be incapacitated to contract is induced to execute a release, it will not be obligatory. Chicago etc. R. Co. *v.* Lewis, 109 Ill. 120; 19 Am. & Eng. R. Cas. 224; Chicago etc. R. Co. *v.* Doyle, 18 Kan. 58. See generally Conner *v.* Dundee Chemical Works (N. J. 1889), 17 Atl. Rep. 975; Lusted *v.* Chicago etc. R. Co., 71 Wis. 391; Missouri Pac. R. Co. *v.* Brazzil, 72 Tex. 233; Bean *v.* Western etc. R. Co. (N. Car. 1890), 12 S. E. Rep. 600. *Compare* Houston etc. R. Co. *v.* Tierney, 72 Tex. 312.

So a release may be set aside by proof that at the time it was executed the injured party was insane, and if he subsequently became sane did not ratify it. George *v.* St. Louis etc. R. Co., 34 Ark. 613; 1 Am. & Eng. R. Cas. 294.

2. Pennsylvania R. Co. *v.* Shay, 82 Pa. St. 193; Missouri Pac. R. Co. *v.* Brazzil, 72 Tex. 233; Chicago etc. R. Co. *v.* Lewis, 109 Ill. 120; 19 Am. & Eng. R. Cas. 224; Chicago etc. R. Co. *v.* Doyle, 18 Kan. 58; Stone *v.* Chicago etc. R. Co. (Mich. 1887), 30 Am. & Eng. R. Cas. 600; Conner *v.* Dundee Chemical Works (N. J. 1889), 17 Atl. Rep. 975; Bussian *v.* Milwaukee etc. R. Co., 56 Wis. 325; 10 Am. & Eng. R. Cas. 716; Eagle Packet Co. *v.* Defries, 94 Ill. 598; 34 Am. Rep. 245; Lusted *v.* Chicago etc. R. Co., 71 Wis. 391; Illinois Cent. R. Co. *v.* Welch, 52 Ill. 183; Sobieski *v.* St. Paul etc. R. Co., 41 Minn. 169: Hirschfield *v.* London etc. R. Co., L. R., 2 Q. B. Div. 1; Rose *v.* West Philadelphia R. Co. (Pa. 1888), 12 Atl. Rep. 78; Hobbs *v.* Brush Electric Light Co., 75 Mich. 550; Horwitz *v.* Forbes (Ind. 1891), 22 Atl. Rep. 267.

If the injured party was made to believe that he was merely signing a receipt (Chicago etc. R. Co. *v.* Lewis, 109 Ind. 120; 19 Am. & Eng. R. Cas.

sary for him to pay back, or to offer to pay back, the money received at the time of signing as a condition precedent to his right to sue.[1]

A release by the person injured will bind those who after his death sue for the damages caused to them by his death.[2]

(2) *Release of Joint Tort-feasors.*—Like any other claim for dam-

224); or if he was induced to sign by representations that his injuries were slight, would not become serious (Herschfield *v.* London, etc., R. Co., L. R., 2 Q. B. Div. 1); or if he was induced to sign by representations that the release covered merely time or wages lost (Illinois Cent. R. Co. *v.* Welch, 52 Ill. 183); or that the release merely covered a claim for property destroyed at the time the injury occurred (Lusted *v.* Chicago etc. R. Co., 71 Wis. 391), it will be void as to the party who was induced to execute it. So, if a railroad company employs a near relative of the injured party to use his influence over her, and to take advantage of her situation and poverty in order to get her to sign a release, it cannot stand. Stone *v.* Chicago etc. R. Co. (Mich. 1887), 30 Am. & Eng. R. Cas. 600. And if the physician attending the injured person practices a fraud upon her and makes fraudulent representations as to the papers she signs, she is not bound by it. Eagle Packet Co. *v.* Defries, 94 Ill. 598; 34 Am. Rep. 245; Bussian *v.* Milwaukee etc. R. Co., 56 Wis. 325; 10 Am. & Eng. R. Cas. 716.

The evidence of fraud inducing the execution of the release must be clear and precise in order to let the question go to the jury; a mere scintilla of evidence is not enough. Pennsylvania R. Co. *v.* Shay, 82 Pa. St. 198; Rose *v.* West Philadelphia R. Co. (Pa. 1888), 21 Atl. Rep. 78. Whether or not the release was procured by means of false representations is a question for the jury. Illinois Cent. R. Co. *v.* Welch, 52 Ill. 183.

In Squires *v.* Amherst, 145 Mass. 192, the defense to the action was a receipt "in full of all demands for damages sustained" by reason of a defect in a highway. The plaintiff made no attempt to show fraud in the procurement of the release. It was held that he was not entitled to show that he was mistaken in the legal effect of the receipt, or that there was an agreement between him and the agent of the town that the release applied only to plaintiff's property and not to personal damages, the terms of the release being unambiguous.

1. Chicago, etc., R. Co. *v.* Doyle, 18 Kan. 58; Chicago, etc., R. Co. *v.* Lewis, 109 Ill. 120; 19 Am. & Eng. R. Cas. 224. However, on the trial the jury may give the company credit for the money paid at the time the release was signed. Chicago etc. R. Co. *v.* Doyle, 18 Kan. 58. Fraud in obtaining a release of a cause of action for personal injuries may be shown in reply to a defense based on such release without refunding the amount paid thereon. Mateer *v.* Missouri Pac. R. Co. (Mo., 1891) 15 S. W. Rep. 970. In an action for personal injuries where it appears that the plaintiff was a minor, and that he executed a release in consideration of $40, and that he did not have the money so paid in his possession or under his control, an instruction that the plaintiff could not recover if he had it under his control, does not require the plaintiff to make a tender, unless he has under his control the identical money received by him, and is not erroneous. Hawes *v.* Burlington etc. R. Co., 64 Iowa 315; 19 Am. & Eng. R. Cas. 220.

A release executed when the releasor was insane or unconscious is binding if after he received knowledge of the facts he did not promptly disaffirm the contract. International etc. R. Co. *v.* Brazzil, 78 Tex. 314; 44 Am. & Eng. R. Cas. 437. But a ratification of a release executed by one incapacitated, is not ratified by a withdrawal of the consideration money out of the bank where it was deposited by persons assuming to act for the plaintiff, but who in fact were not directed to act by her. Pierce *v.* Chicago etc. R. Co. (C. C. N. B. Ill.) not reported.

2. Read *v.* Great Eastern R. Co., L. R. 3 Q. B. 555; Dibble *v.* New York etc. R. Co., 25 Barb. (N. Y.) 183; Pierce *v.* Richmond etc. R. Co., 33 S. Car. 566.

ages, a claim against joint tort-feasors may be settled and the wrong doers released from further liability, as between the parties to the settlement.[1]

A release of one joint tort-feasor is a release of all,[2] though the release stipulates that the others are not discharged.[3] A part

1. See Sharpe *v.* Williams, 41 Kan. 56; Baker *v.* Secor, 51 Hun (N. Y.) 643.

2. Gilpatrick *v.* Hunter, 24 Me. 18; 41 Am. Dec. 370; Gunther *v.* Lee, 45 Md. 60; 24 Am. Rep. 504. In this last case it is said, "the law as settled in *England* is that a judgment in an action against one of two joint tort-feasors, of itself without satisfaction or execution, is a sufficient bar to an action against the other for the same cause. The leading cases upon this subject are Broome *v.* Wootton, Yelv. 67; King *v.* Hoare, 13 M. & W. 494; Brinsmead *v.* Harrison, L. R. 6 C. P. 584; Ex. Ch., L. R. 7 C. P. 547. "This rule, however, to the full extent stated, is not generally accepted by the courts in this country. The opinion of Kent, Ch., in Livingston *v.* Bishop, 1 Johns. (N. Y.) 290; 3 Am. Dec. 330, has been most generally adopted, which is to the effect that a recovery against one of several joint tort-feasors is not of itself, without satisfaction, a bar to the right to recover against the others, but fully conceding that satisfaction received of one is a complete bar to recovery against the others. The principle of Livingston *v.* Bishop, has been fully sanctioned by the Supreme Court of the United States in the case of Lovejoy *v.* Murray, 3 Wall. (U. S.) 1. . . . All the cases, both English and American maintain the doctrine that satisfaction of one joint tort-feasor, whether received before or after recovery, extinguishes the right as against the others. The plaintiff is not entitled to receive more than one satisfaction for, and in respect to the same injury. As was said by the court in Lovejoy *v.* Murray, when the plaintiff has accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far affected in equity and good conscience that the law will not permit him to recover again for the same damages. And as a consideration is always implied in a release under seal, though not expressed on its face, the release by deed of one joint trespasser will discharge all, and this has been the law from very early times. Litt., § 376; Co. Litt. 232; Cocke *v.* Jennor, Hob. 66; 7 Robinson's Prac. 206, 208 and cases there referred to; Ruble *v.* Turner, 2 Hen. & M. (Va.) 38; Gilpatrick *v.* Hunter, 24 Me. 18; 41 Am. Dec. 370; Thurman *v.* Wild, 11 Ad. & El. 453." See, further, Westbrook *v.* Mize, 35 Kan. 299; Mitchell *v.* Allen, 25 Hun (N. Y.) 543; Sharpe *v.* Williams, 41 Kan. 56; Aldrich *v.* Parnell, 147 Mass. 409; Cooley on Torts, 139; Brown *v.* Marsh, 7 Vt. 320; Gould *v.* Gould, 4 N. H. 173; Ayer *v.* Ashmead, 31 Conn. 447; 83 Am. Dec. 154; Irwin *v.* Scribner, 15 La. Ann. 583.

A release of a person as a joint trespasser, who in fact is not liable, will not release those who are in fact liable. Wilson *v.* Reed, 3 Johns. (N. Y.) 175. In an action against two joint carriers for negligence, it was held that a parol release of one before suit released both. Bronson *v.* Fitzhugh, 1 Hill (N. Y.) 185.

See Irvine *v.* Millbank, 36 N. Y. Super. Ct. 264.

3. Gunther *v.* Lee, 45 Md. 60; 24 Am. Rep. 504. *Compare* Matthews *v.* Chicopee Mf'g Co., 3 Robt. (N. Y.) 711.

It has been held that where plaintiff's attorney, in an action for injuries by assault and battery, agreed, conditionally after commencing the action, to dismiss it as to one joint trespasser, without plaintiff's knowledge or assent, the other defendants were not released thereby. Sharpe *v.* Williams, 41 Kan. 56.

Cars of different companies came into collision. A was injured, accepted a sum in full of all claim against one company, and executed a release promising to prosecute the other company and pay the first out of what he recovered. *Held*, that the other company was released also. Seither *v.* Philadelphia Traction Co., 125 Pa. St. 497. To same effect see Tompkins *v.* Clay St. Hill R. Co., 66 Cal. 163; 18 Am. & Eng. R. Cas. 144; Chapin *v.* Chicago etc. R. Co., 18 Ill. App. 47. Judges of election were sued for refusing plaintiff's vote he accepted a certain sum from one defendant. It was held that all were released. Long *v.* Long, 57 Iowa 497.

payment on a claim for damages by one co-trespasser inures to the benefit of all, and, being less than the damages, if not understood to be in full satisfaction, releases the other joint trespasser only *pro tanto*.[1] But a parol release of one joint tort-feasor is not a discharge of the others unless the debt be fully satisfied. If, in such case, the apparent intention is not to release or discharge the debt, but to release only the one from liability, the courts usually hold the agreement to be a covenant not to sue that one, and permit the plaintiff to proceed against the others.[2]

X. **Pleading.**—The pleading of a release first occurs generally in the answer or plea of the defendant, unless in actions brought to set aside a release.[3] And the controverting of the release is usually made under the plaintiff's reply.[4]

There is a difference between pleading a writing in the form of a receipt, as a technical release, and as a receipt in bar, and care

If joint tort-feasors are sued separately, a settlement of the action against one does not release the others, unless the settlement was in full satisfaction of the injury. Pogel *v.* Meilke, 60 Wis. 248.

1. Ellis *v.* Esson, 50 Wis. 138; 36 Am. Rep. 830; Chamberlain *v.* Murphy, 41 Vt. 110; McCrillis *v.* Hawes, 39 Me. 568; Bloss *v.* Plymale, 3 W. Va. 593; 100 Am. Dec. 752; Shaw *v.* Pratt, 22 Pick. (Mass.) 307; Snow *v.* Chandler, 10 N. H. 92; 34 Am. Dec. 140; Catskill Bank *v.* Messenger, 9 Cow. (N. Y.) 37; Line *v.* Nelson, 38 N. J. L. 358; Solly *v.* Forbes, 2 B. & B. 38; 6 E. C. L. 27; Smith *v.* Gayle, 58 Ala. 600.

Yet such partment must be taken into account in the action against the others. Snow *v.* Chandler, 10 N. H. 92; 34 Am. Dec 140. *Examine* Westbrook *v.* Mize, 35 Kan. 299.

2. Matthews *v.* Chicopee Mfg. Co., 3 Robt. (N. Y.) 713; Cooley on Torts, 139; Lovejoy *v.* Murray, 3 Wall. (U. S.) 1; Bloss *v.* Plymale, 3 W. Va. 393; 100 Am. Dec. 752; 2 Brod. & Bing. 38; Couch *v.* Mills, 21 Wend. (N. Y.) 424; Line *v.* Nelson, 38 N. J. L. 358.

3. See, generally, 2 Estee's Pleading and Practice, 736 and 1 Estee's Pleading and Practice 735. See also White *v.* Gray, 68 Me. 579.

A partner brought an action for work and labor. The complaint set forth facts tending to show an authorized settlement with the other partner. A release was introduced in evidence by plaintiff made by the other partner to defendant. *Held*, that plaintiff could not object that the release was not pleaded by the defendant, who relied upon it for release from liability. Hawn *v.* Seventy-six Land etc. Co., 74 Cal. 418.

4. Where a party to release intends to deny it when set out as a defense by the other party, he must reply *non est factum*. A replication denying the legal effect of the release, is demurrable. Denniston *v.* Mudge, 4 Barb. (N. Y.) 243. Where partners sue on a joint demand, and the defendant pleads a general release not showing what demands it applies to, made by one of the partners to him, if the partners want to show that the release applies only to a separate demand of the releasor, they must allege it in their replication. Emerson *v.* Knower, 8 Pick. (Mass.) 63.

In some States the allegation of a written instrument is taken as true unless the denial thereof is verified. So in an action for damages the defendant pleaded among other things a release of all damages, giving a copy of the receipt. Plaintiff without denying the receipt, alleged fraud in obtaining it, but did not verify the replication. It was held that, without some evidence to break the *prima facie* force of the receipt, he could not recover. Scandinavian Coal, etc., Co. *v.* Whittaker, 40 Kan. 123.

It has been held that a reply is not necessary to enable the plaintiff to show that the release set up in the answer is fraudulent. Dambman v. Schulting, 6 Thomp. & C. (N. Y.) 251. And see Bean *v.* Western, etc., R. Co., 107 N. Car. 731.

should be exercised in this regard.[1] Generally, a plea of release of a writing obligatory should allege the release to be under seal;[2] but this is not always necessary.[3] In an action to set aside a release for fraud, the answer supporting the plea of release must deny directly and issuably the circumstances of the fraud charged.[4]

XI. Proof.—The burden of proof that a release pleaded by the defendant is invalid is on the plaintiff.[5] A release is not admissible in evidence unless pleaded.[6] Where a defendant sets up an accord and satisfaction, he must sustain it by proof of actual performance accepted.[7]

XII. Release of Errors.—Errors may be released or waived in many ways.[8]

1. Tucker *v.* Baldwin, 13 Conn. 136; 33 Am. Dec. 384; 1 Estee's Pleading and Practice 735; 2 Estee's Pleading and Practice 735.

2. Gibson *v.* Weir, 1 J. J. Marsh. (Ky.) 446; Griggs *v.* Voorhies, 7 Blackf. (Ind.) 561. See Bender *v.* Sampson, 11 Mass. 42.

3. Bailey *v.* Cowles, 86 Ill. 333; Stinson *v.* Moody, 3 Jones (N. Car.) 53. See Thomas *v.* Mueller, 106 Ill. 36, and Ragsdale *v.* Gossett, 2 Lea. (Tenn.) 729. Where a joint judgment, in favor of the United States was against two obligors, and one of them was released under the act of Congress of March 2, 1831, it was held that the release was a defense, under a plea of payment, to a *scire facias* to revive the judgment against the other obligor. U. S. *v.* Thompson, Gilp. (U. S.) 614.

4. Bolton *v.* Gardner, 3 Paige (N. Y.) 273. But it is not necessary that a plea or answer of release should state that the release was given freely and without fraud, unless the bill charges fraud sufficient to avoid the release. McClane *v.* Shepherd, 21 N. J. Eq. 76.

When the defense was a written contract of settlement, and the reply alleged tnat plaintiff signed it by the fraudulent procurement of a third person, it was held, that the reply set forth no defense to the release, because it did not allege that the third person was authorized by the defendant, or that defendant was a party to the fraud.

Meca *v.* Brown (Iowa 1890), 45 N. W. Rep. 1041.

5. Pugsley *v.* Sumner, 14 Daly (N. Y.) 427; Missouri Pac. R. Co. *v.* Brazzil, 72 Tex. 233.

6. Johnson *v.* Kerr, 1 S. & R. (Pa.) 25.

But it has been held that, in an action for money had and received, a release may be given in evidence under the general issue, even if executed after suit brought. Lyon *v.* Marclay, 1 Watts (Pa.) 271. *Compare* Hart *v.* Porter, 5 S. & R. (Pa.) 201. And see Nelson *v.* Thompson, 7 Cush. (Mass.) 502; Armstrong *v.* Burrell, 12 Wend. (N. Y.) 302.

The plaintiff replied to a defense of release, that the contract was signed through the fraud of a third person. But evidence of the fraudulent acts of the third person were excluded, in the absence of a showing that the third person was acting by authority from defendant. Meca *v.* Brown (Iowa), 45 N. W. Rep. 1041.

7. White *v.* Gray, 68 Me. 579. And see Plunkett *v.* Black, 117 Ind. 14.

8. A confession of judgment is a release of errors. Lewis *v.* Brackenridge, 1 Blackf. (Ind.) 112.

A release of errors by one of several defendants to a record, when the error relates only to the releasor, is valid. Henrickson *v.* Van Winkle, 21 Ill. 274.

In a judgment against two, one gave a release of errors. It was held that the release was pleadable in a bar of a writ of error as to him who released. Clark *v.* Goodwin, 1 Blackf. (Ind.) 74.

Where judgment against several is rendered, one of whom was not served, he may release the error. Henrickson *v.* Van Winkle, 21 Ill. 274.

A release of errors for the purpose of getting an injunction of a judgment releases all errors in the proceedings enjoined, but injunction before judgment to stay proceedings is not a release of errors. McConnel *v.* Ayres, 4 Ill. 210.

An agreement under seal, that the

RELEVANT, RELEVANCY.—In the law of evidence, a fact is said to be relevant when it is so connected, directly or indirectly, with a fact in issue in an action or other proceeding, that evidence given respecting it may reasonably be expected to assist in proving or disproving the fact in issue. Thus, if A is tried for the murder of B by poison, the fact that he had previously been guilty of other crimes would be irrelevant; but the fact that before B's death A procured poison similar to that by which B died would be relevant. So if the question in an action is whether A, the owner of land adjoining a river, owns the entire bed of it or only half the bed at a particular spot, the fact that he owns the entire bed a little lower down the river is relevant.

The question of the relevancy of a fact to a given inquiry is of importance, because evidence is not admissible to prove an irrelevant fact.[1]

RELICT.—The survivor of a married couple, whether husband or wife; the survivor of the union, not simply of the decedent individual.[2]

RELICTION.—See ACCRETION, vol. 1, p. 136; DERELICTION, vol. 5, p. 640.

title to the property in suit is in plaintiff and that the suit is to be tried on its merits, disregarding error in the proceedings, and that the finding may vest the title in him by judgment of court, is equivalent to a release of errors. Martin *v.* Hawkins, 20 Ark. 150. And see generally ERROR, WRIT OF, vol. 6, p. 810.

1. Sweet's Law Dict. See also EVIDENCE, vol. 7, p. 45; IRRELEVANT, vol. 11, p. 845.

Relevant means that any two facts to which it is applied are so related to each other that, according to the common course of events, one, taken by itself or in connection with other facts, proves or renders probable the past, present or future existence or non-existence of the other. Lamprey *v.* Donacour, 58 N. H. 377.

The meaning of the word relevant, as applied to testimony, is that it directly touches upon the issue which the parties have made by their pleadings, so as to assist in getting at the truth. It comes from the French *relievier*, which means to assist. Platner *v.* Platner, 78 N. Y. 95.

Testimony cannot be excluded as irrelevant which would have a tendency, however remote, to establish the probability of the fact in controversy. Trull *v.* True, 33 Me. 367.

"'Relevancy is that which conduces to the proof of a pertinent hypothesis. Hence it is relevant to put in evidence any circumstances which tend to make the proposition at issue more or less improbable.' Whart. Ev., §§ 20, 21. In Trull *v.* True, 33 Me. 367, it was held that 'testimony cannot be excluded as irrelevant which would have a tendency, however remote, to establish the probability or improbability of the fact in issue.' Huntsman *v.* Nichols, 116 Mass. 521, presents a similar decision upon similar facts. It is held in the cases generally, that more liberality may properly be accorded to the admission of evidence affecting the probabilities of a hypothesis, where, if explainable, opportunity is left within the power of the opposing party to submit an explanation of it." State *v.* Witham, 72 Me. 537.

See also Best on Evidence, § 352; Stephen's Indian Evidence Act 52; Stephen's Evidence Digest 135; 7 Am. & Eng. Encyc. of Law 110; Mr. F. Pollock in the Fortnightly Review, Sept., 1876. On the peculiar use, by Sir James Stephen, of relevant as equivalent to admissible, see Solicitor's Journal, Sept. 30, 1876.

2. And. L. Dict., *citing* Spitler *v.* Heeter, 42 Ohio St. 101.

RELIGION—(See also RELIGIOUS LIBERTY, and references there given.) See note 1.

RELIGIOUS LIBERTY—(See also CONSTITUTIONAL LAW, vol. 3, p. 724; DISTURBING MEETINGS, vol. 5, p. 721; LIBERTY, vol. 13, p. 509; OATH, vol. 16, p. 1018; POLICE POWER; RELIGIOUS SOCIETIES).—Religious liberty is secured to the people of the *United States* by provisions in the Constitution of the *United States*,[2]

1. Although "religion in its broadest sense, may include all the different systems of faith and worship which can be found in the world," yet it has been held that the word "religious" as used in a trust provision in a will, "for the purchase and distribution of such religious books or reading as they shall deem best," means "Christian." Simpson *v.* Welcome, 72 Me. 496; 39 Am. Rep. 349. But in Board of Education *v.* Minor, 23 Ohio St. 250, it was held that, as used in the constitution of *Ohio*, providing that, "religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the general assembly to pass suitable laws to protect every religious denomination, etc., etc.," "religion" is not equivalent to "Christian religion," but means the religion of all mankind, and not the religion of any class of men.

"The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with the *cultus* or form of worship of a particular sect, but it is distinguishable from the latter." Davis *v.* Beason, 133 U. S. 333.

2. "No religious test shall ever be required as a qualification to any office or public trust under the United States." Art. 4, ch. 3, U. S. Const.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U. S. Const. Amend. 1.

"Both these provisions it will be seen are limitations upon the powers of Congress only. Neither the original Constitution, nor any of the early amendments undertook to protect the religious liberty of the people of the States against the action of their respective State governments. The 14th Amendment is perhaps broad enough to give some securities if they should be needful." Cooley's Prin. Const. Law, p. 205. See also POLICE POWER.

History of the Amendment Securing Religious Freedom.—"The word 'religion' is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted. The precise point of the inquiry is, what is the religious freedom which has been guarantied? Before the adoption of the Constitution, attempts were made in some of the Colonies and States to legislate not only in respect to the establishment of religion, but in respect to its doctrines and precepts as well. The people were taxed against their will, for the support of religion, and sometimes for the support of particular sects to whose tenets they could not and did not subscribe. Punishments were prescribed for a failure to attend upon public worship, and sometimes for entertaining heretical opinions. The controversy upon this general subject was animated in many of the States, but seemed at last to culminate in *Virginia*. In 1784, the House of Delegates of that State having under consideration 'A bill establishing provision for teachers of the Christian religion,' postponed it until the next session, and directed that the bill should be published and distributed, and that the people be requested 'to signify their opinion respecting the adoption of such a bill at the next session of the Assembly.' This brought out a determined opposition. Amongst others, Mr. Madison prepared a 'Memorial and Remonstrance,' which was widely circulated and signed, and in which he demonstrated 'that religion, or the duty we owe the Creator,' was not within the cognizance of civil government. Semple's Virginia Baptists, Appendix.

At the next session the proposed bill was not only defeated, but another, 'for establishing religious freedom,'

and in those of the several States.[1] These provisions vary somewhat in the different States, but all agree in establishing religious equality, and not merely religious toleration.[2]

drafted by Mr. Jefferson, 1 Jeff. Works, 45; 2 Howison, Hist. of Va., 293, was passed.

"In the preamble of this act, 12 Hen. Stat. 84, religious freedom is defined; and after a recital 'That to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty,' it is declared 'that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order.'

"In these two sentences is found the true distinction between what properly belongs to the Church and what to the State. In a little more than a year after the passage of this statute, the convention met which prepared the Constitution of the United States.

"Of this convention Mr. Jefferson was not a member, he being then absent as minister to France. As soon as he saw a draft of the Constitution proposed for adoption, he, in a letter to a friend, expressed his disappointment at the absence of an express declaration insuring the freedom of religion, 2 Jeff. Works 355, but was willing to accept it as it was, trusting that the good sense and honest intentions of the people would bring about the necessary alterations. 1 Jeff. Works, 79.

"Five of the States, while adopting the Constitution, proposed amendments. Three, *New Hampshire*, *New York* and *Virginia*, included in one form or another a declaration of religious freedom in the changes they desired to have made, as did also *North Carolina*, where the convention at first declined to ratify the Constitution until the proposed amendments were acted upon. Accordingly at the first session of the first congress, the amendment now under consideration was proposed with others by Mr. Madison. It met the views of the advocates of religious freedom, and was adopted. Mr. Jefferson afterwards, in reply to an address to him by a committee of the Danbury Baptist Association, 8 Jeff. Works, 133, took occasion to say: 'Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between Church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see, with sincere satisfaction, the progress of those sentiments which tend to restore man to all his natural rights, convinced that he has no natural right in opposition to his social duties.'" Reynolds *v.* U. S., 98 U. S. 149.

1. In this country, the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, nor infringe personal rights, is conceded to all. The law knows no heresy, is committed to the support of no dogma, the establishment of no sect. Watson *v.* Jones 13 Wall. (U. S.) 728.

2. "We sometimes hear it said that all religions are tolerated in *Ohio*; but the expression is not strictly accurate—much less accurate is it to say, that one religion is a part of our law, and all others only tolerated. It is not by mere toleration that every individual here is protected in his belief or disbelief. He reposes not upon the leniency of government, or the liberality of any class or sect of men, but upon his natural, indefeasible rights of conscience, which, in the language of the Constitution, are beyond the control or interference of any human authority. We have no union of Church and State, nor has our government ever been vested with authority to enforce any religious observance, simply because it is religious." Bloom *v.* Richards, 2 Ohio St. 392. See also, for the distinction

An eminent author[1] enumerates those things which are not lawful under any of the American Constitutions as follows: First, any law respecting an establishment of religion.[2] Second, compulsory support by taxation, or otherwise, of religious instruction.[3] Third, compulsory attendance upon religious worship. Fourth, restraints upon the free exercise of religion according to the dictates of conscience.[4] Fifth, restraints upon the expression of religious belief.[5]

Some States still retain in their Constitutions, provisions disqualifying for office certain classes of persons on account of their religious belief or want of belief. These however, are exceptions.[6] And in some jurisdictions the common-law rule,

between religious toleration and religious equality, Cooley's Const. Lim. (6th ed.) p. 574, n.

1. Cooley's Const. Lim. (6th ed.) p. 575.

2. Nor can the legislature favor one sect more than another. Cooley Const. Lim. (6th ed.) p. 575. In Shreveport *v.* Levy, 26 La. Ann. 671, it was held that a city ordinance, granting one sect a privilege denied to others, was void.

3. The Constitution of *New Hampshire* permits the legislature to authorize "the several towns, bodies corporate, or religious societies within the State to make adequate provisions, at their own expense, for the support and maintenance of public Protestant teachers of piety, religion, and morality." But does not authorize the taxation of other sects for their support. Const. *New Hampshire* part 1, art. 6. As to the meaning of "Protestant" as here used, see PROTESTANT.

Schools.—It is provided by the constitution of *Wisconsin* that "no man shall be compelled to . . . erect or support any place of worship." Again, the Constitution prohibits an appropriation of the funds of the State "for the benefit of a religious seminary." In State *v.* District Board of Edgerton, 76 Wis. 177, it was held that the practice of reading the Bible in the public schools is an act of worship, and that, under the first provision mentioned, tax-payers who are compelled to contribute to the erection and support of the common schools have the right to object to the reading of the Bible therein. And further, that as reading of the Bible in the common school is religious instruction, the drawing of money from the State Treasury for the suport of such school is prohibited by the latter clause. *Compare* Millard *v.* Board of Education, 121 Ill. 297; Donohoe *v.* Richards, 38 Me. 376; Spiller *v.* Woburn, 12 Allen (Mass.) 127. But it has been held that it is not unconstitutional to permit a school-house to be made use of for religious worship when it is not wanted for schools. Nichols *v.* School Directors, 93 Ill. 61; 34 Am. Rep. 160; Davis *v.* Boget, 50 Iowa 11. See, however, Dorton *v.* Hearn, 67 Mo. 301. See also, upon this subject, Board of Education *v.* Minor, 23 Ohio St. 211; SCHOOLS.

4. But this freedom from restraint upon the exercise of his religion does not permit one to break the law, and plead in his defense that his actions were in the exercise of his religion and according to the dictates of his conscience. Laws are made for the government of actions; and while they cannot interfere with mere religious belief and opinions, they may with practices. Thus they prevent human sacrifices, burning alive on funeral piles, plural marriages and the like. To permit such practices would be to make the professed doctrines of religious belief superior to the law of the land, and, in effect, to permit every citizen to become a law unto himself. Under such circumstances the government would exist in name only. Reynolds *v.* U. S., 98 U. S. 166. See also LIBERTY, vol. 13, p. 509; POLICE POWER.

Thus, it is no defense to a prosecution for bigamy to plead that polygamous marriage is one of the tenets of the defendant's church. See BIGAMY, vol. 2, p. 192 n; POLICE POWER.

5. See, however, BLASPHEMY, vol. 2, p. 423.

6. **Religious Qualifications for Office.**—

rendering witnesses incompetent for want of religious belief, has been abrogated. It is said, however, to be no violation of religious liberty in those States where it still obtains.[1]

And it has been repeatedly held that laws punishing blasphemy,[2] and prohibiting ordinary employments on Sunday are not unconstitutional.[3]

RELIGIOUS PURPOSES—(See also CHARITIES, vol. 3, p. 130). See note 4.

The Constitutions of *Alabama*, *Arkansas*, *California*, *Delaware*, *Georgia*, *Illinois*, *Indiana*, *Iowa*, *Kansas*, *Maine*, *Massachusetts*, *Maryland*, *Michigan*, *Minnesota*, *Mississippi*, *Missouri*, *Nebraska*, *New Jersey*, *New Mexico*, *New York*, *Ohio*, *Oregon*, *Rhode Island*, *Tennessee*, *Texas*, *Virginia*, *West Virginia*, and *Wisconsin* require no religious test as a qualification for office, and by the Constitutions of *Alabama*, *California*, *Delaware*, *Georgia*, *Indiana*, *Iowa*, *Kansas*, *Maine*, *Maryland*, *Michigan*, *Minnesota*, *Missouri*, *New Jersey*, *Oregon*, *Tennessee*, *Texas* and *Wisconsin* no religious test is required for any public trust. By the Constitutions of *Alabama*, *Arizona*, *Colorado*, *Illinois*, *Iowa*, *Kentucky*, *Michigan*, *New Jersey*, *Rhode Island*, *Vermont*, *Virginia*, and *West Virginia* no man can be deprived of any civil right as a citizen on account of his religious sentiments. But by the Constitutions of *Arkansas*, *Mississippi*, *North Carolina*, *South Carolina*, and *Texas* a man cannot hold office who denies the being of Almighty God or the existence of a Supreme Being. Stim. Stat. Law, § 45; Cooley's Const. Lim. (6th ed.) 574. On the other hand, the Constitutions of *Delaware*, *Maryland*, *Kentucky*, and *Tennessee* make ineligible to civil office all persons who exercise the functions of clergymen, priest, or teacher of any religious persuasion, society, or sect. Cooley's Const. Lim. (6th ed.) 574. See also PUBLIC OFFICERS.

1. WITNESSES, Cooley's Const. Lim. (6th ed.) p. 586.

2. BLASPHEMY, vol. 2, p. 423; Cooley's Const. Lim. (6th ed.) 580.

3. SUNDAY. But it may be doubted if Sunday laws can be supported upon principle even as an exercise of police power. Ring. Sunday Law, ch. 1, 2, 3.

4. A building for the sessions of a Sunday-school and religious lectures is for a "religious purpose," although occasionally used for fairs and other benevolent purposes. Craig *v.* First Presbyterian Church, 88 Pa. St. 42; 32 Am. Rep. 417. In that case the court by Paxson, J., said: "The objection that the case of the petitioners is not within the purview of the act of assembly involves the further proposition, that the purposes to which the proposed new buildings are to be put are not the religious purposes contemplated by the act. If the petitioners are wrong as to the second proposition, the first necessarily falls with it. The petition alleges that the new building is to be applied only to the religious purposes of said church. There is nothing in the record that contradicts this assertion. The Sunday school-rooms and the lecture room of a modern church are as essentially used for religious purposes as the body of the church building itself. The Sabbath-schools are an important auxiliary of every Christian church, and indispensable to its life and growth. That the services in such schools are in the main of a religious character is too well known to be seriously disputed. So of the lecture room. It is used for the mid-week evening lectures and other services, when the attendance is not large. The expense of lighting and heating the main church building is thus avoided. But the services upon such occasions are as truly religious in their character as the sermon upon the Sabbath. Gass' Appeal, 73 Pa. St. 46; 13 Am. Rep. 726, has no application to the point in controversy. There, a German Reformed congregation and a Lutheran congregation built a church together, in which, by their articles of association, 'divine service' only was to be held; for many years there were no meetings in it except for public worship. It was held under the facts of that case, that 'Sabbath-schools' were not included in the term 'divine service.' . . . The distinction taken in that case, between 'divine service' and Sabbath school services was manifestly proper."

See also LITERARY, vol. 13, p. 914.

RELIGIOUS SOCIETIES—(See also CHARITIES, vol. 3, p. 122; PEWS, vol. 18, p. 413).

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I. **DEFINITION**—1. **Religious Society.**—A religious society is a voluntary association of individuals or families united for the purpose of having a common place of worship and to provide a proper teacher to instruct them in religious doctrines and duties, and to administer the ordinances of religion (baptism, etc.). Although a church or body of professing Christians is almost uniformly connected with such a society or congregation, the members of the church have no other or greater rights than any other members of the society who statedly attend with them for the purposes of divine worship.[1]

1. See generally, First Baptist Church *v.* Witherell, 3 Paige (N. Y.) 294; Lawyer *v.* Cipperly, 7 Paige (N. Y.) 281; Robertson *v.* Bullious, 11 N. Y. 243; Tyler's American Ecclesiastical Law, p. 54, § 100; Miller *v.* Gable, 2 Den. (N. Y.) 492; Fisher *v.* Whitman, 13 Pick. (Mass.) 350; Christian Soc. *v.* Macomber, 5 Met. (Mass.) 155; Lawrence *v.* Fletcher, 8 Met. (Mass.) 153; Silsby *v.* Barlow, 16 Gray (Mass.) 329. In Weld *v.* May 9 Cush. (Mass.) 181, the court by Shaw, C. J., said: "The church is neither a corporation nor a *quasi* corporation, but a body of persons associated together for certain objects under the law—an aggregate body of individuals associated together, in connection with a religious society. The term religious society may with propriety be applied in a certain sense to a church, as that of religious association, religious union, or the like; yet, in the true sense here, and as commonly used in our law, it is synonymous with "parish," "precinct" and designates an incorporated society created and maintained for the support and maintenance of public worship. . . . In this, its legal sense, a church is not a religious society. It is a separate body formed within such parish or religious society whose rights and usages are well known and to a great extent defined and established by law."

The court, by Willes, J., in Baxter *v.* Langley, 38 L. J., M. C. 1, said: "What is Religion? Is it not what a

Ecclesiastical corporations of all denominations have been created to a greater or less extent since the Revolution in almost every State of the Union. They are commonly called in the *United States* religious corporations, but they are not to be regarded as ecclesiastical corporations in the sense of the *English* law, which were composed entirely of ecclesiastical persons and subject to the ecclesiastical judicatories, but as belonging to the class of civil corporations which are controlled and managed according to the principles of the common law as administered by the ordinary tribunals of justice.[1] This is an important distinction in determining the powers and functions of the religious corporation. Although a religious corporation, in some of its objects, embraces matters of a public nature, it is nevertheless regarded in law as a private body, in contradistinction to corporations such as towns, counties, cities, and parishes existing for public purposes; and the religious corporation is governed by the same rules which control other private civil corporations.[2]

2. Parish.—In all English Acts of Parliament passed since 1866 "Parish," unless the contrary intention appears, means, as respects *England* and *Wales*, a place for which a separate poor rate is or can be made or for which a separate overseer is or can be appointed[3]

"'Parishioner' is a very large word, and takes in not only inhabitants of the parish, but persons who are occupiers of land that pay the several rates and duties, though they are not resident, nor do contribute to the ornaments of the church."[4] "The parishioners are the inhabitants of the parish."[5]

In *New England* towns religious societies are generally termed "parishes" and the limits of the town and of the parish were often the same.[6]

man honestly believes in and approves of and thinks it his duty to inculcate on others whether with regard to this world or the next; a belief in any system of retribution by an overruling power. It must, I think, include the principle of gratitude to an active power who can confer blessings." See also Wilkinson *v.* Lindgren, 5 Ch. 570.

1. Watkins *v.* Wilcox, 6 Thomp. & Co. (N. J.) 539; 4 Hun (N. Y.) 220; Calkins *v.* Cheney, 92 Ill. 463.

2. Angell & Ames on Corp., ch. 1, § 3; 2 Kent's Comm. 274; Robertson *v.* Bullious, 11 N. Y. 251; Tyler's Am. Eccl. Law, pp. 56, 57, §§ 104, 105; Fadners *v.* Braunborg, 73 Wis. 257, holding that the synod of the Norwegian Evangelical Lutheran church is not a single governing body, but a confederation of churches acting as a council, and that single churches, being independent members thereof, may withdraw therefrom.

3. § 5 Interp. Act. 1889; Plomesgate *v.* West Ham, 50 L. J., M. C. 51; 6 Q. B. D. 576; Reg. *v.* Vane, 51 L. J., M. C. 114. And see Preston *v.* Buckler, 39 L. J., M.C. 105; L. R., 5 Q. B. 391; Smith *v.* Redding, 35 L. J., M. C. 202; L. R., 1 Q. B. 489; Rice *v.* Slee, L. R., 7 C. P. 378; Craven *v.* Sanderson, 7 A. & E. 880; 7. L. J., Q. B. 81; 2 N. & P. 641.

4. Per Hardwicke, Ch., in Attorney-Gen'l *v.* Pauser, 3 Atk. 577. See also Etherington *v.* Wilson, 45 L. J., Ch. 153; 1 Ch. Div. 160; Batten *v.* Gedye, 41 Ch. Div. 507.

5. Lewin C. C. 86.

6. In First Parish in Brunswick *v.* Dunning, 7 Mass. 445, the court said: "Every town is considered to be a parish until a separate parish be formed within it; and then the inhabitants and

A parish has, in *Massachusetts*, the same meaning as a precinct and the terms may be used interchangeably.[1]

3. Church.—A clear distinction exists between the terms "religious society" and "church," the former usually including the latter. The body of communicants gathered into church order according to established usage in any town, parish, precinct, or religious society established according to law, and actually connected and associated therewith for religious purposes, for the time being, is to be regarded as the church of such society.[2] No more than one church or religious society can be included within one

territory not included in the separate parish form the first parish; and the minister of such first parish by law holds to him and his successors all the estates and rights which he held as minister of the town before the separation."

In Tobey *v.* Wareham Bank, 13 Met. (Mass.) 446, the court, by Dewey, J., said: "Every town was a corporation of that peculiar character that it embraced within the scope of its appropriate duties, those of a parish until a separate parish was formed and organized within its limits."

In First Parish *v.* Cole, 8 Mass. 96, the court said: "The Congregational Society, created by the statute of 1794, is, to every intent, a parish. The persons named in the act, together with their estates are set off from the rest of the inhabitants and territory of the town and erected into a corporation well known in this commonwealth by the name of a poll-parish. In the language of the Declaration of Rights, prefixed to the Constitution, and of our laws, the terms parish and religious society have the same meaning and effect." See also Baker *v.* Fales, 16 Mass. 499; Minot *v.* Curtis, 7 Mass. 441; Proprietors of St. Luke's Church *v.* Slack, 7 Cush. (Mass.) 226; Weld *v.* May, 9 Cush. (Mass.) 181.

1. In Milford *v.* Godfrey, 1 Pick. (Mass.) 96, the court by Parker, C. J., says: "Finding. by an examination of our statutes, that a precinct and a parish differ in nothing but name, both of them being corporations entitled and required to support public worship and having all the powers and privileges necessary for that purpose, the terms may be used indiscriminately in the course of this opinion."

In Cushing *v.* Newburyport, 10 Met. (Mass.) 515, the court by Shaw, C. J., says: "It must be borne in mind that the territory of the State was divided into parishes, commonly in the law called 'precincts,' and a town often consisted of two or more precincts." See also First Parish in Sudbury *v.* Jones, 8 Cush. (Mass.) 188; Bird *v.* Waterloo St. Mark's Church, 62 Iowa 567, defining the parish of a Protestant Episcopal Church.

2. In Stebbins *v.* Jennings, 10 Pick. (Mass.) 172, the court by Shaw, C. J., said: "If a church is rightly described as an association of all or part of the members of a religious society and united for the celebration of Christian ordinances, it is necessarily incident to and inseparably connected with such parish or religious society, which is a corporation with perpetual succession, and the perpetual existence and identity of the church is ascertained and identified by such corporation."

In Parker *v.* May, 5 Cush. (Mass.) 345, the court by Shaw, C. J., said: "The religious society is a corporation known in law, capable of taking and holding real and personal property, and charged with the duty of maintaining public worship and religious instruction. The church is a voluntary association consisting of the whole or some part of the members of the society united together by covenant or agreement according to usages well known and generally recognized for the purpose mainly of celebrating the Christian ordinance of the Lord's Supper and for mutual discipline in regular church order. The church is a voluntary association, not a corporation nor a *quasi* corporation in the usual sense in which those terms are used, but like a corporation in respect to its powers to act by votes and by majorities." See also Weld *v.* May, 9 Cush. (Mass.) 181; Jefts *v.* York, 10 Cush. (Mass.) 392; People *v.* Phillips, 1 Den. (N. Y.) 388.

corporation.[1] There are, however, three distinct bodies within a religious corporation; first, the church, consisting of officers and communicants; second, the congregation, which includes the stated hearers and attendants on divine worship and who are competent to vote for trustees; third, trustees of the society or corporation.[2] The doctrine, government, and worship of the church is governed and regulated by its own rules, and, in order to maintain its identity, strict adherence and subordination to the church standards and ecclesiastical judicatories must be maintained. In matters of faith and doctrine churches are left to speak for themselves, but where rights of property are in question courts will interfere; therefore a priest cannot be prohibited from the exercise of his profession by his bishop, without accusation or hearing, for his right to exercise his profession is his property.[3]

4. **Minister.**—A minister is a person who serves at the altar or administers the rites of religion. A clergyman is a man in holy orders or one who is set apart by ordination for the offices of religion. A rector is the clergyman who has charge of a parish church—literally the governor of a church; the name is usually applied to the priest or minister of the Protestant Episcopal church. The terms priest, minister, clergyman, and rector are almost synonymous.[4]

II. **Formation and Organization**—1. **Organization.**—Though religious societies are denominated generally voluntary associa-

1. Everson *v.* Ellingson, 67 Wis. 646; Ebaugh *v.* German Ref. Church, 3 E. D. Smith (N. Y.) 60; Wheaton *v.* Gates, 18 N. Y. 395; Baker *v.* Fales, 16 Mass. 503; Stebbins *v.* Jennings, 10 Pick. (Mass.) 172; McGinnis *v.* Watson, 41 Pa. St. 9; Sutler *v.* First Ref. Dutch Church, 42 Pa. St. 503.

2. Robertson *v.* Bullions, 9 Barb. (N. Y.) 93; 11 N. Y. 243; Lawyer *v* Cipperly, 7 Paige (N. Y.) 279. In Petty *v.* Tooker, 21 N. Y. 270, the court, by Selden, J., said: "These two bodies, viz: the corporation and the church, although one may exist within the pale of the other, are in no respect correlative. The objects and interests of the one are moral and spiritual, the other deals exclusively with things temporal and material."

3. Gable *v.* Miller, 10 Paige (N. Y.) 627; Miller *v.* Gable, 2 Den. (N. Y.) 492; Chase *v.* Cheney, 58 Ill. 538; 11 Am. Rep. 95; White Lick Quarterly Meeting *v.* White Lick Quarterly Meeting, 89 Ind. 153; First Presbyterian Church *v.* Wilson, 14 Bush (Ky.) 252.

4. Tyler Am. Eccl. Law, p. 101.

A regular clergyman of the church of England means one who is not only duly ordained but one who has been duly inducted and licensed to preach by the bishop. To preach in any other parish than his own he must have the consent of his rector or vicar. Foundling Hospital *v.* Garrett, 47 L. T. 230.

"There are various authorities to show that a Roman Catholic priest is also a clergyman in Holy Orders." Per Stephen J. in R. *v.* Haslehurst, 53 L. J. M. C. 129. See also Bird *v.* St. Marks Church, 62 Iowa 567.

But a clergyman of the Baptist church is not a minister within the meaning of the statute. People *v.* Peck, 11 Wend. (N. Y.) 604, 27 Am. Dec. 184.

A regular clergyman, however, means not only a clergyman of the church of England, but also one who has been duly licensed to perform duty. A regular minister of any dissenting congregation is one who has been regularly invited by the congregation to accept the office of their minister and who accepts that office. Per Meller J. in Rex *v.* Oldham, 38 L. J. Q. B. 125; 10 B. & S. 193; L. R. 4 Q. B. 290; 2 L. R. Dig 4608; Kibbe *v.* Antram, 4 Conn. 139.

The meaning of "stated and ordained

tions, statutes have been and were early passed in most of the States providing for their incorporation. These must be consulted to discover the details required in each State.[1]

Where the statute requires a certificate of incorporation, such certificate is *prima facie* evidence of the truth of recitals, where subsequent user of corporate rights is shown.[2]

If, at an election of church trustees, the parties interested had actual notice of time and place,[3] and, if the election was fairly conducted, it may be valid, even though the statute has not been exactly complied with.[4] The act of a religious society in admitting or refusing to admit members is not subject to control by

minister of the gospel," is defined in Ligonia *v.* Buxton, 2 Me. 102, 11 Am. Dec. 46.

1. Kulinski *v.* Dambrowski, 29 Wis. 109; Everson *v.* Ellingson, 72 Wis. 242; St. Luke's Church *v.* Slack, 7 Cush. (Mass.) 226; Attorney Gen. *v.* Clergy Soc., 8 Rich. Eq. (S. Car.) 190; Wilson *v.* Perry, 29 W. Va. 169.

Parish Organization in Massachusetts.—The following cases deal with questions of parish organization under the early *Massachusetts* statute: First Parish in Sutton *v.* Cole, 3 Pick. (Mass.) 232; Oakes *v.* Hill, 10 Pick. (Mass.) 333; 14 Pick. (Mass.) 442; Fisher *v.* Whitnan, 13 Pick. (Mass.) 335; First Parish in Stearns, 21 Pick. (Mass.) 148; Ludlow *v.* Sikes, 19 Pick. (Mass.) 317; Reynolds *v.* New Salem, 6 Met. (Mass.) 345.

2. Reformed Dutch Church *v.* Harder, 58 Hun. (N. Y.) 605; Stokes *v.* Schwab, 56 N. Y. Super. Ct. 122; Attorney Gen. *v.* Dutch etc. Church, 36 N. Y. 452; M. E. Union Church *v.* Pickett, 23 Barb. (N. Y.) 436; Van Buren *v.* Reformed Church, 62 Barb. (N. Y.) 495; Methodist Episcopal Soc. *v.* Lake, 51 Vt. 353; First Evangelical etc. Church *v.* Rechlin, 49 Mich. 515; Baltimore etc. R. Co. *v.* Fifth Baptist Church, 137 U. S. 568.

Corporate Organization in New York; Certificate, etc.—In *New York* the fact of incorporation must be proved by the certificate, or its absence must be accounted for. The record of the certificate is not enough. Jackson *v.* Leggett, 7 Wend. (N. Y.) 377; but see *In re* Arden's Will, 1 Cow. (N. Y.) 159; Stokes *v.* Schwab, 56 N. Y. Super. Ct. 122; Reformed Dutch Church *v.* Harder, 58 Hun (N. Y.) 605; Lynch *v.* Pfeiffer, 110 N. Y. 33; Attorney Gen. *v.* Dutch etc. Church, 36 N. Y. 452; M. E. Union Church *v.* Pickett, 23 Barb. (N. Y.) 436; People v. Keese, 27 Hun (N. Y.) 483; First Baptist Soc. *v.* Rapalee, 16 Wend. (N. Y.) 605; Welland Canal Co. *v.* Hathaway, 8 Wend. (N. Y.) 480; 24 Am. Dec. 51.

Where statutory provisions are all complied with except that the certificate required is recorded in the recorder's office instead of that of the county clerk, the error does not prevent the incorporation. *In re* Arden's Will, 1 Cow. (N. Y.) 159; but see Ferraria *v.* Vasconcelles, 23 Ill. 456.

A certificate reciting "Manhattanville Presbyterian Society" complies with the requirement that it shall give the name by which the trustees shall be called. Lynch *v.* Pfeiffer, 110 N. Y. 33; People *v.* Keese, 27 Hun (N. Y.) 483. The certificate is good even if the seal is accidentally lost. St. Jacobs Lutheran Church *v.* Bly, 73 N. Y. 323; First Baptist Soc. *v.* Rapalee, 16 Wend. (N. Y.) 605. But see Buffalo etc. R. Co. *v.* Cary, 26 N. Y. 78.

Where a religious corporation purchases land and buildings and establishes a mission church and Sunday school, which becomes strong and numerous enough to be organized as a separate religious society and are so organized and incorporated, the new corporation does not thereby become vested with any rights in the premises occupied, to the exclusion of the original church. Alexander Presbyterian Church *v.* Presbyterian Church, 46 How. Pr. (N. Y.) 312.

3. People *v.* Peck, 11 Wend. (N. Y.) 602; 27 Am. Dec. 104.

4. Bethany *v.* Sperry, 10 Conn. 200, but see Weber *v.* Zimmerman, 22 Md. 156; Wiggin *v.* Freewill Baptist Church, 8 Met. (Mass.) 301; Ladd *v.* Clements, 4 Cush. (Mass.) 476.

the civil courts.[1] A by-law requiring a two-thirds vote to repeal a by-law may be repealed by a majority vote.[2] A change in the constitution of a church can be made only in the manner therein provided; any change made otherwise is invalid and of no effect.[3] It has been held that a special meeting of the trustees of a religious corporation called without stating the business of the meeting and with at least two trustees absent can do no valid act.[4] A member of a religious society cannot be dropped without a hearing.[5]

Parol evidence as to the number of members of a church entitled to vote at an election of trustees is admissible, even though there be a register kept of the names of the stated hearers and of the times when they became such.

A religious corporation *de facto* may be established either by charter or by user of corporate powers.[6] Where subscriptions are made toward the support of a minister of a particular denomination whenever his services can be procured, an unincorporated religious society will not thereby be formed.

The acceptance of a charter must be by an act of the society as a body at a regular meeting called for that purpose; the individual assent of the members is not sufficient.[7]

Congress may annul a territorial church charter.[8] A charter will be refused to a church with a name so like that of another church

1. Richardson *v.* Union Congregational Soc., 58 N. H. 187; Hardin *v.* Second Baptist Church, 51 Mich. 137; 47 Am. Rep. 555.

2. Richardson *v.* Union Congregational Soc., 58 N. H. 187; Miller *v.* English, 21 N. J. L. 317, and see Attorney Gen'l *v.* Geerlings, 55 Mich. 562; Ehrenfeldt's Appeal, 101 Pa. St. 186.

3. Rottman *v.* Bartting, 22 Neb. 375; Dahl *v.* Palache, 68 Cal. 248.

4. Maclaury *v.* Hart, 10 N. Y. Supp. 135; Downs *v.* Bowdoin Square Baptist Soc., 148 Mass. 135.

5. Gray *v.* Christian Society, 137 Mass. 329; 50 Am. Rep. 310.

6. In M. E. Union Church *v.* Pickett, 19 N. Y. 482, the court by Selden, J. said: "Two things are necessary to be shown in order to establish the existence of a corporation *de facto*, viz. 1. The existence of a charter or some law under which a corporation with the powers assumed might lawfully be created; and, 2. A user by the party to the suit of the rights claimed to be conferred by such charter or law. (U. S. Bank *v.* Stearns, 15 Wend. (N. Y.) 314. The rule established by law as well as by reason is, that parties recognizing the existence of corporations by dealing with them have no right to object to any irregularity in their organization or any subsequent abuse of their powers not connected with such dealing. As long as these are overlooked or tolerated by the State, it is not for individuals to call them in question." In Whitmore *v.* Fourth Cong. Soc. in Plymouth, 2 Gray (Mass.) 306, the court by Metcalf, J., said: "It was not necessary, upon the pleadings in the case, for the plaintiff to prove that the defendants formally accepted their act of incorporation and were duly organized under it. They have acted as a corporation for many years and cannot now avoid their contracts by denying their legal capacity to make them." Middlesex etc. Manufacturers *v.* Davis, 3 Met. (Mass.) 138; Narragansett Bank *v.* Atlantic Silk Co., 3 Met. (Mass.) 288; Christian Soc. in Plymouth *v.* Macomber, 5 Met. (Mass.) 155; Jones *v.* Cary, 6 Me. 448; Langdon *v.* Plymouth Cong. Soc., 12 Conn. 113.

7. Shortz *v.* Unaugst, 3 W. & S. (Pa.) 45.

8. As by *United States* act March, 1877, annulling the charter granted by the Territory of Utah to the Mormon church. U. S. *v.* Church of Jesus Christ etc., 5 Utah 361.

in the same place that confusion might arise between them.[1] Change or alteration in a church name will not affect its identity. The question of identity is one of intention.[2]

2. Qualifications of Members—*a.* IN GENERAL; AGE, CREED, ETC. On first organizing a religious society, in the absence of statute, the persons entitled to vote are the male adults belonging to the church congregation or society, who have statedly worshiped with it and who have formerly been considered as belonging to it.[3]

Public profession of the faith of the church which is attached to any religious society and submission to its government and discipline are usual requirements of membership; conformity to these requirements, stated attendance on divine worship with its members,[4] or contribution to its support by renting a pew or otherwise may be sufficient to constitute a member.[5]

1. *In re* First Presbyterian Church, 2 Grant's Cas. (Pa.) 240.

2. Trinity Church *v.* Hall, 22 Conn. 125; First Society *v.* Brownell, 5 Hun (N. Y.) 464; Everson *v.* Ellingson, 67 Wis. 634; Neale *v.* St. Paul's Church, 8 Gill (Md.) 116; Merwin *v.* Camp, 3 Conn. 35; Meyer *v.* German Evangelical etc. Church, 37 Minn. 241.

In *Pennsylvania*, notice of application to change the name of a corporation, religious or other, must be given to the auditor-general before proceedings for the purpose can be had. *In re* First Presbyterian Church, 107 Pa. St. 543. And it is not necessary that all the corporators should be heard on such applications. Watkins *v.* Wilcox, 4 Hun (N. Y.) 220.

3. Robertson *v.* Bullious, 11 N. Y. 243; Baker *v.* Fales, 16 Mass. 488; Sparrow *v.* Wood, 16 Mass. 457; Oaks *v.* Hill, 10 Pick. (Mass.) 333; People *v.* Tuthill, 31 N. Y. 550.

If it appears that at a meeting at which the organization was perfected only male members were present while female members had a right to be there but were not excluded, the meeting is not illegal. And in the absence of minister, elders, and deacons, two members of the congregation may preside as chairman and assistant chairman. Lynch *v.* Pfeiffer, 110 N. Y. 33.

Where the charter of a church directed that at the election of its minister, wardens and vestrymen no person should vote who had not been regularly admitted as a member of the church for twelve months prior to the election, it was held that no person whose pew rent was more than two years in arrears was entitled to vote. Com. *v.* Cain, 5 S. & R. (Pa.) 510.

Where a charter conferred the right to vote on "contributing members, being communicants," and a subsequent confirming statute declared that no person could vote who was under eighteen years of age, it was held that it was not necessary, to entitle a member to vote, that he should have taken the sacrament after the age of eighteen years. Weckerly *v.* Geyer, 11 S. & R. (Pa.) 35.

Where a charter included certain persons, "with their families," as members of a religious society, it was held that minor sons became thereby members of the society and continued to be such, even after arriving at age, and until they changed their membership in some manner provided by statute. Bradford *v.* Cary, 5 Me. 339.

4. Den *v.* Bolton, 12 N. J. L. 206, the court by Ewing, C. J., said: "To constitute a member of any church, two points at least are essential, without meaning to say that others are not so: a profession of its faith and a submission to its government. Simply holding the same faith without submitting to the government and discipline of a church cannot make or keep a man a member of that church." See also Baker *v.* Fales, 16 Mass. 488; Oakes *v.* Hill, 10 Pick. (Mass.) 333; Keith *v.* Howard, 24 Pick. (Mass.) 292; Winebrenner *v.* Colder, 43 Pa. St. 244.

5. In First Baptist Church *v.* Witherell, 3 Paige. (N. Y.) 296, the court by Walworth, Ch., said: "Over the church as such the legal or temporal tribunals of this State do not profess to

The question whether one belongs to a church is usually a mixed question of law and fact.[1]

One who as a contributor, etc., is entitled to vote at a parish meeting cannot be denied that right by the vestry's refusal to receive further contributions from him.[2] As a member of the vestry the rector is entitled to vote in the election of a person to fill a vacancy therein.[3]

Church membership is not terminated nor tenure of office affected where a moderator of a synod participates in the union with another body of Christians of the church to which he belongs.[4] The formation of another minor society for the instruction of a portion of the main society is not *per se* a separation from the main society, though the subordinate society has a minister and officers of its own.[5] The legislature is not prevented from setting off the members of one religious corporation to another, whether of the same denomination of Christians or not.[6]

b. CITIZENSHIP.—In the absence of statutory regulations the general rule as to citizenship of members is the same rule as that which governs the citizenship of members of municipal corporations; they must be males of full age who have belonged to the society for a specified time and who have made public profession of adherence to the faith of the society. The statutes of each State must be consulted for the details.[7]

have any jurisdiction whatever except so far as is necessary to protect the civil rights of others and to preserve the public peace. All questions relating to the faith and practice of the church and its members belong to the church judicatories to which they have voluntarily subjected themselves . . . I confess I have always entertained serious doubts whether any civil tribunal in this State could interfere to prevent the majority of the corporators in a religious society from introducing such changes in the doctrine or modes of worship in their churches as they might deem expedient, and which they could introduce through their trustees elected in the manner prescribed by law." And see Gage *v.* Currier, 4 Pick. (Mass.) 399.

In the Presbyterian church, election of trustees can be made only by those who contribute their just proportion to the necessary expenses of the church. State *v.* Crowell, 9 N. J. L. 391. And see East Norway Lake etc. Church *v.* Halvorson, 42 Minn. 503.

Members who have been expelled cannot maintain a suit in relation to church property nor vote for trustees; nor can the court help them by inquiring into the propriety of the expulsion. Shannon *v.* Frost, 3 B. Mon. (Ky.) 253.

A member who has acquired the right to sepulture cannot compel restoration to membership on the ground that by expulsion he has been deprived of his acquired right. State *v.* Hebrew Congregation, 31 La. Ann. 205; 33 Am. Rep. 217.

1. People *v.* Keese, 27 Hun (N. Y.) 483.

2. State *v.* Trinity Church, 45 N. J. L. 230.

3. Neetson's Appeal, 105 Pa. St. 180.

4. People *v.* Farrington, 22 How. Pr. (N. Y.) 294.

5. Weckerley *v.* Geyer, 11 S. & R. (Pa.) 35.

6. Thaxter *v.* Jones, 4 Mass. 570.

It was adjudged in Isham *v.* First Presbyterian Church, 63 How. Pr. (N. Y.) 465, that where a Presbyterian clergyman adopted and advocated religious views at variance with Presbyterian standards, the trustees were authorized in excluding him from the church edifice.

7. Sumner *v.* First Parish, 4 Pick. (Mass.) 361; Gage *v.* Currier, 4 Pick. (Mass.) 399; Holbrook *v.* Holbrook, 1 Pick. (Mass.) 248; Kniskern *v.* Lutheran Churches, 1 Sandf. Ch. (N. Y.)

3. Tenets of Belief.—If property has been conveyed to a society for the support of certain specified forms of worship or of stated doctrines of belief it cannot be devoted to the support of any different forms or doctrines, even with the consent of a majority of the members of the society, unless the conveyance admits of such a change of purpose.[1]

But where both parties to a division adhere to the tenets, doctrines, and discipline of the organization the property may be divided between them proportionately to the number of their members at the time of separation.[2]

An essential change of doctrine, either by itself or accompanied by other conduct, as willful neglect of duty or immoral or criminal conduct, is sufficient to dissolve the ministerial and parochial relation between a minister and his church and congregation.[3]

III. Church Government and Control.—Every person entering a church impliedly, if not expressly, covenants to conform to its rules and to submit to its authority and discipline.[4]

The society may prescribe such rules as it thinks proper for the preservation of order at public service, and may use necessary force to remove a person willfully violating such rules.[5] And where a member of the congregation interrogates a priest with regard to allusions made during his sermon and refuses to desist when commanded to do so by the priest, sufficient force may be used for his removal.[6]

To disturb a religious meeting is a common-law offense; and is dealt with also by local statutes.[7]

439; Miller *v.* Gable, 2 Den. (N. Y.) 492.

1. Miller *v.* Gable, 2 Den. (N. Y.) 492; Baker *v.* Ducker, 79 Cal. 365. And see Morville *v.* Fowle, 144 Mass. 109.

2. Hale *v.* Everett, 53 N. H. 9; 16 Am. Rep. 82. In this case it was said that, in *New Hampshire*, the term "Protestant" means all Christians who deny the authority of the Pope of Rome, but does not include Mahomedans, Jews, infidels, deists, theists, or free religionists, though the latter may be Unitarians, or Pagans.

In the same case it was said that to find the religious opinions of a Congregational society, we must look at the creed, or confession, or doctrines of the church with which it is connected, which is the center and foundation of the whole. And this is true of Baptists, Orthodox Congregationalists, Liberal Congregationalists, Unitarians, Universalists and others.

3. Sheldon *v.* Congregational Parish, 24 Pick. (Mass.) 286; Thompson *v.* Catholic Congregational Soc., 5 Pick. (Mass.) 469; Avery *v.* Tyringham, 3 Mass. 160; 3 Am. Dec. 105; Burr *v.* First Parish, 9 Mass. 277.

In McGuire *v.* St. Patrick's Cathedral (Supreme Ct.), 3 N. Y. Supp. 781, it was held that whether a person died in the faith of the Roman Catholic church so as to entitle him to burial in a Roman Catholic cemetery is not a question for civil courts but for ecclesiastical courts to decide.

4. Lucas *v.* Case, 7 Bush (Ky.) 297; Juker *v.* Com., 20 Pa. St. 484.

5. McLain *v.* Matlock, 7 Ind. 525; 65 Am. Dec. 746.

As to the right of a society to eject a member from its meeting-house, see Howard *v.* Hayward, 10 Met. (Mass.) 408.

6. Wall *v.* Lee, 34 N. Y. 149; New York Protestant etc. School *v.* Davis, 31 N. Y. 592; Hale *v.* Everett, 53 N. H. 71; 16 Am. Rep. 82.

7. See DISTURBING MEETINGS, vol. 5, p. 721.

Submission of a doctrinal point made in accordance with the contract of association of a religious body to the proper judicatory is binding, and the findings of such judicatory are conclusive on the civil courts; what the doctrinal standard is must be determined by reference to the rules, constitution, or by-laws of the congregation.[1]

Church judicatories may excommunicate a member of the church; and he thereupon loses his rights as a corporator, if the church has been incorporated. In the Dutch Reformed Church the judicatories are the consistory, classis, and synod, and an appeal lies from the first named through to the last.[2]

A change in the corporate name does not interfere with the continuity or identity of the corporation so as to prevent its holding corporate property previously acquired.[3] But where religious organizations have subordinate branches the subordinate cannot dissolve its connection with the principal without permission.[4] A synod has no power to excind a constituent church; a regular judicial decree is necessary to complete the forfeiture of the church's rights.[5]

A mere resolution to secede from a religious society without any action by its higher authorities does not deprive any member of membership.[6]

In an organization governed by a select body of its own members the act of the majority is ordinarily the act of the whole.[7] But a church cannot be bound by the action of the trustees beyond the express powers granted them.[8]

A sentence of excommunication from the fellowship of a religious organization, whether performed with authority or without, cannot impair a person's civil rights.[9] And civil courts cannot determine whether or not the opinions of expelled members are inconsistent with the standards of the society.[10]

1. East Norway Lake etc. Church *v.* Halvorsen, 42 Minn. 503; *contra* Tubbs *v.* Lynch, 4 Harr. (Del.) 521.

2. German Ref. Church *v.* Seibert, 3 Pa. St. 282; Den *v.* Bolton, 12 N. J. L. 206. And those not satisfied with the decision cannot avoid its effect by changing their allegiance. Den *v.* Bolton, 12 N. J. L. 206.

3. Meyer *v.* German Evangelical etc. Church, 37 Minn. 241; Gibson *v.* Armstrong, 7 B. Mon. (Ky.) 481.

4. Vasconcelles *v.* Ferraria, 27 Ill. 237; Schmorr's Appeal, 67 Pa. St. 138; Lucas *v.* Case, 9 Bush (Ky.) 297; Ehrenfeldt's Appeal, 101 Pa St. 186.

5. McAuley's Appeal, 77 Pa. St. 397.

6. Den *v.* Pilling, 24 N. J. L. 653.

7. Wehr *v.* German etc. Congregation, 47 Md. 177; East Norway Lake etc. Church *v.* Halvorsen, 42 Minn. 503; Skilton *v.* Webster, Bright (Pa.) 203; Den *v.* Pilling, 24 N. J. L. 653.

8. Miller *v.* Church, 4 Phila. (Pa.) 48; Bailey *v.* M. E. Church, 71 Me. 472. And where a by-law provided "and generally to manage the business of the society, expending only such sums of money as the society shall place at their disposal," it was held that the standing committee so empowered had no authority to employ counsel to defend the society. Child *v.* Christian Society, 144 Mass. 473. But a committee of the church appointed for that purpose may bring suit in its own name. Shannon *v.* Frost, 3 B. Mon. (Ky.) 253.

9. Fitzgerald *v.* Robinson, 112 Mass. 371; Grosvenor *v.* United Soc. of Believers, 118 Mass. 78.

10. Grosvenor *v.* United Soc. of Believers, 118 Mass. 78.

Where a charter of a religious society enjoins the duty of annual elections of trustees, fixing the time at which they shall be held, but is silent as to the mode of conducting them, the corporation may provide by a by-law for the mode of performance; but where no such by-law has been adopted, a long established usage will govern.[1]

A church edifice erected by voluntary contributions and under agreement that it shall be used only for certain specified purposes cannot be sold without adequate reason therefor, and where the effect would be to divert the funds arising from the sale to different purposes.[2]

IV. Relation to Pastor: Employment; Compensation; Dismissal.—The minister cannot be called and settled by the communicants only, if he is to receive his support or compensation from pew rents or from the subscriptions or contributions of the stated hearers in the congregation.[3] The call must be ratified by the congregation or society, and the ratification must be made at a regular meeting of the society duly called for that purpose according to custom and usage. Thus only can the revenues of the society be reached and applied to the support of the minister.[4] It is necessary that the vote of the corporators fixing the salary be ratified by the trustees or a majority of them before the revenues of the church or society can be devoted to the support

1. Juker *v.* Com. 20 Pa. St. 484.

It was held in St. Luke's Church *v.* Mathews, 4 Desaus. (S. Car.) 578, 6 Am. Dec. 619, that a by-law requiring payment of a certain sum as a voting qualification was illegal; but, where an election was held under such a by-law and a vestry chosen, who appointed a minister with a certain salary, it was held. in an action by him to recover the salary, that the contract having been made with officers *de facto* and without collusion he was entitled to recover.

A majority of the members need not be present in order to constitute a corporate meeting of a religious society. those present at a regular meeting constitute a quorum and a majority of them can act.

Madison Ave. Baptist Church *v.* Baptist Church, 32 How. Pr. (N. Y.) 335.

Where the charter prescribes the mode of calling a corporate meeting, any variation from the mode renders the meeting illegal and its action invalid. Weber *v.* Zimmerman, 22 Md. 156; Wiggin *v.* Freewill Baptist Church, 8 Met. (Mass.) 301; Ladd *v.* Clements, 4 Cush. (Mass.) 476; but see Bethany *v.* Sperry, 10 Conn. 200.

The election inspectors are the officers whose duty it is to pass upon the qualifications of members when they offer to vote. After they have received the vote of an elector they cannot throw it out on the ground that he was not qualified to vote. Hartt *v.* Harvey, 32 Barb. (N. Y.) 55; People *v.* Peck, 11 Wend. (N. Y.) 604; 27 Am. Dec. 104.

2. Avery *v.* Baker, 27 Neb. 388; Hendrickson *v.* Decow, 1 N. J. Eq. 577. Where members of a religious society, incorporated and organized under a national church to teach the gospel according to the doctrines, rules, and tenets of that church, purchased a parsonage with funds contributed by themselves, it was held that a good cause of action arose in their favor against other members who procured the name of the corporation to be changed for fraudulent purposes and diverted the property from its intended use. Baker *v.* Ducker, 79 Cal. 365.

3. Lawyer *v.* Cipperly, 7 Paige (N. Y.) 281; Tyler's Am. Eccl. Law, p. 102; Burr *v.* First Parish, 9 Mass. 297; Bisbee *v.* Evans, 4 Me. 375.

4. Tyler's Am. Eccl. Law, p. 104; Robertson *v.* Bullions, 9 Barb. (N. Y.) 64; First Congregational Soc. *v.* Swan, 2 Vt. 222.

of the minister.[1] Unless the salary be regularly and legally fixed in the manner indicated the trustees should withhold their assent to the call.[2]

Where the trustees neglect to apply the revenues of the society to pay the minister's salary he may recover it in an action against the corporation.[3]

Where, however, certain members of the society bind themselves by written agreement with the trustees to assume the payment of the minister's salary upon certain specified conditions, they make themselves liable as in any similar secular agreement and until the conditions are broken.[4] This obligation remains even though the person settled as minister be tried for offenses which would disqualify him for discharging his ministerial duties.[5] If the trial results in a sentence of deprivation, given by the proper ecclesiastical judicatory, he would thereupon cease to be a minister and the temporalities of the society could not legally be applied to his support thereafter.[6]

In *New York*, the trustees have the right to employ the minister, the check being the right of the society to refuse to vote him a salary.[7]

Though the relation of pastor and people is purely an ecclesiasti-

1. Tyler's Am. Eccl. Law, p. 106; West *v.* First Presbyterian Church, 41 Minn. 94; Landers *v.* M. E. Church, 97 N. J. 117; Pendleton *v.* Waterloo Baptist Church, 49 Hun (N. Y.) 596.

2. German Ref. Church *v.* Busche, 5 Sandf. Ch. (N. Y.) 666; Lawyer *v.* Cipperly, 7 Paige (N. Y.) 281; First Baptist Church *v.* Witherell, 3 Paige (N Y.) 298; Landers *v.* M. E. Church, 15 Hun (N. Y.) 340.

3. Ebaugh *v.* German Ref. Church, 3 E. D. Smith (N. Y.) 60. See also Jewett *v.* Thames Bank, 16 Conn. 511.

4. First Religious Soc. *v.* Stone, 7 Johns. (N. Y.) 112. See also Thompson *v.* Garrison, 22 Kan. 765; Jones *v.* Mount Zion Congregation, 30 La. Ann. Pt. 1, 711; Myers *v.* Baptist Soc., 38 Vt. 614.

5. Dieffendorf *v.* Reformed Calvinist Church, 20 Johns. (N. Y.) 12; Calkins *v.* Cheney, 92 Ill. 463.

6. Robertson *v.* Bullions, 9 Barb. (N. Y.) 64; but see Bristor *v.* Burr, 120 N. Y. 427.

7. In Petty *v.* Tooker, 21 N. Y. 267, the court, by Selden J., said: "The change in the character of the congregation of which the plaintiff's complaint has been brought about, not by the proceedings of the Presbytery or the resolutions of the society, but by the action of the trustees in employing a Presbyterian clergyman and opening the meeting house to his ministrations. This they had a legal right to do. The trustees are the representatives of the corporate body and the statute invests them with extensive powers. They are entitled to the possession and management of all the property of the corporation and are empowered to exercise its entire administrative functions. The legislature had been careful to guard against the abuse of this authority by providing that the salary of the minister shall be regulated, not by the trustees, but by a majority of the corporators at a meeting called for that purpose. Subject to this important and most efficient check, the trustees have the undoubted power of determining by whom the pulpit shall be occupied. It is quite apparent that this power which the statute plainly confers must of necessity give to the trustees and a majority of the corporators when united, a virtual control over the forms and ordinances to be observed." See also Bouldin *v.* Alexander, 15 Wall. (U. S.) 131.

In Burrel *v.* Associate Ref. Church, 44 Barb. (N. Y.) 282, it was said that equity has no power to control the action of church trustees in the employment and payment of a minister.

cal one and ecclesiastical tribunals alone have cognizance of it, yet the courts have jurisdiction of the civil contract for salary. The dissolution of the contract by proper ecclesiastical authority is conclusive.[1]

A clergyman may be excluded by the trustees of the society of which he is pastor, from using the church edifice for the promulgation of views at variance with the articles of belief of the society, and it is the duty of the trustees to exclude him.[2] But trustees cannot, without right and solely at the will of the members of the church, close the church against the duly appointed preacher. They may be restrained from so doing by injunction.[3]

A "call" from a Presbyterian congregation to a minister, made according to forms and discipline of that church, and signed by three elders and a trustee, does not bind them individually to pay the minister's salary, but is the act of the congregation.[4] Until the acceptance of the call by the candidate the pastoral relation

1. Connitt *v.* Ref. etc. Dutch Church, 4 Lans. (N. Y.) 339.

It was held in Downs *v.* Bowdoin Square Baptist Soc., 149 Mass. 135, that a corporation of proprietors of a meeting house incorporated under Stat. 1840, ch. 62 (*Massachusetts* Pub. Stat., ch. 38, §§ 27, 41), is not liable to the minister for his salary, where the weight of evidence is that he looked to the church instead of the society, and where the question of his employment by the society was not submitted under such a notice as the statute requires.

An article of the discipline of the Methodist Episcopal Church, retained by the African Methodist Episcopal Church after its separation therefrom, vested in the bishop the right of ordaining elders and appointing charges. An amendment to the charter made after the separation provided that the trustees, ministers and others could elect from their own body a presiding minister of the African Methodist Episcopal Church. It was held that this did not give the right of electing the elder in charge, constant usage for a long series of years having been to leave such choice to the bishop. Com. *v.* Cornish, 13 Pa. St. 288.

It was held in Baldwin *v.* McClench, 1 Me. 102, that a local preacher of the Methodist Society, when ordained as a deacon of the Methodist Episcopal Church, was exempt from taxation as a minister of the gospel, though he had no authority to administer the communion.

2. Isham *v.* First Presbyterian Church, 63 How. Pr. (N. Y.) 465. In People *v.* Runkle, 9 Johns. (N. Y.) 147, the court said: "Though the trustees hold the church property in trust for the church and congregation still it is their possession, and the courts are bound to protect them against every irregular and unlawful intrusion made against their will, whether by members of the congregation or by strangers."

3. Whitecar *v.* Michenor, 37 N. J. Eq. 6.

4. In Paddock *v.* Brown, 6 Hill (N. Y.) 532, the court by Nelson, J., said: "The written instrument or 'call' relied on to bind the defendants, does not purport on its face to bind them, but the contrary. If any legal obligation at all is to be predicated upon it in favor of the plaintiff, which may be questionable, it is an obligation assumed by the congregation through its authorized agents and nothing more. . . . The paper judging from the established course of proceeding in the regular installment of a pastor over a congregation, appears to be an instrument of a purely ecclesiastical character, having relation to the spiritual concerns of the church, rather than to its temporal affairs. True it contains a recognition of the annual stipend agreed upon and an assumption on the part of the congregation to contribute the same. . . . But the trustees are the body legally constituted under the statute to take charge of all the temporalities of the congregation and to manage and control the same. . . . They are the body, therefore, that should attend to the raising and payment of the minister's salary.

is temporary only, and no permanent obligation rests upon the congregation to pay him his salary for any longer term than it receives his services. The rate of compensation fixed in the call may be referred to to determine the amount of such temporary salary.[1]

In the Protestant Episcopal Church the church wardens and vestrymen have the exclusive power to call and induct the rector; the assent of the church or congregation need not necessarily be obtained. The power to call and induct carries with it as well the power to fix the salary of the rector and to deliver to him the possession of the church.[2]

"By the form of government of the Presbyterian Church, when the congregation are prepared to elect a pastor, it is made the duty of the church session to convene the society, if a majority of the persons entitled to vote in the case shall by a petition request that such meeting be called. Notice of the contemplated meeting must be publicly given from the pulpit of the church or house of worship, on a Lord's Day immediately after public worship. On the day appointed for the meeting, if expedient, a minister invited for the purpose must preach a sermon, and after the sermon must announce to the people that he will proceed to take the votes of the electors of the congregation or society, for a pastor if they so desire. If such desire be expressed by a majority of voices, the minister must then proceed to take the votes accordingly.

No person will be entitled to a vote in the election who refuses to submit to the censures of the church regularly administered, or who does not contribute his just proportion according to his own engagements, or the rules of the congregation or society, to all its necessary expenses. If a majority of the votes cast are in favor of the candidate, and they insist upon their right to call a pastor, the presiding minister must draw up a call in due form and have it subscribed by the electors; and the proceedings of the meeting, together with the call, must be then laid before the presbytery to which the church belongs. If the presbytery think it expedient to present the call to the candidate it will be presented accordingly, and no minister or candidate is allowed to receive a call but through the hands of the presbytery. Should it not be expedient for a minister to moderate the meeting at which the call emanates, then, of course, one of the elders or other member of the congregation or society may be called to the chair and preside. In case the church session should neglect or refuse to call a meeting of the congregation or society to act upon the question of calling a pastor, upon a proper request, the presbytery would order the meeting, or require the church session to do so themselves." Tyler's Amer. Eccl. Law, p. 103; and see Cases of Presbyterian Church, 383 *et seq.*; West *v.* First Presbyterian Church, 41 Minn. 94.

1. West *v.* First Presbyterian Church, 41 Minn. 94.

2. Humbert *v.* Protestant Episcopal Church, 1 Edw. Ch. (N. Y.) 308; Youngs *v.* Ransom, 31 Barb. (N. Y.) 49. But see Landers *v.* Frank St. M. E. Church, 15 Hun (N. Y.) 340. In Humbert *v.* Protestant Episcopal Church, 1 Edw. Ch. (N. Y.) 308, it was said: "In what does the call and induction consist? I have no doubt it includes the power to fix the salary as well as to make a contract with the rector and deliver him possession of the church. The call and induction appear to be substitutes for what is known in the common law as the right of advowson or presentation to an ecclesiastical benefice and of institution and induction. The first belongs to the founder or patron of the church; the second to the bishop, which, according to Blackstone, 'is a kind of investiture of the spiritual part of the benefice;' and the last to the church wardens and vestrymen, which is a giving in possession or an investiture of the temporal part as institution is of the spiritual. The term 'call' as used in the statute is derived from the constitution of the Reformed Dutch Church and when it is made it must necessarily contain an offer of salary and specify the views

A minister engaged for a given time is entitled to be retained unless he loses the right by some fault of his own. He may be dismissed for good cause shown, but not arbitrarily; there is no legal distinction between a contract with a minister and his congregation and any other civil contract for personal services.[1]

In the Roman Catholic church the priest is appointed by the bishop of the diocese in which the church is located; and his salary is usually paid from the pew rents of the church.[2] The bishop is not liable therefor,[3] nor for the support of a priest during a period for which the bishop has refused to assign him a charge.[4]

In the Congregational church a minister settled over a parish for an indefinite term does not hold his office at the will of the parish, nor from year to year, but for life. The pastoral relation can be dissolved only by agreement, such loss of character for purity of morals on the part of the minister as unfits him for performing his sacred functions, or by an essential change of doctrine on the part of parish or pastor.[5] But if anterior

and wishes of those tendering it for the proposed incumbent's consideration; and if the terms be accepted the call becomes the contract between the church and him. Van Vlieden *v.* Welles, 6 Johns. (N. Y.) 85; Reformed Dutch Church *v.* Bradford, 8 Cow. (N. Y.) 457. Upon the making of the contract the call is complete. Nothing then remains to be performed, but the ceremony of induction."

In Bird *v.* St. Mark's Church, 62 Iowa 567, it was held that a rector could not be removed indirectly by the church wardens and vestrymen by reducing his salary.

"If the call be accepted by the clergyman within a reasonable time after its receipt, it is binding upon both parties. No formal induction or institution is necessary unless required by a rule of the ecclesiastical body to which the clergyman and parish belong. A call to a parish, and its acceptance, and a consequent entry upon the duties of the office of its minister are all which we have in this country resembling the presentation, admission, and induction of the English church; and neither these terms nor the ceremonies indicated are known to the law, as applicable to any of the churches in the State of New York." Tyler's Am. Eccl. Law, p. 105. And see Youngs *v.* Ransom, 31 Barb. (N. Y.) 49.

In the absence of stipulation in the call and settlement a rector cannot be dismissed from his parish except by mutual consent or by the authority of the bishop. Youngs *v.* Ransom, 31 Barb. (N. Y.) 49.

Though the election of a church vestry is illegal, a minister employed by it and who has no notice of the illegality, may be entitled to the salary agreed upon. St. Luke's Church *v.* Mathews, 4 Desaus. (S. Car.) 578; 6 Am. Dec. 619.

1. Congregation of the Children of Israel *v.* Peres, 2 Coldw. (Tenn.) 620.

2. Tyler's Am. Eccl. Law, p. 102, § 221.

3. Rose *v.* Vertin, 46 Mich. 457; 41 Am. Rep. 174.

4. Tuigg *v.* Sheehan, 101 Pa. St. 363; 47 Am. Rep. 727.

A priest may be removed from his congregation at the pleasure of the bishop without trial. He cannot, however, be suspended from his priestly functions without specific accusation and trial. Stack *v.* O'Hara, 98 Pa. St. 213.

5. In Avery *v.* Tyringham, 3 Mass. 182; 3 Am. Dec. 105, the court by Parke, J., said, "but, considering the established usage of the country, known to the contracting parties; the nature of the duties to be performed which peculiarly require permanency in office; the solemnity of the act, which testifies the assent of the minister and his people, it would certainly seem that the connection, thus established, was to endure for life, unless some stipulation to the contrary should be expressed. Add to this the provision made by our laws for the first settled ministers in

immorality on his part is the ground of dismissal it must be so recited in the vote which dismisses him; it cannot be brought in as a cause of dismissal after trial begins.[1]

Where a Congregational minister changes his religious opinions and the parish retains those first held by the minister, a proper case exists for the calling of an ecclesiastical council.[2] The

new countries to have a considerable portion of land in fee, and the use of other lands during their ministry, and no doubt will remain that our legislature has always considered the office of a religious teacher durable as his life unless otherwise provided by the original terms of his settlement, or unless dissolved by a breach of contract on his part, or by a merited loss of that character for purity of morals, and Christian virtue, which is essential to the due performance of his sacred functions." . . . "The nature of the office implies a contract to preserve an irreproachable character for the moral and Christian virtues; and that whenever gross misconduct or omission of duty, shall be proved against a minister suing for his salary, my apprehension is, that he will deemed to have forfeited all rights resulting from the sacred profession he has abused; in addition to which the people connected with such a minister, by resorting to an ecclesiastical council, a tribunal coeval with the settlement of our country will be sure to find a remedy by the removal of a man who has given them reasonable cause of disgust." See also opinion of Sedgwick, J., in same case, "these facts operate very strongly in my mind to show the public and general impression in the country, that a settlement of a minister under a contract for an indefinite period is a settlement for life." See also opinion of Parsons, C. J., in same case. See also Burr *v.* First Parish, 9 Mass. 277; Peckham *v.* Haverhill, 33 Mass. 274. In Sheldon *v.* Congregational Parish, 24 Pick. (Mass.) 281, the court by Morton, J., said; "the settlement of a minister over a congregational church and society without any limitations as to its continuance or any express stipulations as to the mode of its dissolution is a contract for life, determinable only in the manner and for the causes established by law." In the absence of agreement to the contrary the pastoral office is for the life of the incumbent and not determinable at the will of either party, and a court of law cannot determine what acts or omissions will create a forfeiture, but a court of equity will at the motion of members of the society oust a minister who has been deposed by his denomination and whom the trustees insist upon retaining. Whitney *v.* First Ecclesiastical Soc., 5 Conn. 405; Bristor *v.* Burr, 120 N. Y. 427; Isham *v.* Fullager, 14 Abb. N. Cas. (N. Y.) 363.

1. Avery *v.* Tyringham, 3 Mass. 182; 3 Am. Dec. 105; Thompson *v.* Catholic Congregational Soc., 5 Pick. (Mass.) 478. In Whitmore *v.* Fourth Congregational Soc., 2 Gray (Mass.) 306, the court, by Metcalf, J., said: "If the defendants had a legal right to rescind their contract on the ground of anterior immorality on his part (a point which need not be decided now), yet we are of opinion that they could not do so by vote without stating that as the reason for rescission, and reciting it in their vote. They gave him no notice of the reason for their vote and ought not to be permitted to show now for the first time, what that reason was." See also Thompson *v.* Catholic Congregational Soc., 22 Mass. 469.

A minister having been settled in a parish at a fixed salary, the parish afterwards voted that the parish committee should annually value the salary, according to the price of the necessaries of life, so that it should be increased as that price rose, the minister also agreeing that it should be decreased as the price fell. It was held that the minister was bound by the valuation of the committee, unless he could show that they had acted therein unfairly, partially or corruptly. Burr *v.* First Parish, 9 Mass. 277.

2. Burr *v.* First Parish, 9 Mass. 276; Sheldon *v.* Congregational Parish, 24 Pick. (Mass.) 281.

Such a council may be *ex parte* or mutual: a mutual council should be offered first. Thompson v. Catholic Congregational Soc., 5 Pick. (Mass.) 469.

In Burr *v.* First Parish, 9 Mass. 277, the court by Parsons, C. J., said: "The result of a mutual council legally

purpose of the council is to try charges against the minister; but it has no sanction by which it can remove him from his office. The application for a council should state substantially the charges against which the minister must defend himself. If he declines to signify his assent or dissent to the application until unreasonable conditions imposed by him have been complied with, his conduct amounts to an unreasonable refusal to join in calling a council.[1]

The immoralities for which a parish may dismiss the minister are of the grosser sort, such as habitual intemperance, unchaste behavior, etc.; lesser offenses, such as imprudence, censoriousness, etc., are not good cause for dismissal.[2]

V. Relation to Members—1. Expulsion.—In the absence of rules made by the religious organization regulating the expulsion of members, those of the common law prevail. Before a member can be lawfully expelled, notice must be given him and an opportunity afforded to meet the charges made against him.[3]

convoked, will not bind either party rejecting it. The effect of the advice of a council is nothing more than a legal justification of the party who shall adopt it." But in Avery *v.* Tyringham, 3 Mass. 182, 3 Am. Dec. 105, the same judge said: "If, in a proper case for the meeting of an ecclesiastical council to be mutually chosen either party should unreasonably and without good cause refuse their concurrence to a mutual choice, the aggrieved party may choose an impartial council, and will be justified in conforming to the result;" and Parker C. J. said that either party had a right, by usage to call an *ex parte* council if there was a refusal or an unreasonable delay to join. But in Stearns *v.* First Parish, 21 Pick. (Mass.) 125, the court, by Morton, J., said: "In many cases it is not easy to see how it (the decree of an ecclesiastical council) will justify one party and not bind the other."

1. In Thompson *v.* Catholic Congregational Society, 7 Pick. (Mass.) 159, the court, by Parker C. J., said: "*Ex parte* councils should be composed of those who are presumed to be impartial and who have not prejudged. If there be a mutual council, no objection can be taken to the individuals composing it, unless some partiality can be proved. But when there is an *ex parte* council it is important that all the members should be free from prepossession." And see Peckham *v.* Haverhill, 16 Pick. (Mass.) 288.

2. Thompson *v.* Catholic Congregational Society, 5 Pick. (Mass.) 469: Where a pastor had been tried by a church council for "an exclusive course in regard to ministerial exchanges," "neglect to reply to communications" from committees of the parish and "loss of the confidence of a large portion of his parishioners in his moral honesty and integrity," it was held that this was not sufficient to warrant an order dissolving the pastoral relation. Sheldon *v.* Easton, 24 Pick. (Mass.) 281.

Where some of the members of a council called to consider charges against a minister have sat in a previous council to try the same minister on the same charges, a similar result is not a valid finding and a recommendation of dissolution of the ministerial contract made without specifying which of several charges are proved, has no effect. Thompson *v.* Catholic Congregational Society, 7 Pick. (Mass.) 160.

3. Jones *v.* State, 28 Neb. 495; McAuley's Appeal, 77 Pa. St. 397; Avery *v.* Tyringham, 3 Mass. 160; 3 Am. Dec. 105; Burr *v.* First Parish, 9 Mass. 277; Sheldon *v.* Congregational Parish, 24 Pick. (Mass.) 288; Thompson *v.* Catholic Congregational Society, 5 Pick. (Mass.) 478.

This is the rule also in the Episcopalian church. Lucas *v.* Case, 9 Bush (Ky.) 297; McAuley's Appeal, 77 Pa. St. 397; Batterson *v.* Thompson, 8 Phila. (Pa.) 251.

Where a by-law provided that any member ceasing to worship or failing to

The judgments of religious associations bearing upon their own members are not cognizable in a court of law unless they affect civil rights; an award of a committee appointed by a church to investigate a dispute between members is not evidence in a court of law.[1]

Where a congregation in its constitution adopts certain books as the exponents of its doctrine, and there arise honest differences of opinion as to the interpretation of the statements of doctrine in such books, and the constitution is silent as to such matter of interpretation, and provides no mode for determining the differences, the civil courts will not hold that adherence to either interpretation dissolves *ipso facto* a member's connection with the congregation, so that he ceases to be a member of the corporation it has formed to hold and control its property.[2]

Churches may discipline their members by vote of excommunication and by reading of the sentence in the presence of the congregation.[3]

contribute for a year, should be dropped, it was held that this could be done only after notice and hearing and by a vote of the society. Gray *v.* Christian Soc., 137 Mass. 329; 50 Am. Rep. 310.

1. Harmon *v.* Dreher, Spears Eq. (S. Car.) 87; Tubbs *v.* Lynch, 4 Harr. (Del.) 521. But see Nachtrieb *v.* Harmony Settlements, 3 Wall. Jr. (C.C.) 66.

In the society of Shakers the right to expel members rests with the ministers and elders; and a court of law cannot determine whether the opinions and conduct of expelled members are inconsistent with the established belief of the society. Grosvenor *v.* United Society of Believers, 118 Mass. 98.

2. East Norway Lake etc. Church *v.* Halvorson, 42 Minn. 503.

In Taylor *v.* Edson, 4 Cush. (Mass.) 522, the court by Dewey, J., said: "The law of this commonwealth regulating religious societies and defining the privileges as well as liabilities of individual members of such associations must be found in our peculiar local history and usages, in our constitution, and the various statutes enacted by the legislature from time to time, rather than in any general principles contained in the elementary books relating to corporations generally. So, too, in examining questions appertaining to this subject, it is to be remembered, that religious societies in this commonwealth have been materially modified during the present century in some aspects. Closely connected as were religious and civil rights in the early period of our history, the right of membership in a parish or religious society, seems to have assumed much the same character with the right to be an inhabitant of a town, and to be entitled to all the privileges of such inhabitancy. This right to the privileges seemed necessarily and certainly, very properly, to result from the correlative liability of each individual to be thus enrolled and made to bear the burdens of supporting religious worship. It was a legal duty, devolving on all the citizens, to contribute to the parochial charges; and the organization of parishes, to a great extent, being no other than the town organization, the voters were much the same, and the rights and duties of the inhabitants, as to municipal privileges and burdens, and as to membership were acquired and lost much in the same way . . . Those voluntary associations known as poll parishes, have been established on different principles from territorial parishes and particularly so as to membership. They are voluntary, and where unrestrained by their articles of association, or by their act of incorporation, if incorporated, are of course fully at liberty to prescribe terms of membership from time to time, which terms will be of binding authority on all connected with the parish." See also Fisher *v.* Whitman, 13 Pick. (Mass.) 350; Oakes *v.* Hill, 10 Pick. (Mass.) 333. But see Keith *v.* Howard, 24 Pick. (Mass.) 292.

3. In Farnsworth *v.* Storrs, 5 Cush. (Mass.) 412, the court by Shaw, C. J., said: "The rights of churches to use,

2. Withdrawal.—Members of a religious society may voluntarily withdraw from it and enter another more consonant with their views, but, where they do so, they must be considered as abandoning their rights to the property of the society which they leave, to the adherents of the original articles of belief.[1] But, to have this effect, the withdrawal must be absolute and entire, not conditional or limited until a change in the arrangement of church service.[2]

VI. Trustees.—The trustees, not the members of the church or congregation, have the control of the church edifice, and can let it temporarily or make such similar disposition of it as will

exercise, and enjoy all their accustomed privileges and liberties, respecting divine worship, church order and discipline, etc., are declared and secured by statutes passed at various times and in force to the present day. . . . Among these powers and privileges established by long and immemorial usage, churches have authority to deal with their members, for immoral and scandalous conduct; and for that purpose to hear complaints, to take evidence and to decide; and, upon conviction, to administer proper punishment by way of rebuke, censure, suspension and excommunication. To this jurisdiction, every member, by entering into the church covenant, submits, and is bound by his consent. Remington *v.* Congdon, 2 Pick. (Mass.) 313; 13 Am. Dec. 431. The proceedings of the church are *quasi* judicial, and therefore those who complain, or give testimony, or act and vote, or pronounce the result, orally or in writing, acting in good faith, and within the scope of the authority conferred by this limited jurisdiction, and not falsely or colorably making such proceedings a pretense for covering an intended scandal are protected by law." See also Grosvenor *v.* United Soc. of Believers, 118 Mass. 78; Lucas *v.* Case, 9 Bush (Ky.) 297.

See also on the general subject of excommunicated members, Berryman *v.* Reese, 11 B. Mon. (Ky.) 287; Jenkins *v.* Cook, 45 L. J., P. C. 1; L. R., 1 P. Div. 80.

In Grosvenor *v.* United Soc. of Believers, 118 Mass. 78, it was held that an action of tort would not lie against the minister and elders of a Shaker society for expulsion.

1. Isham *v.* First Presbyterian Church, 63 How. Pr. (N. Y.) 465; Taylor *v.* Edson, 4 Cush. (Mass.) 522; Miller *v.* Gable, 2 Den. (N. Y.) 492.

2. Marks *v.* Congregation Daruch Annuns, 5 Daly (N. Y.) 8, where it was held that a resignation of members, who stated that they resigned "until a new reader should be elected," was not a resignation, but an attempt to create a suspension of membership until the happening of an event, and that, as there was no provision in the by-laws of the society authorizing such a suspension, they continued members and were liable under the by-laws for the payment of dues.

Where members claiming to be such meet for worship and church business in another building than the church edifice their conduct does not show an intention to withdraw from membership. McAuley's Appeal, 77 Pa. St. 397.

In the Lutheran church a congregation connected with a district synod may withdraw therefrom; and, though there are pending before the synod appeals from the action of the congregation and complaints against its members, the power to withdraw is not affected thereby. Bartholomew *v.* Lutheran Congregation, 36 Ohio St. 567, the connection of the congregation with the synod being voluntary, so that a dissolution of the connection is not a violation of the condition on which the congregation holds its property. Heckman *v.* Mills, 16 Ohio 583.

The way provided by statute whereby a member of a religious society may leave it without its consent does not prohibit him from withdrawing in some other way; where a member produced a certificate of the clerk of the society stating that at his own request he had ceased to be a member his connection with the society was considered to be at an end. Oakes *v.* Hill, 10 Pick. (Mass.) 333.

not permanently interfere with the rights of the members to use it.[1]

If the trustees are irregularly elected yet they are trustees *de facto*, and their proceedings as such are valid until ouster by judgment of a competent court, but they must be acting under color of election or appointment.[2] Control of the church edifice by the trustees includes the power to repair or demolish it.[3]

The trustees may close up the Sabbath school and chapel whenever they think proper.[4] A bishop holding title to realty as trustee for his congregation under the rules and regulations of the Roman Catholic Church, can maintain trespass against such of its members as tear down the church edifice against his protest even for the purpose of repairing and rebuilding it, even though funds and material for the building had been contributed by members of the congregation.[5] Where a fund is in the hands of a trustee for the benefit of a church, a bill will lie to compel the trustee to apply the fund to the purposes for which the trust was created.[6]

Property of an unincorporated religious association is held by trustees according to the discipline, rules, and usages of the denomination, including the corporation itself.[7] The trustees of an incorporated religious society can alone represent it in making contracts.[8] But the order in which public worship shall be

1. Wheaton *v.* Gates, 18 N. Y. 395; Hale *v.* Everett, 53 N. H. 71; 16 Am. Rep. 82; Tyler's Amer. Eccl. Law, p. 99, § 216; Bates *v.* Houston, 66 Cal. 198; German etc. Congregation *v.* Pressler, 17 La. Ann. 127; German Ref. Church *v.* Busche, 5 Sandf. (N. Y.) 666; *In re* St. Ann's Church, 14 Abb. Pr. (N. Y.) 424; 23 How. Pr. (N. Y.) 285; but see Morgan *v.* Rose, 22 N. J. Eq. 583.

Every member of a church organized under the general law is entitled to a beneficial interest in the property of the church while his membership continues. Brunnenmeyer *v.* Buhre, 32 Ill. 183.

2. Vernon Soc. *v.* Hills, 6 Cow. (N. Y.) 23; 16 Am. Dec. 429; People *v.* Peck, 11 Wend. (N. Y.) 604; 27 Am. Dec. 104; East Norway Lake etc. Church *v.* Halvorson, 42 Minn. 503.

In Reformed Methodist Soc. *v.* Draper, 97 Mass. 349, the court by Foster, J., said: "Persons who are in the open and peaceable exercise of the powers and duties of officers in a corporation are presumed to have been duly elected and to be entitled to the positions they occupy. Strangers cannot be permitted to contest their title or to impeach the validity of their acts by showing irregularities in their election or in any of the antecedent proceedings of the corporation." See also Whitmore *v.* Fourth Congregational Soc., 2 Gray (Mass.) 306; Oakes *v.* Hill, 14 Pick. (Mass.) 442; First Parish *v.* Cole, 3 Pick. (Mass.) 232; Burr *v.* First Parish, 9 Mass. 277; Christ Church *v.* Pope, 8 Gray (Mass.) 140.

3. Van Houten *v.* First Ref. Dutch Church, 17 N. J. Eq. 130; Bronson *v.* St. Peter's Church, 7 N. Y. Leg. Obs. 364; Heeney *v.* St. Peter's Church, 2 Edw. Ch. (N. Y.) 608; Fink *v.* Umscheid, 40 Kan. 277.

4. Alexander Presbyterian Church *v.* Presbyterian Church, 46 How. Pr. (N. Y.) 312.

5. Keiss *v.* Vosburg, 59 Wis. 532.

6. Wilson *v.* Johns Island Church, 2 Rich. Eq. (S. Car.) 192; Skilton *v.* Webster, Bright. (Pa.) 203. These cases are authority for the doctrine that a seceding majority forfeits all rights to the benefit of such a trust.

7. M. E. Church *v.* Clark, 41 Mich. 730; Isham *v.* First Presbyterian Church, 63 How. Pr. (N. Y.) 465; Curd *v.* Wallace, 7 Dana (Ky.) 190; 32 Am. Dec. 85.

8. Baptist Congregation *v.* Scannel, 3 Grant Cas. (Pa.) 48; African Baptist Church *v.* St. Louis Transfer Co., 98 Mo. 412.

conducted and its general nature is to be determined by those who administer the church discipline.[1]

The trustees of a religious corporation are the only persons empowered to bind the corporate body, and in order to execute this power they must meet as a board, deliberate and decide. The separate and individual action of the trustees without meeting and consulting together as a board, even though a majority in number should agree upon a certain act, is not binding upon the corporation and cannot of itself create a corporate liability.[2] The trustees are mere agents to give effect to the will of a majority of the corporation.[3] The act of the warden and burgesses of a society in accepting a church clock is binding on the society without showing a vote of the corporation accepting it.[4] The vestrymen of a church have power to preserve order and remove disturbers from a meeting of the church.[5] The trustees of a religious society may sue on behalf of all the members to establish a will devising property to the society.[6]

The trustees of an independent congregation in whom the title to the church property is vested for the use of the congregation may maintain ejectment against seceders who have formed a separate organization and taken possession of the church edifice.[7] A Shaker community is liable on the contracts of its trustees, in suits brought against them, and the writs, judgment, execution, and levy may run against them and their successors in their official capacity.[8]

The official acts of a minister of the gospel, when coming in question collaterally and not declared void by statute, are as valid as the official acts of other persons.[9] In the Dutch Reformed Church every minister, elder, or deacon, properly called and instituted, is *virtute officii* a trustee and remains such as long as his office

1. Tartar *v.* Gibbs, 24 Md. 323.

2. Constant *v.* St. Albans Church, 4 Daly (N. Y.) 305; United Brethren Church *v.* Vandusen, 37 Wis. 54; St. Patrick's Roman Catholic Church *v.* Gavalon, 82 Ill. 170.

3. Kulinski *v.* Dambrowski, 29 Wis. 109; St. Patrick's Roman Catholic Church *v.* Gavalon, 82 Ill. 170.

Under *New York* Laws, 1875, ch. 79, a trustee may sue in the name of the corporation, to restrain his co-trustees from diverting the corporate property from its proper channels. Reformed Presbyterian Church *v.* Bowden, 14 Abb. N. Cas. (N. Y.) 356.

4. Davidson *v.* Bridgeport, 8 Conn. 472.

5. Beckett *v.* Lawrence, 7 Abb. Pr. N. S. (N. Y.) 403.

A sexton conducting a funeral in a church building may lawfully remove therefrom an undertaker who is there in violation of the rules of the church. Com. *v.* Dougherty, 107 Mass. 243.

6. Lilly *v.* Tobbein, 103 Mo. 477.

7. Fernstler *v.* Seibert, 114 Pa. St. 196; see also Kreglo *v.* Fulk, 3 W.Va. 74.

But not in *New York*. Concord Society *v.* Staunton, 38 Hun (N. Y.) 1; Watkins *v.* Wilcox, 6 Thomp. etc. (N. Y.) 539; 4 Hun (N. Y.) 220.

8. Davis *v.* Bradford, 58 N. H. 476.

9. State *v.* Winkley, 14 N. H. 480. See as to the acts of a clerk of a parish, Price *v.* Lyon, 14 Conn. 280.

In the absence of statutory permission the president of a religious corporation cannot maintain actions in favor of the corporation in his own name. Designating himself in the pleadings is a mere description of the person. Lowenthall *v.* Wiseman, 56 Barb. (N. Y.) 490.

continues or until removal or secession.[1] The certificate of election given a trustee is only *prima facie* evidence of title to office, and in its absence title may be shown *aliunde*.[2] The office of deacon is ecclesiastical, not statutory, and the members of the unincorporated religious association control the office; the fact that the deacons are authorized to be *ex officio* trustees of the association when it has been incorporated makes no difference.[3] It must be shown positively that the property of the society will be impaired or the rights of beneficiaries imperiled before the removal of a trustee will be ordered.[4]

The property of the church vested in trustees is held under a trust which courts of law will enforce; but they will not lend their aid to divert the property from the original uses and purposes to which it was devoted.[5] But trustees of religious and other benevolent associations cannot, without sanction from their charter, purchase and hold real estate under trusts of their own creating which protect their property from their creditors.[6] The male members of a Christian Society are invested with no visitorial or controlling power over the ministers or trustees or interest in the property of the society, and have no authority except in the case of selling or leasing or in amending the church articles.[7] Courts cannot control the discretion of trustees in the management of church funds so long as they do not violate their charter; they are responsible to their constituents alone.[8] But when trustees apply to the court for aid and direction respecting the exchange of securities or investment of funds, the court has power to make the necessary decree in the premises.[9] And where church property is held in trust for religious purposes, the legislature may authorize the trustees to convert the real estate into personal for the purpose of carrying out the object of the trust.[10]

1. Doremus *v.* Dutch Ref. Church, 3 N. J. Eq. 332.

2. North Baptist Church *v.* Parker, 36 Barb. (N. Y.) 171; but see M. E. Church *v.* Clark, 41 Mich. 730.

3. Attorney-Gen'l *v.* Gleerlings, 55 Mich. 562.

4. Determann *v.* Luehrsmann, 74 Iowa 275; Cicotte *v.* St. Ann's Church, 60 Mich. 552; Field *v.* Field, 9 Wend. (N. Y.) 394.

The election of new trustees before the expiration of the term of office of the old does not affect their tenure of office. The meeting for the election must be held in the meeting house, and in case that is impossible then in the nearest practicable place. Den *v.* Pilling, 24 N. J. L. 653: Appeal of Nolde (Pa. 1888), 15 Atl. Rep. 877.

As to what voluntary acts of a trustee remove him from office of their own force, see *In re* Court St. M. E. Soc. (Supreme Ct.), 4 N. Y. Supp. 723.

Persons elected trustees on a different day and after different notice than the rules of the church require are not trustees *de jure* or *de facto*, and the previous trustees holding over may resist their taking possession of church property. First African M. E. Church *v.* Hillery, 51 Cal. 155; Miller *v.* Eschbach, 43 Md. 1; People *v.* Nappa, 80 Mich. 484.

5. Nelson *v.* Benson, 69 Ill. 27; Field *v.* Field, 9 Wend. (N. Y.) 394.

6. Magie *v.* German Evangelical etc. Church, 13 N. J. Eq. 77.

7. Tartar *v.* Gibbs, 24 Md. 323.

8. Episcopal Church *v.* Salksdale, 1 Strobh. Eq. (S. Car.) 197; Field *v.* Field, 9 Wend. (N. Y.) 394.

9. M. E. Society *v.* Harriman, 54 N. H. 444.

10. Sohler *v.* Trinity Church, 109

Seceders from a *classis* of a Reformed Dutch Church, though they retain its faith and doctrines and connect themselves with another *classis*, have no title to corporate property of the *classis* from which they seceded.[1] An alienation of the legal title by the trustee of a charitable trust will be considered *per se* as a breach of trust, unless he can show that his action was beneficial to the trust.[2] Statutory power in regard to the appointment, change, and removal of trustees gives the court no power to determine how the trust shall be administered, but only who shall administer it; a judgment going further than this is void and may be questioned collaterally.[3] Trustees cannot take a trust for the benefit of members of the church only, as distinguished from members of the congregation, nor for the benefit of a part of the corporators.[4] In case of schism in a religious society a court of equity will not attempt to enforce the faith or doctrines of either party, but only the observance and execution of an ascertained trust.[5] Persons must be peaceably admitted as trustees into possession of the temporalities or their title to office established by action of the attorney-general before they can restrain the trustees in possession, and who have been duly elected, from performing the duties of their office.[6]

Trustees are personally liable on the covenant of warranty in a deed of church property signed by them in their individual capacity only.[7]

VII. General Powers; Judicial and Legislative Interference.—The State constitutions generally prohibit all church establishment and guaranty to every citizen the right to worship God in his own way, and to give full expression to his religious views. Therefore a law giving to one religious sect a privilege not enjoyed by all equally is unconstitutional and void.[8]

Mass. 1; Blanc *v.* Alsbury, 63 Tex. 489; 51 Am. Rep. 666.

1. Den *v.* Bolton, 12 N. J. L. 206. See also Venable *v.* Ebenezer Baptist Church, 25 Kan. 177.

2. Beckwith *v.* St. Philips Parish, 69 Ga. 564.

3. Wade *v.* Hancock, 76 Va. 620; Field *v.* Field, 9 Wend. (N.Y.) 294.

4. Gram *v.* Prussia etc. Soc., 36 N.Y. 161.

5. Rottmann *v.* Bartling, 22 Neb. 375.

6. North Baptist Church *v.* Parker, 36 Barb. (N. Y.) 171.

7. Klopp *v.* Moore, 6 Kan. 27.

The *New York* act of 1863 relative to the incorporation of religious societies does not constitute the trustee the corporation in place of the congregation, so that the acts of a majority of the trustees would not be binding on the congregation. Peoples' Bank *v.* St. Anthony's Roman Catholic Church, 109 N. Y. 512.

Thanks voted by the wardens and vestry of a church to its secretary and treasurer "for their able and gratuitous services" and so entered on the parish books, operate as a bar to the recovery of pecuniary compensation for services rendered. Episcopal Church *v.* Barksdale, 1 Strobh. Eq. (S. Car.) 197.

8. Shreveport *v.* Levy, 26 La. Ann. 671; 21 Am. Rep. 553; Cooley Const. Lim., p. 571, *et seq.*, and cases cited:

"Whatever establishes a distinction against one class or sect is, to the extent to which the distinction operates unfavorably, a persecution. The extent of the discrimination is not material to the principle, it is enough that it creates an inequality of right or privilege;" and, again, "not only is no one denomination to be favored at the expense of the rest, but all support of

Attendance upon religious worship must be voluntary.[1]

But, while the exercise of the rites of religion must be free and no restraints can be placed upon the expression of religious belief, an act done in the performance of religious services, or in accordance with religious belief, which constitutes a disturbance of the public peace and tranquillity, may be prohibited by statute or municipal ordinance without violating the constitutional rights of citizens to worship God according to the dictates of their own conscience.[2] The legislature may also interfere in cases where the public health or safety is concerned with the use which a religious society may make of its real estate, as by ordering the removal of a churchyard from its location to one more suitable.[3]

The ecclesiastical judicatories which, in every principal denomination, have jurisdiction over matters of doctrine or discipline, have also some jurisdiction over the faith and conduct of the members of the denomination.[4]

religious instruction must be entirely voluntary. It is not within the sphere of government to coerce it." Cooley Const. Lim., pp. 576, 577.

Judge Cooley says (p. 576, n. 1): "We must exempt from this the State of *New Hampshire*, whose constitution permits the legislature to authorize 'the several towns, parishes, bodies corporate, or religious societies within this State to make adequate provisions, at their own expense, for the support and maintenance of public Protestant teachers of piety, religion, and morality; but not to tax those of other sects or denominations for their support.'" As to the meaning of "Protestant," see Hale *v.* Everett, 53 N. H. 1; 16 Am. Rep. 82.

The attempt to amend the above provision by striking out the word "Protestant" was made in 1876, but failed, though at the same time the acceptance of the Protestant religion as a test for office was abolished; and the application of money raised by taxation to the support of denominational schools was prohibited.

1. Cooley Const. Lim. (6th ed.) 576.

2. State *v.* White, 64 N. H. 48; Com. *v.* Davis, 140 Mass. 485; State *v.* Freeman, 38 N. H. 426; People *v.* Rochester, 44 Hun (N. Y.) 166; *In re* Frazee. 63 Mich. 396; Anderson *v.* Wellington, 2 L. R. A. 110.

3. In Sohier *v.* Trinity Church, 109 Mass. 1, the court by Chapman, C. J., said: "This court has had occasion to discuss the power of the legislature to pass laws which belong to the class of police regulations and which include laws for the preservation, care and removal of cemeteries and tombs, and the disposal of the remains of the dead; and it is held here as well as in other States, that all individual rights of property are subject to laws of this character. This principle was fully stated by Chief Justice Shaw in Com. *v.* Alger, 7 Cush. (Mass.) 53; Fisher *v.* McGirr, 1 Gray (Mass.) 1; 61 Am. Dec. 381; Baker *v.* Boston, 12 Pick. (Mass.) 184; 22 Am. Dec. 421; Vandine, Petitioner, 6 Pick. (Mass.) 187; 17 Am. Dec. 351; Nightingale, Petitioner, 11 Pick. (Mass.) 168; Salem *v.* Eastern R. Co., 98 Mass. 431; 96 Am. Dec. 650; Dingley *v.* Boston, 100 Mass. 544. In U. S. *v.* Union Pacific R. Co., 98 U. S. 569, the court by Miller, J., said: "They are cases of municipal, charitable, religious, or eleemosynary corporations public in their character, which have abused their franchises, perverted the purposes of their organization or misappropriated their funds, and being from the nature of their corporate functions more or less under government supervision have been proceeded against by the Attorney-General to obtain correction of the abuse."

4. First Baptist Church *v.* Witherell, 3 Paige (N. Y.) 296; White Lick Quarterly Meeting *v.* White Lick Quarterly Meeting, 89 Ind. 163; Gibson *v.* Armstrong, 7 B. Mon. (Ky.) 481; Bouldin *v.* Alexander, 15 Wall. (U. S.) 131.

It is said, in Tyler's Am. Eccl. Law, pp. 127, 128, that "The legal character of the (religious) corporation is not affected by the existence or non-

The corporators of a religious society may not only elect their officers and so control the disposition of their own property, but may change their faith and form of worship at pleasure.[1]

If trustees attempt a diversion of the trust property, equity will interfere.[2] But where the property is dedicated to the support of peculiar religious tenets it is *prima facie* subject to the

existence or ecclesiastical connection, doctrines, rites, or modes of government, of a church or churches formed by the corporators. Religious societies usually maintain public worship according to some specified denominational usage, but the corporation and the church, although one may exist within the pale of the other, are in no respect correlative. The object and interests of the one are moral and spiritual; and the other deals exclusively with things temporal and material. The existence of the church proper is not recognized by the municipal law. . . . The society has the entire control of the question as respects the form of religious worship, which shall be promoted by the church property. In the strong language of the courts: 'It was the intention of the legislature to place the control of the temporal affairs of these societies in the hands of a majority of the corporators, independent of priest, bishop, presbytery, or synod, or other ecclesiastical judicatory. This is the inevitable effect of the provision giving to the majority, without regard to their religious sentiments, the right to elect trustees and fix the salary of the minister.'" And see Robertson *v.* Bullious, 11 N. Y. 243; Bellport *v.* Tooker, 29 Barb. (N. Y.) 256; Petty *v.* Tooker, 21 N. Y. 267.

1. Robertson *v.* Bullious, 11 N. Y. 243; Bellport *v.* Tooker, 29 Barb. (N. Y.) 256; Watkins *v.* Wilcox, 6 Thomp. & C. (N. Y.) 539; 4 Hun (N. Y.) 220; Miller *v.* Gable, 2 Den. (N. Y.) 492.

"And persons otherwise qualified do not lose their right as corporators to vote at elections, by reason of their having renounced the doctrines and ecclesiastical government professed and recognized by the religious body in whose worship and service the corporate property had always been employed, and the title of trustees to office and to the control of the corporate property is not impaired by any alteration in doctrine or church government on their part or on the part of those by whom they are elected." Tyler's Am. Eccl. Law, p. 129. See also Petty *v.* Tooker, 21 N. Y. 267; Snowden *v.* M'Leod, 1 Edw. Ch. (N. Y.) 588; People *v.* Tuthill, 31 N. Y. 550; Vidal *v.* Mayor etc. of Philadelphia, 2 How. (U. S.) 127; *In re* St. Mary's Church, 7 S. & R. (Pa.) 539; Kniskern *v.* Lutheran Churches, 1 Sandf. Ch. (N. Y.) 439.

"Should a religious society think proper to separate from the church with which it has previously been connected and form a connection with another denomination, the trustees have the power to employ such minister as they see fit, and to exclude from the pulpit a minister appointed by the ecclesiastical judicatory with which the society was previously connected." Tyler's Am. Eccl. Law, p. 129. And see Den *v.* Bolton, 12 N. J. L. 206; Fadness *v.* Braunborg, 73 Wis. 257.

2. Field *v.* Field, 9 Wend. (N. Y.) 401; Hale *v.* Everett, 53 N. H. 71; 16 Am. Rep. 82. See also Lawyer *v.* Cipperly, 7 Paige (N. Y.) 281. In Gable *v.* Miller, 10 Paige (N. Y.) 627 (Miller *v.* Gable, 2 Den. (N. Y.) 492) the court by Walworth, Ch., said: "The exercise of jurisdiction by this court in cases of this kind is not without its difficulties. And I felt them pressing upon me in the case of First Baptist Church *v.* Witherell, 3 Paige (N. Y.) 298, so as to induce me to doubt whether civil courts could interfere. Since that time, however, several cases have arisen and been decided, in this country and in *England*, which appear to settle the question in favor of such jurisdiction."

In re St. Mary's Church, 7 S. & R. (Pa.) 539; Attorney-Gen'l *v.* Drummond, 1 Connor & L. 210; *In re* New York Protestant etc. School, 31 N. Y. 592. See Kniskern *v.* Lutheran Churches, 1 Sandf. Ch. (N. Y.) 510, the court by Sanford, Asst. V. Ch., quoting from First Baptist Church *v.* Witherell, 3 Paige (N. Y.) 304 (*q. v.*) said: "When this court is obliged to administer a trust, the chancellor cannot put his conscience into the keeping of any ecclesiastical tribunal. The facts constituting the alleged breach of trust must be

jurisdiction of ecclesiastical courts; and their findings upon points of discipline, order and doctrine are conclusive in common-law courts.[1]

Courts of equity, on the application of a portion of the corporators, have taken jurisdiction over trustees to restrain them from applying the temporalities of the corporation to the support of a minister who has been deposed from his office by the proper ecclesiastical tribunal and has not been restored, on the ground that their action is opposed to the principles of faith and doctrine professed by the church at the time the property which the trustees hold in trust was acquired.[2]

But courts of equity have no general visitorial power over corporations;[3] they have only a general superintendence applicable to cases of abuse of trust or to redress grievances or suppress frauds.[4] The visitorial power is lodged in *England* in the king and in the States of the Union in the legislature, as the successor of the king, and a court of chancery has no jurisdiction as visitor over religious corporations.[5] It will, however, entertain

stated in the bill, and if put in issue must be proved to the satisfaction of the court as in other cases of trust."

Moore *v.* Moore, 4 Dana (Ky.) 357; Philadelphia Baptist Assoc. *v.* Smith, 3 Pet. (U. S.) 481; McCartee *v.* Orphan Asylum Soc., 9 Cow. (N. Y.) 437; 18 Am. Dec. 516; Whitman *v.* Lex, 7 S. & R. (Pa.) 88; Inglis *v.* Sailors' Snug Harbor, 3 Pet. (U. S.) 112; Christ Church *v.* Holy Communion Church, 14 Phila. (Pa.) 61; Bates *v.* Houston, 66 Ga. 198; Third Ref. Dutch Church's Appeal, 88 Pa. St. 503.

1. Skilton *v.* Webster, Bright. (Pa.) 203; Chase *v.* Cheney, 58 Ill. 509; 11 Am. Rep. 95; Voorhees *v.* Presbyterian Church, 8 Barb. (N. Y.) 135; Robertson *v.* Bullious, 9 Barb. (N. Y.) 64; Grosvenor *v.* United Soc. of Believers, 118 Mass. 78; Venable *v.* Ebenezer Baptist Church, 25 Kan. 177; German Ref. Church *v.* Seibert, 3 Pa. St. 282.

In ascertaining the purposes to which the property conveyed was intended to be devoted by the donor, the language of the conveyance is conclusive. Hale *v.* Everett, 53 N. H. 71; 16 Am. Dec. 82. In this case the court by Sargent, J., said: "If the language is indefinite, extrinsic evidence, such as the trusts held by the donor or the faith then actually taught by the donees, and the circumstances under which the gift was made, and the denominational name of a religious corporation or society to which a donation is made and the doctrines actually taught therein at the time of the gift, may be resorted to in order to limit and define the trust in respect to doctrines usually considered fundamental, such as those in dispute between Trinitarians and Unitarians, but not as to lesser shades on points of doctrine not deemed fundamental. See also People *v.* Steele, 2 Barb. (N. Y.) 397; Lawyer *v.* Cipperly, 7 Paige (N. Y.) 281; Bowden *v.* M'Leod, 1 Edw. Ch. (N. Y.) 588; Kniskern *v.* Lutheran Churches, 1 Sandf. Ch. (N. Y.) 439; Gibson *v.* Armstrong, 7 B. Mon. (Ky.) 481; Trustees *v.* Johnson, 1 W. & S. (Pa.) 1; Scott *v.* Curle, 9 B. Mon. (Ky.) 17; Princeton *v.* Adams, 10 Cush. (Mass.) 132; 2 Story's Eq. Jur., § 1191, and note; Hill on Trustees, § 467 and note.

2. Robertson *v.* Bullious, 11 N. Y. 243; Bellport *v.* Tooker, 29 Barb. (N. Y.) 256; Petty *v.* Tooker, 21 N. Y. 267; Isham *v.* First Presbyterian Church, 63 How. Pr. (N. Y.) 465.

3. Attorney-Gen. *v.* Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371; Galway *v.* U. S. Steam Sugar Refining Co., 36 Barb. (N. Y.) 259; Auburn Academy *v.* Strong, Hopk. Ch. (N. Y.) 278; 2 Kent. Comm. 300; 1 El. & Bl. 481.

4. Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 676; Robertson *v.* Bullious, 9 Barb. (N. Y.) 91.

5. 2 Kent's Comm. 303; 2 Bac. Abr. 27; Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518; Ang. & Ames Corp. 407.

jurisdiction to compel the trustee of a church to permit clergymen who adhere to the principles of the church to minister to the congregation in the church edifice, even though a majority thereof may thereby consider themselves excluded from the church.[1] But a minister cannot be put in possession of the temporalities of a religious society without the consent of the trustees and in the absence of a decree of a competent court.[2]

VIII. Powers in Relation to Property—1. In General.—The civil courts will control the action of churches or religious associations where rights of property or individuals are concerned, but have no jurisdiction over doctrines or rules of faith of the society as such. Where, however, rights of property are dependent on adherence to a teaching of a particular religious doctrine, courts will examine what, as a fact, that doctrine is and whether as a fact the persons interested adhere to or teach it.

Courts will not allow property belonging to a church organization and dedicated to religious purposes to be taken from the members of the organization without regard to the regulations and restraints by which it was intended to protect them.[3]

A majority of the corporators of a religious society, without regard to their religious views, have exclusive control over the revenues of the society.[4]

1. Skilton *v.* Webster, Bright. (Pa.) 203.

2. Lawyer *v.* Cipperly, 7 Paige (N. Y.) 281; Tibballs *v.* Bidwell, 1 Gray (Mass.) 399.

3. Grimes *v.* Harmen, 35 Ind. 213; 9 Am. Rep. 690; Miller *v.* Gable, 2 Den. (N. Y.) 492; 10 Paige (N. Y.) 627; Robertson *v.* Bullious, 11 N. Y. 243; Dieffendorf *v.* Reformed Calvinist Church, 20 Johns. (N. Y.) 12; German Ref. Church *v.* Siebert, 3 Pa. St. 291; Ferraria *v.* Vasconcellos, 31 Ill. 46; Bowden *v.* McLeod, 1 Edw. Ch. (N. Y.) 588; Hale *v.* Everett, 53 N. H. 9; 16 Am. Rep. 82; East Norway Lake etc. Church *v.* Halvorson, 42 Minn. 503; Harrison *v.* Hoyle, 24 Ohio St. 254; Newman *v.* Proctor, 10 Bush (Ky.) 318; Brunnenmeyer *v.* Buhre, 32 Ill. 183; Kinkead *v.* McKee, 9 Bush (Ky.) 535; Shannon *v.* Frost, 3 B. Mon. (Ky.) 258; Lutheran Evangelical Church *v.* Gristgan, 34 Wis. 328; Henry *v.* Deitrich, 84 Pa. St. 286; Curd *v.* Wallace, 7 Dana (Ky.) 190; 32 Am. Dec. 85; Happy *v.* Morton, 33 Ill. 398; Harmon *v.* Dreher, Spears Eq. (S. Car.) 87.

4. Tyler's Ecclesiastical Law, p. 100, § 217. In Bowden *v.* McLeod, 1 Edw. Ch. (N. Y.) 588, the court by McConn, Vice Chancellor, said: "The property or temporalities are to be managed by persons constituting the consistory who are also trustees. Now over them and the property, considering it as a trust estate, this court has jurisdiction. It will interfere to prevent any abuse of the trust; can compel the trustees, in other words, the consistory, to discharge their duties fairly with respect to the property; has power to remove them if found necessary; will preserve the temporalities and appropriate them to the original object of the institution—in short, will see that the trusts are faithfully performed and executed.

It is to this end, the power which is a common-law power and inherent in the court, is used. Besides this, it has powers conferred by statute over corporations and their directors and managers; but those statutory powers do not extend to religious corporations. Except in connection with the property and temporalities of a religious society whether incorporated or not, and upon the principle just stated, this court has no jurisdiction and cannot interfere. It has nothing immediately to do with their spiritual concerns, church government, discipline, faith, doctrines, or modes of worship. These are matters which are to be left to the regulation of their own

peculiar tribunals and the ecclesiastical judicatories of each church. Nor will this court interfere to restrain the free exercise of religion in any man according to the dictates of his own conscience. It disclaims all such power and authority. And yet it must be admitted, there are cases in which this court has power to inquire into tenets openly and publicly expressed in reference to the place in which they are promulgated. The task may be a difficult and painful one, but equity can do this whenever called upon (in connection with it) to execute or administer a trust. As, for instance, where a religious society is formed, a place of worship provided, and, either by the will of the founder, the deed of trust through which the title is held, or by the charter of incorporation, a particular doctrine is to be preached in the place, and the latter is to be devoted to such particular doctrine and service. In such a case it is not in the power of the trustees of the congregation to depart from what is thus declared to be the object of the foundation or original formation of the institution and teach new doctrines and set up a new mode of worship there. At least this cannot be done without the consent of all the members of the church or congregation, because it would be an infraction of the will of the founder, be contrary to the spirit of the deed or act of incorporation and a perversion of the original object and design of its institution. Upon the complaint of any party aggrieved it may be made the duty of this court to inquire into the doctrines taught with a view to ascertain whether there is such a departure, and to restrain and bring them back to the original principles of faith and doctrine, if they will continue to worship in that place." In Oglesby *v.* Attrill, the court by Field, J., said: "They (the court) will not examine into the affairs of a corporation to determine the expediency of its action or the motives for it when the action itself is lawful."

In Kniskern *v.* Lutheran Churches, 1 Sandf. Ch. (N. Y.) 439, the court by Sandford, V. Ch., says: "The defendants also make it a point, that the question whether or not they are orthodox can only be determined by the proper ecclesiastical tribunal and cannot be decided by this court."

In Cammeyer *v.* United German etc. Churches, 2 Sandf. Ch. (N. Y.) 186, the court by Sandford, V. Ch., said: "The trustees of a religious society can alone bind the corporate society and in order to execute this power, the trustees must meet as a board so they may have each other's views and deliberate and decide the questions before them. The separate action of the trustees individually without consultation although a majority in number should agree upon a certain act, would not be the act of the constituted body of men clothed with the corporate powers." In Robertson *v.* Bullious, 11 N. Y. 251, the court by Selden, J., said: "What, then, are the powers, rights and obligations of this class of corporate officers, and to what extent has this court jurisdiction over them? These questions are to be answered in view of the statute authorizing the incorporation of these societies and the rules which regulate other corporations of the same legal character and their officers and not with reference to those peculiar principles which are applied to trusts by courts of equity. These officers are trustees in the same sense with the president and directors of a bank or of a railroad company. They are the officers of the corporation to whom is delegated the power of managing its concerns for the common benefit of themselves and all the other corporators, and over whom the body corporate retains control through its power to supersede them at every recurring election. . . . But if it be admitted that a court of equity has power by virtue of its general jurisdiction over every species of trust to interfere at the instance of a corporator in cases of gross violation of duty by the managing officers of a civil corporation which is at least doubtful, the question still remains how may this jurisdiction be exercised. Does it extend to the removal of the officers of the corporation? It is difficult to conceive from what source the court, independent of legislative enactment, could derive such a power. This class of officers receive their authority directly from the sovereignty of the State. The statute prescribes their qualifications, the mode of their election and the tenure of their offices; what power has the court of chancery or any other court to set aside the statute, to impose conditions to the holding of the office which the statute does not impose? There is a wide difference between this description of officers and mere private trustees whose powers rest solely upon individual contract. There if the conditions of the

Where a corporation has the legal capacity to take real and personal estate, it may take and hold it in trust in the same manner and to the same extent as a private person, always, however, under the control of a court of competent jurisdiction;[1] and a treasurer who has invested funds of the society for which he acts as such in his own name will be held to answer for them as trustee.[2]

contract be violated, the office is rightfully forfeited and the court may enforce this forfeiture at the instance of the party aggrieved. But the powers of corporate officers have a source above that of mere private contract over which the court of chancery has no paramount authority. 17 Vesey 491; but see 1 Madd. 92; Lawyer *v.* Cipperly, 7 Paige (N. Y.) 281; Bowden *v.* McLeod, 1 Edw. Ch. (N. Y.) 588; Kniskern *v.* Lutheran Churches, 1 Sandf. Ch. (N. Y.) 439; Tyler's Eccl. Law, p. 98, § 212. In People *v.* Runkle, 9 Johns. (N. Y.) 147, the court said: "The trustees have the possession and custody of the temporalities belonging to the church, whether the same consists of real or personal estate. They must therefore be considered as being *virtute officii* entitled to the possession and lawfully seised of the ground and of the buildings belonging to the church, and the merit or demerit of their conduct in closing the doors of the church against the defendant cannot be taken into consideration in this case. If they have abused their trust, the congregation who are their constituents have ample remedy, but this remedy does not consist in a forcible entry upon their possessions. Though the trustees hold the church property in trust for the church and congregation, still it is their possession, and the courts are bound to protect them against every irregular and unlawful intrusion made against their will, whether by members of the congregation or by strangers." See also Humbert *v.* Protestant Episcopal Church, 1 Edw. Ch. (N. Y.) 308.

In Petty *v.* Tooker, 21 N. Y. 271, the court by Selden, J., said: "The trustees are the representatives of the corporate body, and the statute invests them with extensive powers. They are entitled to the possession and management of all the property of the corporation, and are empowered to exercise its entire administrative functions . . . the salary of the minister shall be regulated not by the trustees but by a majority of the corporators at a meeting called for that purpose. Subject to this important and most efficient check, the trustees have the undoubted power of determining by whom the pulpit shall be occupied."

See also Attorney-Gen'l *v.* Union Society, 116 Mass. 167; German etc. Congregation *v.* Pressler, 17 La. Ann. 127; Trustees *v.* Sturgeon, 9 Pa. St. 321; Curd *v.* Wallace, 7 Dana (Ky.) 90; 32 Am. Dec. 85.

In Paige *v.* Crosby, 24 Pick. (Mass.) 211, the court, by Morton, J., said: "According to the settled and established law of *Massachusetts* the plaintiff was the legal successor of the deacons, who had withdrawn from the old parish, and as such became the lawful owner and entitled to the possession of the church plate, which is the subject of the present controversy. . . . The plaintiff has a right to hold these goods in trust and the use of the church of which he is a deacon."

1. In Vidal *v.* Mayor etc. of Philadelphia, 2 How. (U. S.) 127, the court by Story, J., said: "Neither is any positive objection in point of law to a corporation taking property upon a trust not strictly within the direct scope of the purposes of its institution but collateral to them; nay, for the benefit of a stranger or of another corporation." But see Inglis *v.* Sailors' Snug Harbor, 3 Pet. (U. S.) 99; Scott *v.* Curle, 9 B. Mon. (Ky.) 17.

2. In Reformed Dutch Church *v.* Mott, 7 Paige (N. Y.) 77; 32 Am. Dec. 613, the court by Walworth, Ch., said: "That the legislature had the power to transfer the legal title from the mere naked trustees to the *cestuis que trustent* after the latter were incorporated, in a case where the trustees might themselves be compelled to make such a transfer under a decree of this court, there cannot be any room for doubt. . . . And no subsequent violation of the trust upon which the property was held can ever revest either the legal or equitable title . . . in the heirs of the original trustees, although a palpable breach of trust might form a proper

Where the officers of a religious corporation have authority to determine what persons in a parish are poor and worthy to receive money given for that purpose, the corporation can receive and administer the trust fund. And where the officers neglect to designate the beneficiaries the court will appoint some other instrumentality.[1]

A fund given for the benefit of a voluntary religious society connected with an organized church accrues to the same society after its organization under an act of the legislature for that purpose.[2] It is not necessary for a religions organization to become incorporated for it to maintain regular worship, contract debts in its own name, have representation at a conference of sister organizations, receive members to its communion, and try and expel them for misconduct.[3]

2. Acquisition of and Title to Property—*a.* IN GENERAL.—The

ground for an application to the court of chancery on the part of the corporators or by the attorney-general to compel the due execution of the trust." And in Robertson *v.* Bullious, 11 N. Y. 243, the court by Selden, J., said: "The trustees of a religious corporation in this State cannot receive a trust limited to the support of a particular faith or a particular class of doctrines for the reason that it is inconsistent with those provisions of the statute which give to the majority of the corporation without regard to their religous tenets, the entire control over the revenues of the corporation." See also Watkins *v.* Wilcox, 66 N. Y. 654; Mason *v.* Muncaster, 9 Wheat. (U. S.) 445; Tibballs *v.* Bidwell, 1 Gray (Mass.) 399; Wallace *v.* First Parish in Townsend, 109 Mass. 263; Tyler's Eccl. Law, p. 242, § 559. "Where the land of a religious society is conveyed to individual trustees instead of the religious corporation the individual grantees are regarded as trustees of the society, or on sale of such land they will receive the proceeds in trust for the use of such society. Seceders from a regularly organized church who have organized themselves into a separate body are not entitled to any portion of the property of the society from which they seceded." M. E. Church of Cincinnati *v.* Wood, 5 Ohio 283. In Attorney Gen'l *v.* Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371, the court by Kent, Ch., said: "I should rather conclude that under the constitutional administration of justice in this State all corporations of whatever name or description were amenable to the supreme court and to that court only, according to the course of the common law for nonuser or misuser of their franchises. But at the same time I admit that the persons who from time to time exercise the corporate powers may in their character of trustees be accountable to this court for a fraudulent breach of trust and to this plain and ordinary head of equity the jurisdiction of this court ought to be confined."

In Lawyer *v.* Cipperly, 7 Paige (N. Y.) 279, the court by Walworth, Ch., said: "If the trustees, without any reason whatever, should obstinately refuse to employ a minister who was every way acceptable to the great mass not only of the church but also of the congregation and who had not, in their opinion, departed materially from the standards of faith adopted in such church, I am not prepared to say this court would not correct such a flagrant breach of trust by removing them from their office as trustees so as to allow the congregation to elect others in their places. It must, however, be a case of a palpable breach of trust which will authorize this court to interfere and it should not be done in any case where the church and congregation were very nearly equally divided as to the propriety of employing any particular person as their minister." Weld *v.* May, 9 Cush. (Mass.) 181, see also Church of the Redeemer *v.* Crawford, 43 N. Y. 476.

1. Appeal of Goodrich, 57 Conn. 275.
2. Attorney Gen'l *v.* Dublin, 38 N. H. 459.
3. M. E. Church *v.* Clark, 41 Mich. 730.

title to property acquired by an incorporated religious society in its own name is in the artificial creature, the corporation, and possession by the trustees of the society is possession by the society. Therefore, in the case of a forcible entry and detainer of a church owned by such a society, proceedings to recover possession must be instituted by the corporation itself in its own name and not by the individual trustees or in their name. The possession of the trustees is for the use of the persons who, by its constitution, usages, and laws, compose the society. Their possession is fiduciary and they may be dispossessed by the election of others in their places.[1]

The organization of the corporation must be in strict conformity to the statute, otherwise it will be incapable of holding real estate or suing as a corporation.[2] But where title to land is taken in the names of individuals as trustees, to be used with the buildings on it as and for a church, if the trustees accept the trust the legal ownership is in them, subject to the limitations and conditions of the instrument creating the trust. Such trustees are not removable at the pleasure of the *cestui que trust;* they need not be communing members of the church; excommunication from the church will not disqualify them; they cannot be removed from their office by a minority of the church society, without warning, charges, citation, a trial, and in defiance of the church rules; and their title cannot be impeached collaterally.[3] But where some of the members and officers of a religious society join

1. In People *v.* Fulton, 11 N. Y. 94, the court by Denio, J., said: "Incorporated religious societies are aggregate corporations and whatever property they acquire, whether it be real or personal, is vested in interest in the body corporate, and while the officers have it under their control or dominion, whatever possession they have is the possession of the artificial person whose agents they are. Although called trustees they do not hold the property in trust for the corporation or religious society. The name is simply the title of their office and their position respecting the corporate property would be the same if they were denominated directors or managers. Their right to intermeddle is an authority, not an estate or title. They have no other possession than the directors of a bank have of the banking house . . . It is the person who has the legal right to the possession who is to institute the proceedings in the case of a forcible entry and detainer. See also Watson *v.* Jones, 13 Wall. (U. S.) 679; Miller *v.* Gable, 2 Den. (N. Y.) 492. But see Methodist Soc. *v.* Bennett, 39 Conn. 293; Kirkpatrick *v.* Rogers, 6 Ired. Eq. (N. Car.) 130.

As to when and how property may be acquired by religious societies, and their right to control and dispose of the same, see Cammeyer *v.* United German etc. Churches, 2 Sandf. Ch. (N. Y.) 186; Ayers *v.* Methodist Church, 3 Sandf. (N. Y.) 351; Smith *v.* Nelson, 18 Vt. 511; Van Duzen *v.* Trustees of Presbyterian Congregation, 4 Abb. App. Dec. (N. Y.) 465; Bundy *v.* Birdsall, 29 Barb. (N. Y.) 31; Calkins *v.* Cheney, 92 Ill. 463; First M. E. Church *v.* Filkins, 3 Thomp. & C. (N. Y.) 279.

2. Tunstall *v.* Wormley, 54 Tex. 476; Combe *v.* Brazier, 2 Desaus. (S. Car.) 431.

3. Bouldin *v.* Alexander, 15 Wall. (U. S.) 131; Reformed Dutch Church *v.* Harder, 58 Hun (N. Y.) 605; Bundy *v.* Birdsall, 29 Barb. (N. Y.) 31; Brunnenmeyer *v.* Buhre, 32 Ill. 183; First Presbyterian Soc. *v.* Smithers, 12 Ohio St. 248; Bowen *v.* Irish etc. Congregation, 6 Bosw. (N. Y.) 245.

A deed to "A, B and C, Trustees of the D Congregation, their successors

another society whose tenets differ, without conforming to the rules prescribed for membership in the constitution of the society, they cannot hold the property of the society.[1]

The legal title is vested in the trustees for the purposes of convenience only. They have no power to pervert it or to prevent its being used for the purposes of the trust upon which they hold it. All their powers are subject to the rules and customs of the organization and not to a will of a majority of the members.[2]

Where there is no local statute contravening, property may be held by trustees for the use and benefit of an unincorporated religious society under the rule that, at common law, property may be granted to pious uses before there is a grantee in existence competent to take it, in the mean time the fee being in abeyance. The persons to whom the grant is made are seised to the use of the society or church, and, after it has acquired the legal capacity to take and hold real estate the statute executes the possession to the use, and the estate vests.[3]

and assigns"—The D Congregation being a religious corporation, vests the legal title in A, B and C individually and not in the corporation. Den *v.* Hay 21 N. J. L. 174.

1. Rottman *v.* Bartting, 22 Neb. 375.

2. Brunnenmeyer *v.* Buhre, 32 Ill. 183.

It has been held that property may be granted to individuals for the use of a church not incorporated, in such a way that when the society may be incorporated, it can take and hold it. Reformed Dutch Church *v.* Veeder, 4 Wend. (N. Y.) 494. It has also been held that trustees *de facto* of a religious society unincorporated, may maintain an action against a trespasser for an injury to the meeting house of the society. Green *v.* Cady, 9 Wend. (N. Y.) 414.

3. Tyler's Am. Eccl. Law, p. 55; Miller *v.* Chittenden, 4 Iowa 252. In Reformed Dutch Church *v.* Veeder, 4 Wend. (N. Y.) 490, the court, by Savage, J., said: "There is, indeed, no pecuniary consideration; but the support of the Gospel in Christian county is a sufficient consideration." Cammeyer *v.* United German etc. Churches, 2 Sandf. Ch. (N. Y.) 221.

In First Baptist Church *v.* Witherell, 3 Paige (N. Y.) 298, the court, by Walworth, Ch., said: "If the grantor or any other person hold the estate originally in trust for the church or society, the legal estate is transferred to the church or corporation whenever the requisites of the statute are complied with, so as to render them legally competent to take property, in their corporate character." And see Miller *v.* Chittenden, 4 Iowa 252; Schmidt *v.* Hess, 60 Mo. 591; M. E. Protestant Church *v.* Adams, 4 Oregon 76. But see Beckwith *v.* St. Philips Parish, 69 Ga. 564.

A decree of court incorporating a religious society passes to the corporation the title to land conveyed to such society, before its incorporation where the court has jurisdiction of the subject-matter and parties; and its decree cannot be collaterally attacked. Keith etc. Coal Co. *v.* Bingham, 97 Mo. 196.

In *New England* it has been held that real estate granted to a parish, upon the incorporation of the parish into a town, passes to and is held by the new corporation; and that, if the town is subsequently divided into parishes, the property will not revert to the original parish if it has been appropriated to the use of the town in its municipal capacity. Lakin *v.* Ames, 10 Cush. (Mass.) 198; New Market *v.* Smart, 45 N. H. 87. And that, if, prior to the incorporation, a new religious society has been formed in the town, recognized as an independent organization, and its members therefore exempted from taxation in the original parish, the real estate anciently granted to the parish will not pass to the town. Essex *v.* Low, 5 Allen (Mass.) 595; Stearns *v.* Woodbury, 10 Met. (Mass.) 27; New Market *v.* Smart, 45 N. H. 87.

Trustees cannot take in trust for the benefit of the members of the church as distinguished from other members of the society, or for a portion of the corporators to the exclusion of others.[1]

Real estate may be granted in trust for a body incapable of holding it in its own right; and the conveyance need not show the real grantee by name; it is enough if the intention of the donor appears in it.[2] Where title to property paid for by the members of a religious society was taken in the name of one of them, the trustees appointed upon the subsequent incorporation of the society have a right to call for a conveyance. The indorsement of the grantee that he held the title to be conveyed upon the assent of the members to an open communion, which was contrary to the tenets of a large proportion of their members, cannot be regarded, no assent having been proven.[3] The courts will decree the fulfillment of a contract to convey land as the site of a church to members of a society when the same shall have been incorporated. But when the person holding the legal estate has expended his own money in building the church of the society the court will not compel him to give up his legal claim to the estate until his equitable claim is satisfied.[4]

A religious corporation may acquire title to land by adverse possession, and a title thus acquired is not cumbered with any equitable trusts which may have been in force prior to the date on which the adverse possession began.[5]

If land conveyed to a religious society is sold without leave of

1. Tyler's Am. Eccl. Law, p. 114; Robertson *v.* Bullious, 11 N. Y. 243; Presbyterian Church *v.* Donnom, 1 Desaus. (S. Car.) 154.

"When a religious society is organized as a branch or part of an established denomination, and becomes endowed with property given upon the faith of its being so, the trustees, at a given time, will not be permitted to employ such property in maintaining doctrine and discipline at variance with that of the denomination, even though they might be sustained by a majority of the corporators; and in such a case the intention of the donors is the criterion by which to determine the purposes to which the property of the church has been dedicated."

Tyler's Am. Eccl. Law, p. 114; and see People *v.* Steel, 2 Barb. (N. Y.) 397; Ebbinghaus *v.* Killian, 1 Mackey (D. C.) 247.

2. Robertson *v.* Bullious, 9 Barb. (N. Y.) 79; Reformed etc. Dutch Church *v.* Mott, 7 Paige (N. Y.) 77; 32 Am. Dec. 613; Theological Seminary *v.* Child, 4 Paige (N. Y.) 423; Boyce *v.* St. Louis, 29 Barb. (N. Y.) 657; Burr *v.* Smith, 7 Vt. 241; Cincinnati *v.* White, 6 Pet. (U. S.) 435; M. E. Church *v.* Hoboken, 33 N. J. L. 17; 97 Am. Dec. 696; Cawlett *v.* Clark, 9 Cranch (U. S.) 292.

3. Trustees of South Baptist Church *v.* Yates, Hoffm. Ch. (N. Y.) 142.

4. In Canajoharie etc. Church *v.* Lieber, 2 Paige (N. Y.) 43, the court, by Walworth, Ch., said: "Although the agreement to convey this lot was made before the society was incorporated yet in equity the agreement ought to be carried into effect with the corporation which now represents the rights of the original associates."

Beatty *v.* Kurtz, 2 Pet. (U. S.) 566; Macon *v.* Sheppard, 2 Humph. (Tenn.) 335; Consociated Pres. Soc. *v.* Staples, 23 Conn. 544.

5. Pine St. Cong. Soc. *v.* Weld, 12 Gray (Mass.) 570; Old South Soc. *v.* Crocker, 119 Mass. 1; 20 Am. Rep. 299; Landis' Appeal, 102 Pa. St. 467; Harpending *v.* Reformed Dutch Church, 16 Pet. (U. S.) 455.

court, the proceeds may form a fund to be applied in the place of the land.[1]

A deed of land to an organized and active, though unincorporated, religious society, conveys title to the grantees as a body,

1. *In re* First Presbyterian Soc., 106 N. Y. 251: "Every minister settled over a parish is a corporation sole or a corporation composed of one person, and he holds the parsonage land in fee simple as a sole corporation in the right of his parish or church; and, on his resignation, deprivation, or death, the fee is in abeyance until there be a successor. If a minister or his predecessor be disseised of the parsonage he may enter, if his right of entry be not taken away, and declare upon his own seisin or upon that of his predecessor, according to the nature of the case; and where a minister was settled in a town, and, upon his decease, a successor of the same denomination was settled, he will succeed to all the rights of the former and can recover the lands which belong to the parish. A parish, however, may be seised of land for the purpose of supporting a minister out of the proceeds of it, and yet it may not be the property of the minister so as to make it technically a parsonage and cause the seisin to be in the minister as a sole corporation."

Tyler's Am. Eccl. Law, p. 197, § 450. And see Jewett *v.* Burroughs, 15 Mass. 464; Emerson *v.* Wiley, 10 Pick. (Mass.) 317. In Brown *v.* Parker, 10 Mass. 93, the court by Sewall, J., said: "Lands and tenements thus given and appropriated to pious uses, are holden by the minister of the parish or corporation, for whose particular benefit the gift or appropriation is made, as an estate in fee simple in him and his successors; the first appointed minister and his successors taking the same, upon a regular settlement and ordination, as a sole corporation, and until the appointment and during vacancies in the ministry, the estate being in abeyance, but in custody and therefore in the possession and under the care of the parish or aggregate corporation. And, independently of the interposition of the legislature for the purpose, the estate in lands appropriated to the benefit of a parish or religious society by whatever description incorporated, remains with the residue of the original parish or society, and is not in any manner transferred or distributed by a separation or change among the members or in the territorial limits of the corporation." See also Cheever *v.* Pearson, 16 Pick. (Mass.) 266.

In First Parish *v.* Dunning, 7 Mass. 445, the court said: "Where a minister of a town or parish is seised of lands in right of the town or parish, which is the case of all parsonage lands or lands granted for the use of the minister or of the minister for the time being, the minister for this purpose is a sole corporation and holds the same to himself and his successors, and in case of a vacancy in the office the town or parish is entitled to the custody of the same, and for that purpose may enter and take the profits until there be a successor."

In Weston *v.* Hunt, 2 Mass. 500, the court, by Parsons, C. J., said: "Ministers being thus made sole corporations, their rights and remedies are clearly defined by the common law. They stand on the same foundation as to their parsonages with all other sole corporations holding lands in succession at common law. The minister holding parsonage lands in fee simple holds them in right of his parish or church, and therefore on his resignation, deprivation or death the fee is in abeyance until there be a successor. During the vacancy the parish or church have the custody, and are entitled to the profits of the parsonage. If the minister alien with the assent of his parish or of the vestry of the church, the alienation shall bind the successor; if without such assent it will be valid no longer than he continues minister, and it will be no discontinuance of the estate so as to drive the successor to his action, but he may enter for an alienation of the parsonage by the town, district or precinct, or vestry, for if there be a minister the fee is in him, or if there be a vacancy the fee is in abeyance, and a corporation cannot acquire a freehold by a disseisin committed by itself." The minister of a parish settled for life for a term of years is seised of the freehold in the ministerial land, upon condition, and is answerable for waste. He may therefore maintain trespass against a stranger for an injury to the

and does not create a tenancy in common among the individuals who compose the society; and where the conveyance is to the trustees of such a society, the legal title vests in the survivors, on the decease of some of them, or in their successors appointed by the court.[1]

At common law churchwardens could not, as such, hold the title to real estate.[2]

Where a conveyance is made to certain members of a religious body which has no corporate existence, in trust to them and their successors in office for church purposes, all the members of the body become beneficiaries in equal degree, although some may have contributed more than others toward the common enterprise.[3] A minority of an unincorporated religious society cannot, by procuring a charter of incorporation, acquire the right to the management of the property in opposition to the will of the majority.[4] Trustees elected by the expelled and minor party of a church have no title to the house and ground of the entire church.[5] Improvements and additions to the church structure, made by an unincorporated association, composed in part of members of the church, become the property of the church, and the members of the association have no estate in them by reason of its participation in raising the fund which supplied them; and no irrevocable license to use these additions and improvements can be implied from the consent of the vestry of the church

freehold, and the suit is not abated by the termination of the estate pending the termination of the suit. Cargill *v.* Sewall, 19 Me. 288.

In Austin *v.* Thomas, 14 Mass. 338, a conveyance of parsonage land from the parish to the minister was holden to be a void act.

1. Hamblett *v.* Bennett, 6 Allen (Mass.) 140; First Congregational Parish *v.* Milton, 10 Pick. (Mass.) 447; Second Precinct *v.* Catholic Congregational Church etc., 23 Pick. (Mass.) 139; Cahill *v.* Bigger, 8 B. Mon. (Ky.) 211; White *v.* Price, 108 N. Y. 661; Bridges *v.* Wilson, 11 Heisk. (Tenn.) 458; Landis' Appeal, 102 Pa. St. 467; Gass' Appeal, 73 Pa. St. 39; 13 Am. Rep. 726; Jones *v.* Wadsworth, 11 Phila. (Pa.) 227; Draper *v.* Minor, 36 Mo. 290; Peabody *v.* Eastern Methodist Soc., 5 Allen (Mass.) 540; Anderson *v.* Brock, 3 Me. 243; Bailey *v.* M. E. Church, 71 Me. 472.

2. In Terrett *v.* Taylor, 9 Cranch (U. S.) 43, the court, by Strong, J., said: "No statute of *Virginia* has been cited which creates churchwardens a corporation for the purpose of holding land, and at common law their capacity was limited to personal estate. 1 Bl. Com. 394; Bro. Abr. Corp. 76, 84; 1 Roll. Abr. 393, 4, 10; Com. Dig., title Esglise F. 3, 12 Hen. VII 27*b*; 13 Hen. VII 7, 9*b*. It would seem, therefore, that the present deed did not operate by way of grant to convey a fee to the churchwardens and their successors; for their successors as such could not take; nor to the churchwardens in their natural capacity for "heirs" is not in the deed. But the covenant of general warranty in the deed binding the grantors and their heirs forever and warranting the lands to the churchwardens and their successors forever may well operate by way of estoppel to confirm to the church and its privies the perpetual and beneficial estate in the land." See also Mason *v.* Muncaster, 9 Wheat. (U. S.) 445; People *v.* Trinity Church, 22 N. Y. 44.

3. Ferraria *v.* Vasconcellos, 31 Ill. 25. See also Brown *v.* Lutheran Church, 23 Pa. St. 495, and Hadden *v.* Chorn, 8 B. Mon. (Ky.) 70.

4. Henry *v.* Deitrich, 84 Pa. St. 286; Keyser *v.* Stansifer, 6 Ohio, 363.

5. Shannon *v.* Frost, 3 B. Mon. (Ky.) 253.

to their erection. Defiance of the authority of the vestry in the matter of their use and occupancy is just cause for exclusion from the building.[1]

The property of an extinct religious corporation vests in its former members individually; and they may sell the same in accordance with the customs adopted, provided such customs do not conflict with the laws of the State.[2] To come within the protection of the statutes of the State a dedication of property to religious uses must regard the rights of the local society or religious congregation. Any deed disregarding such rights will not be sustained.[3]

A statute prohibiting a religious society from holding more than twenty acres of land applies to the single religious society, not to the denomination.[4]

1. Read *v.* Church of St. Ambrose (Pa. 1891), 20 Atl. Rep. 1002.

In *Pennsylvania*, it has been held that a religious corporation could hold the legal title to land as trustee for a testator's heirs, the *English* statutes of mortmain never having been in force in that State. Miller *v.* Lerch, Wall. Jr. (C. C.) 210.

Missouri Gen. St., ch. 70, § 5, as amended by acts 1871, p. 16, provides that "any number of persons, not less than three in number, may become an incorporated church, religious society, or congregation, by complying with the provisions of this chapter," and section 2, that "any association of persons desirous of becoming incorporated under the provisions of this chapter shall present to the circuit court . . . a copy of their constitution or articles of association and a list of all their members, etc. It was held, in Keith etc. Coal Co. *v.* Bingham, 97 Mo. 196, that these provisions did not contravene the provision of the *Missouri* constitution of 1865, that "any church or religious society or congregation may become a body corporate for the sole purpose of acquiring, holding, using, and disposing of so much land as may be required for a house of public worship."

2. Burke *v.* Wall, 29 La. Ann. 38; 29 Am. Rep. 316.

3. Brooke *v.* Shacklett, 13 Gratt. (Va.) 301; Carter *v.* Wolfe, 13 Gratt. (Va.) 301; Bogardus *v.* Trinity Church, 4 Sandf. Ch. (N. Y.) 633.

Where a testator left a legacy to the consistory of a church, and there was an acting consistory, composed of the ministers, elders and deacons, it was held that the legacy vested, and that the question whether the officers of the consistory were rightfully in office could not be raised collaterally. Reformed Dutch Church *v.* Brandow, 52 Barb. (N. Y.) 228; Bogardus *v.* Trinity Church, 4 Sandf. Ch. (N. Y.) 633.

The charter of Trinity Church limited its clear income from land at £500 a year. In 1705 a tract of land was granted to it which subsequently increased enormously in value and in rental. It was held that such increase did not divest the church of its title under the grant, and that, if it did, it could only be taken advantage of by the sovereign and not by one claiming a title hostile to the corporation and to the sovereign. Bogardus *v.* Trinity Church, 4 Sandf. Ch. (N. Y.) 633. People *v.* Trinity Church, 22 N. Y. 44; Groesbeeck *v.* Dunscomb, 41 How. Pr. (N. Y.) 302.

4. Morgan *v.* Leslie, Wright (Ohio) 144.

Where a corporation is forbidden to take or receive lands, such prohibition operates directly upon the conveyance to the corporation and makes it void. The deed passes no title. And the same rule applies where the limit of the capacity of the corporation to acquire land has been passed; and where the charter of the corporation reserves to the legislature the power to modify or limit the amount of land which it may hold, a subsequent general law defining the limits will be binding, and conveyance of an amount in excess thereof, null and void.

St. Peter's Catholic Congregation *v.* Germain, 104 Ill. 440; Church of the Redemption *v.* Grace Church, 6 Hun (N. Y.) 166.

The American Tract Society and

Where title to property is taken by one "as bishop" the grantee takes in fee, but in trust also for the benefit of the members of his parish or diocese.[1] And where a deed, absolute on its face, is made to a grantee who is in fact archbishop of the Roman Catholic Church, the property so acquired is taken in trust for purposes of public religious worship and other charitable uses.[2]

A majority of a religious society cannot change the purposes for which its property was acquired by adopting a change of doctrine and procuring a change of the corporate name of the society. Nor does it matter that many of the original members of the society and many contributors to the parsonage fund favor the change proposed.[3]

When there are two bodies, each claiming to be the beneficiaries of a trust, a court of equity may require them to interplead, without compelling either to establish its rights at law.[4]

A division of a church made in pursuance of proper authority carries with it, ordinarily, a division of the common property of the organization.[5] But a secession forfeits the right of the seceders to the common property; the minority remaining become entitled to its exclusive use.[6] The seceders cannot retain the

the Presbyterian' Committee of home missions are not included in the mortmain restrictions imposed by *Delaware* Rev. Stat., ch. 39, relating to religious societies. American Tract Society *v.* Purdy, 3 Houst. (Del.) 625.

It was held in Catholic Cathedral Church *v.* Manning, 72 Md. 116, that the legislature of *Maryland* could grant leave to a religious society to acquire more land than, without such leave, it could take, and that a subsequent legislative ratification of a purchase was equally effective to validate the title.

1. Beckwith *v.* St. Philip's Parish, 69 Ga. 564.

2. Mannix *v.* Purcell, 46 Ohio St. 102. In this case it was held that the canons and decrees of the Roman Catholic Church were evidence; that the property did not pass to the archbishop's assignee in insolvency; that the trust was such a one as courts of equity would take cognizance of and enforce; and that each separate piece of property so taken formed a separate trust, and that one piece was not chargeable with the expense of improving another, nor of improving property generally in the diocese. See Curd *v.* Wallace, 7 Dana (Ky.) 190; 32 Am. Dec. 85.

3. Baker *v.* Ducker, 79 Cal. 365; Wicks *v.* Nedrow, 28 Neb. 386.

A minority of the church or congregation cannot, by excluding the majority by force or intimidation from their rightful share of control over the property of the church, change the relations of the church and attach it to another denomination. Civil courts will redress such a wrong. Deaderick *v.* Lampson, 11 Heisk. (Tenn.) 523; Curd *v.* Wallace, 7 Dana (Ky.) 190; 32 Am. Dec. 85.

As to when and how the division of a church into two separate religious organizations may be effected, see Nelson *v.* Benson, 69 Ill. 27.

4. First Presbyterian Soc. *v.* First Presbyterian Soc., 25 Ohio St. 128; Kisor's Appeal, 62 Pa. St. 428.

5. Smith *v.* Swormstedt, 16 How. (U. S.) 288; Brooke *v.* Shacklet, 13 Gratt. (Va.) 301; Reeves *v.* Walker, 8 Baxter (Tenn.) 277.

6. Lewis *v.* Watson, 4 Bush (Ky.) 228; M. E. Church *v.* Wood, 5 Ohio 283; Associate Reformed Church *v.* Theological Seminary, 4 N. J. Eq. 77; Hoskinson *v.* Pusey, 32 Gratt. (Va.) 428; McRoberts *v.* Mondy, 19 Mo. App. 26; M. E. Church *v.* Wood, 5 Ohio 283.

In the Congregational Church this is so also. Baker *v.* Fales, 16 Mass. 488; Stebbins *v.* Jennings, 10 Pick

funds in their hands as trustees on the ground that they were members of the society at the time the funds were collected.[1] The title to the property of a divided congregation is in that part which is acting in accordance with its own law, and the standard accepted among the members before the division determines which party is in the right.[2]

But an organized church cannot be divested of its property against its will, even though a majority of its members enter into a new organization which adopts the name of the old, provided the old still exists.[3]

Where a minority has seceded they cannot interfere with the demolition of the church edifice by the remaining majority and the erection by them of a larger one. The fact that the minority have been allowed by the majority for thirty years to use the church edifice on alternate Sundays does not affect the case.[4] The majority have the right to control the church property.[5]

The term "schism" means a division or separation of the members of a religious body on religious questions. A difficulty arising from an illegal election of church officers will not cause a "schism."[6] Where the members divide, but each party formed adheres to the tenets and discipline of the denomination, so that the administration of the church property by either would be the execution of any trust upon which it might have been given, the court will divide the property between them in proportion to their members at the time of the division.[7]

(Mass.) 172; Sawyer *v.* Baldwin, 11 Pick. (Mass.) 492.

1. M. E. Church *v.* Wood, Wright (Ohio) 12.

2. McGinnis *v.* Watson, 41 Pa. St. 9; Ferraria *v.* Vasconcelles, 23 Ill. 456; Ramsey's Appeal, 88 Pa. St. 60; App *v.* Lutheran Congregation, 6 Pa. St. 201; Lawson *v.* Kolbenson, 61 Ill. 405; Roshi's Appeal, 69 Pa. St. 462; Brown *v.* Monroe, 80 Ky. 443; McBride *v.* Porter, 17 Iowa 203; White Lick Quarterly Meeting *v.* White Lick Quarterly Meeting, 89 Ind. 156.

3. Venable *v.* Coffman, 2 W. Va. 310; Harper *v.* Straws, 14 B. Mon. (Ky.) 48.

4. Landis' Appeal, 102 Pa. St. 467.

5. Dressen *v.* Brameier, 56 Iowa 756.

It was said, in Amish *v.* Gelhaus, 71 Iowa 170, that in the Roman Catholic Church, money raised for a special purpose does not come under the absolute control of the bishop or priest, but of the contributing congregation, and that trustees appointed by the congregation could recover it from the bishop or priest; and in St. Patrick's Roman Catholic Church *v.* Gavalon, 82 Ill. 170, that a majority of the trustees must act in order to bind the board or the church unless the act done by a minority is subsequently ratified by the church or the board of trustees.

6. Nelson *v.* Benson, 69 Ill. 27.

7. Niccolls *v.* Rugg, 47 Ill. 47; 95 Am. Dec. 462; Gartin *v.* Penick, 5 Bush. (Ky.) 110.

Land was conveyed to individuals "as one entire property never to be divided or severed, for the use of the First Baptist Society in K., to be forever kept for the sole use and support of a minister of the Baptist denomination." There was a society of that name in K., but it had never been legally organized. This society became divided and each division assumed the same name and organized under the statute, claiming to be the "First Baptist Society in K." It was held that they were both new societies, and that neither was intended by the grant or entitled to the benefit of it. Cox *v.* Walker, 26 Me. 504.

Land conveyed to a church for a valuable consideration, belongs to the church so long as it subsists, whatever change may take place in its religious tenets, and though a majority of the members secede and retain their primitive doctrines.[1]

A bequest to an unincorporated religious society, as such, is valid as a gift to pious and charitable uses, where there is no actual doubt or uncertainty as to the legatee intended.[2] And a grant of land to a religious society for the support of the minister of the church is within the "other pious uses" clause of the *New York* Revised Statutes.[3] Non-residence will not invalidate a charitable bequest to an unincorporated religious society. Nor is such a bequest void because made to an unincorporated association.[4]

b. By Will.—Since the *English* statutes of mortmain, generally adopted in this country, the power of a religious society to take and hold real estate or personalty by bequest or devise depends upon statute. To bring a case within the *New York* statute the property must have been given, granted, or devised to it or to some person for its use.[5] An uncorporated local religious association cannot take personal property under a will probated before the enactment of a statute allowing such a bequest.[6] The power to take and hold "subscriptions or contributions in money or otherwise," does not include the power to take by will.[7] Property dedicated to a given purpose must continue to be appropriated to that purpose, in the absence of any positive law authorizing the division or apportionment of it.[8]

1. Organ Meeting House *v.* Seaford, 1 Dev. Eq. (N. Car.) 453.

Where property was conveyed to certain persons, "in trust for the use and benefit of the colored members of the M. E. Church South, according to the rules and discipline which, from time to time, may be agreed upon and adopted by the ministers and preachers of said church at their general conference," etc., it was held that this conveyance was for the sole use of the colored members of the church named, and that no one not answering that description was entitled to have the trust enforced.

Newman *v.* Proctor, 10 Bush. (Ky.) 318. See also Wilson *v.* Johns Island Church, 2 Rich. Eq. (S. Car.) 192.

It was held in second Ecclesiastical Soc. *v.* First Ecclesiastical Soc., 23 Conn. 255, that, under the constitution of *Connecticut*, the legislature could not divide an ancient local or territorial religious society into two or more societies, or divide the fund of such ancient society and assign it among the divisons.

2. Banks *v.* Phelan, 4 Barb. (N. Y.) 80.

3. Tucker *v.* St. Clements Church, 3 Sandf. (N. Y.) 242.

4. Evangelical Assoc. Appeal, 35 Pa. St. 316.

In Burke *v.* Wall, 29 La. Ann. 38; 29 Am. Rep. 316, it was said that, where a church congregation who own the soil of a cemetery, have, for years, entrusted the administration of the cemetery and the sale of its lots to the priests of their church, they clothe the priests with power to create servitudes on the soil of the cemetery which will be binding on the congregation and on all third persons.

As to what constitute the records of a church, see Sawyer *v.* Baldwin, 11 Pick. (Mass.) 492.

5. Alexander Presbyterian Church *v.* Presbyterian Church, 64 N. Y. 274; Frierson *v.* General Assembly, 7 Heisk. (Tenn.) 683.

6. Rhodes *v.* Rhodes, 88 Tenn. 637.

7. Brown *v.* Thompkins, 49 Ind. 423.

8. McKinney *v.* Griggs, 5 Bush (Ky.) 401; 96 Am. Dec. 360; Eastman's

3. Alienation and Sale.—Religious corporations have no common-law right to alienate their real estate.[1]

Estate, 60 Cal. 308; Boxwell *v.* Affleck, 79 Va. 402; Diocese of East Carolina *v.* Diocese of North Carolina, 102 N. Car. 442; Consistory *v.* Brandow, 52 Barb. (N. Y.) 228.

It was held in McGlade's Appeal, 99 Pa. St. 338, that an executed gift of personalty was neither a bequest, devise, or conveyance such as, under the *Pennsylvania* statute must be made for a religious or charitable use more than a certain time before the donor's death, to be valid.

A bequest to executors in their own right, trusting nevertheless, and believing, that, under a proper sense of their obligation to their own consciences and their accountability to God, they will, etc. pay over and contribute the same to charitable objects, etc., creates no trust enforcible in a court of equity; the executors take in their own right subject only to their own consciences. Frierson *v.* General Assembly, 7 Heisk. (Tenn.) 683.

It has been held that a bequest to the executor for masses for the repose of the testator's soul is void. Holland *v.* Alcock, 108 N. Y. 312; *In re* Schwartz's Will, 6 Dem. (N. Y.) 169; *In re* McEvoy's Estate, 6 Dem. (N. Y.) 7.

But in Frierson *v.* General Assembly, 7 Heisk. (Tenn.) 683, it was said that probably there are no "superstitious uses" in the *United States*, for lack of a standard of orthodoxy whereby to guage superstition.

In Bailey *v.* Lewis, 3 Day (Conn.) 450, it was held that a fund bequeathed to a religious society for the maintenance of free schools could not be applied by the society to the support of the minister.

In Mong *v.* Rousch, 29 W. Va. 119, it has adjudged that a bequest to the trustees of a church or unincorporated religious society is void and lapse of time and acquiescence on the part of the other beneficiaries in the will makes no difference. *Contra*, Fadness *v.* Braunborg, 73 Wis. 257; in which last case it was said that a conveyance to trustees does not violate the rule against suspension of the power of alternation, since they are persons in being by whom an absolute fee in possession could at any time be conveyed.

1. 2 Kent, Comm. 283; Madison Ave. Baptist Church *v.* Baptist Church, 46 N. Y. 131. But see *In re* Brick Presbyterian Church, 3 Edw. Ch. (N. Y.) 157; South Baptist Soc. *v.* Clapp, 18 Barb. (N. Y.) 49; Hardy *v.* Wiley, 87 Va. 125; Van Houten *v.* First Ref. Dutch Church, 17 N. J. Eq. 126; Bowen *v.* Irish etc. Congregation, 6 Bosw. (N. Y.) 245; Lynch *v.* Pfeiffer, 110 N. Y. 33.

In Trelawney *v.* Bishop of Winchester, 1 Burr. 221, it was held that, in the absence of any statute, ecclesiastical corporations undoubtedly had power to alienate real estate.

In *New York*, by a law passed in 1806, the chancellor, upon the application of any religious corporation, and in case he shall deem it proper, may make an order for the sale of any real estate belonging to such corporation, and direct the application of the proceeds arising therefrom to such uses as the corporation, with the consent and approbation of the chancellor, shall conceive to be most for the interest of the society to which the real estate belongs. The corporation may make, without leave of court an execution contract of sale preliminary to a conveyance, and the consent of the court may be obtained after the contract and before the conveyance. See Congregation Beth Elohim *v.* Central Presbyterian Church, 10 Abb. Pr., N. S. (N. Y.) 489. See also *New York* Laws, 1890, ch. 424; *New Jersey* Laws 1890, ch. 104.

No meeting of the corporation, or any action by it as such, is necessary to authorize the trustees to make an application to the court for the sale of the real estate of the corporation; the court acquires jurisdiction upon the petition of the trustees and in the absence of any action by the corporators, if neither the good faith of the application nor the propriety of the proposed sale is questioned. *In re* St. Ann's Church, 23 How. Pr. (N. Y.) 285; *In re* Second Baptist Soc., 29 How. Pr. (N. Y.) 324; Madison Ave. Baptist Church *v.* Baptist Church, 46 N. Y. 131.

Where, at a meeting held under authority of the court to learn the feeling of a congregation as to a sale of its real estate, a large majority of the votes

The consent of the presbytery is not a condition precedent to a valid sale of realty by a religious society of the Presbyterian denomination.[1]

The power of holding, controlling, and disposing of the real or personal estate of a religious corporation is not in the congregation at large, but in the trustees by and in the corporate name.[2]

cast were in favor of the sale, the fact may affect the discretion of the court, but not the validity of the sale. Resolutions directing a sale of church property and an appropriation of the proceeds must be taken as a whole and no sale will be allowed where the appropriation would be illegal. Such sale and appropriation may be lawfully ordered at the regular annual meeting of the corporation without special notice, and adjourned sessions are but a lawful prolongation. Burton's Appeal, 57 Pa. St. 213.

Where land was granted "out of respect for the institution of Christianity," and as a site for the erection of a church to be used by different religious sects, or, in certain contingencies as a school-house, it was held, that, upon sale of the land by the trustees of the church, in whom the title was vested, without the consent of the grantor or his heirs, and when use had been made of the church edifice as a store, a right of entry accrued to the grantor for condition broken. Scott *v.* Stipe, 12 Ind. 74.

When the legal title to property has been conveyed in trust for the use of a church, no subsequent violation of the trust will revest the title of the donor in the trustees. Reformed etc. Dutch Church *v.* Mott, 7 Paige (N. Y.) 77; 32 Am. Dec. 613.

By the *New York* Rev. Laws of 1801, 339, the legal title to all property held in trust for the Reformed Dutch Church, was transferred to the ministers, elders and deacons. Reformed etc. Dutch Church *v.* Mott, 7 Paige (N. Y.) 77; 32 Am. Dec. 613.

Application to the court must be made by a majority of the board of trustees, sanctioned by a majority of the corporators; otherwise the leave granted by the court may be revoked. The individual corporators are not bound by a submission by the corporation to arbitrators of the question who were the legally elected trustees; any member of the corporation may call in question the right of a trustee to act as such. Wyatt *v.* Benson, 23 Barb. (N. Y.) 327.

In re New South Meeting House, 13 Allen (Mass.) 497; Burton's Appeal 57 Pa. St. 213.

The corporation is without authority to refer the question of the sale of its real estate to arbitration; no corporator is bound by the award; and an injunction will be granted to stay the sale, if the majority of the corporators are opposed to it. Wyatt *v.* Benson, 23 Barb. (N. Y.) 327.

It was said in Christie *v.* Gage, 71 N. Y. 189, that conveyance made in pnrsuance of an order of court granted on application, would not be a judicial sale and so exempt from the operation of the Champerty act.

An order allowing real property to be conveyed by a religious corporation does not estop a grantee who has parted with no consideration. St. James' Church *v.* Church of the Redeemer, 45 Barb. (N. Y.) 356; 31 How. Pr. (N. Y.) 381.

As to the requisites of a deed under a decree of court, see Lombard *v.* Chicago Sinai Congregation, 64 Ill. 477. Madison Ave. Baptist Church *v.* Baptist Church, 46 N. Y. 131.

1. *In re* First Presbyterian Soc., 106 N. Y. 251.

2. Van Houten *v.* First Ref. Dutch Church, 17 N. J. Eq. 126; Blanc *v.* Alsbury, 63 Tex. 489; 51 Am. Rep. 666.

Where the owner of vacant city lots marked on the plan of the city addition made by him that they were donated for the use of the church, and where the church accepted the lots in payment of the owner's subscription, and built a church edifice thereon, it was held that the church acquired an equitable unconditional title, the right to the legal title, and the right to dispose of the lots by sale. Enos *v.* Chestnut, 88 Ill. 590.

The holder of the legal title to church property, claiming that the church is indebted to him, but failing to substantiate such claim, will be compelled to convey to the equitable owner and pay

Where trustees are authorized to sell or mortgage the church premises to pay for money loaned and refuse to do so, equity will enforce a sale.[1] A canon of the church prescribing the form necessary in order to dispose of the church edifice in any parish does not affect the legal right of a parish to dispose of the property according to the municipal statute, and without regard to the requirements of the canon.[2]

A society seeking to repudiate an unauthorized conveyance of real estate, and to recover the possession, must restore to the purchaser all he has paid upon the faith of the supposed title and of the enjoyment of the property.[3]

The funds of a Congregational Church derived from individual contributions not specifically appropriated by the donors, and from accumulations of interest, are held by the church in its own right, and not by the deacons in trust for the society, and may be appropriated by the church in its discretion both as to principal and interest.[4] An order made on the petition of a majority of the members of a religious corporation directing a sale of the corporate real estate and prescribing the application of the proceeds, will not be reversed on the ground that a good title cannot be given by reason of a trust imposed on the property arising from the general duty of the corporation to use its property for the purposes of its creation.[5]

costs of the proceedings. Beatty *v.* Henry, 10 Phila. (Pa.) 35.

1. Bushong *v.* Taylor, 82 Mo. 660; Newmyer's Appeal, 72 Pa. St. 121; Eggleston *v.* Doolittle, 33 Conn. 396.

2. Sohier *v.* Trinity Church, 109 Mass. 1.

Where land was granted to a church corporation on condition that it should not be used for secular purposes, and the corporation erected a church and granted in fee and on long leases lots in the churchyard on which tombs were erected and vaults built, it was held that the corporation could not sell the church and grounds without the consent of the lot owners, they having acquired a title. *In re* Brick Presbyterian Church, 3 Edw. Ch. (N. Y.) 155.

Where land was conveyed to two persons in trust for an unorganized religious society, and, after the society was organized, conveyed to it upon condition that it should hold, occupy, and improve for religious worship, it was held that the minister and a minority of the society, not being pew holders nor having paid any of the consideration money for the purchase, could not restrain the society from conveying to the trustees discharged of any trust, nor compel them to permit the minister to preach in the house. Clark *v.* Evangelical Soc., 12 Gray (Mass.) 17.

It was held in Weston *v.* Hunt, 2 Mass. 500; Brown *v.* Porter, 10 Mass. 93; Austin *v.* Thomas, 14 Mass. 333, that the consent of the minister, however, was necessary to the alienation by a town parish or vestry of its parsonage.

The division of property held in trust by the bishop for the benefit of the congregation, when made with the consent of all parties concerned, is sufficient consideration to sustain a bond given by one part of the congregation to the other on the sale of the property, and though one of the principals acted as representative of the society, and that fact was recited in the bond, yet, his obligation being personal, he was personally liable thereon. Arts *v.* Guthrie, 75 Iowa 674.

3. Baptist Church *v.* Baptist Church, 73 N. Y. 82.

4. Parker *v.* May, 5 Cush. (Mass.) 336; Freewill Baptist Church *v.* Bancroft, 4 Cush. (Mass.) 281.

5. *In re* First Presbyterian Soc., 106 N. Y. 251. In this case it was held, also, that a proper register of the vote taken at a church meeting is not essential, where due notice of the meeting was given, the election fairly conducted,

To constitute a valid sale of the real property of a religious corporation, there must be a valuable consideration inuring to the corporation as such; benefits resulting to the individual members are no consideration, and a deed made in dependence on them is void.[1] Where church property is vested by its charter of incorporation in a board of trustees annually elected by the pew holders on whom devolves the duties of the trust, an act of the legislature is the only means whereby a transfer of the property and of its trusts can be made to third persons; and a majority of the corporators could not make such a change in the absence of any authority to alter the charter.[2]

4. Mortgage.—A religious corporation may give a purchase-money mortgage,[3] or a mortgage for a pre-existing debt without an order of court, although forbidden to sell property without such an order.[4]

no lawful votes excluded, and no unlawful vote admitted.

1. Baptist Church *v.* Baptist Church, 46 N. Y. 131; 11 Abb. Pr., N. S. (N. Y.) 132.

2. Langolf *v.* Seiberlidch, 2 Pars. Eq. Cas. (Pa.) 64.

A decree of the general synod of the Reformed Presbyterian Church recited that certain members of the Second Congregation of Philadelphia, whose names appeared in a paper presented to the synod, had denied the authority and jurisdiction of the so-called Philadelphia Presbytery, and desired to maintain relations with and be in submission to the general synod, and had asked the counsel and advice of that body; it was therefore resolved that the members of said Second Congregation, whose names appeared on said paper, together with others who might unite with them, "be and are hereby declared to be the Second Congregation of Philadelphia, and as such are entitled to all the rights and immunities pertaining thereto." The petition to the synod was by a minority of the congregation. There had been no charge of offense or legal investigation, and no notice was given to the congregation or trustees. *Held* that the resolution of the synod was *ultra vires* and ineffectual to dispose of the charter and property of the Second Congregation. Kerr's Appeal, 89 Pa. St. 97.

But, under its legislative powers, a synod may dissolve a presbytery and assign its churches to some other presbytery; and may, for proper cause, depose a presbyter and dissolve or reorganize churches. McAuley's Appeal, 77 Pa. St. 397.

3. South Baptist Soc. *v.* Clapp, 18 Barb. (N. Y.) 35.

4. Walrath *v.* Campbell, 28 Mich. 111; Manning *v.* Moscow Presbyterian Soc., 27 Barb. (N. Y.) 52. But see *In re* Church of the Messiah (Supreme Ct.), 12 N. Y. Supp. 489.

It is not *ultra vires* for the trustees of a religious society, to whom power has been granted by charter or legislative enactment, to give a mortgage to secure an indebtedness of the society. In an action to foreclose, the trustees cannot set up that they had no title to the premises. The corporate name of the society will be presumed to be that in which the mortgage was executed. The answer may not aver that the note to secure which the mortgage was given, included a personal debt due from a trustee to a third person, of which the mortgagee had notice. M. E. Church *v.* Shulze, 61 Ind. 511.

In Walrath *v.* Campbell, 28 Mich. 111, the court refused to sustain a mortgage to the pastor in consideration of his services, as against a subsequent levy by an execution creditor.

A covenant running with the land, prohibiting the grantee, religious corporation, from alienating, disposing of, or otherwise changing or incumbering the property, does not prevent the execution of a mortgage to secure a legitimate debt. The power to do so exists at law, and there is no equity in refusing to enforce the mortgage for the payment of an honest debt of the corporation under color of protecting a charitable use. Magie *v.* German

5. Assignment for Benefit of Creditors.—Under the common-law power of a religious corporation to alien its real estate it may, as a natural person may, make an assignment thereof or of its personal property in trust for the benefit of creditors unless restrained by a charter or statute.[1] Generally such assignments can only be made after an application to the court and leave obtained.[2]

Evangelical etc. Church, 13 N. J. Eq. 77.

As to what is sufficient notice of a meeting of a church and congregation, at which a resolution authorizing the placing of a mortgage upon the church property, is to be passed upon, see Hubbard *v.* German Catholic Congregation, 34 Iowa 31.

In this case it is held that a committee authorized to sell the real estate and to execute a deed, is not authorized to execute a mortgage or deed of trust for the purpose of securing various creditors holding general claims against the society; and that the vote of a subsequent meeting cannot cure the defects in such a mortgage.

Where a statute gives to church trustees "authority, under the direction of the society, to sell and convey, mortgage or lease any real estate belonging to such society," providing that, "no such sale or conveyance" shall be made unless the assent of two-thirds of those present at any meeting specially called for the purpose, should be obtained, it was held that a two-thirds' vote was not necessary to authorize a mortgage; that where any two of the trustees might lawfully call a meeting of the trustees, a majority of whom, when lawfully convened, could do anything that the trustees could do, two of these trustees who had come together without notice to any one else, might execute a valid mortgage on the church property; and that, if the trustees had acted without authority, the society could ratify their action, directly by vote, or indirectly by acts of recognition and acquiescence. Scott *v.* First Free Methodist Church, 50 Mich. 528.

As to what attendance of the vestry of an Episcopal Church is necessary to constitute a quorum to authorize the execution of a mortgage, and what is a sufficient authorization and execution, see Moore *v.* Rector etc. of St. Thomas, 4 Abb. N. Cas. (N. Y.) 51.

1. Curtis *v.* Leavitt, 15 N. Y. 216; De Ruyter *v.* St. Peter's Church, 3 N. Y. 242; Hurlbut *v.* Carter, 21 Barb. (N. Y.) 223; Hill *v.* Reed, 16 Barb. (N. Y.) 280; Harris *v.* Thompson, 15 Barb. (N. Y.) 66; Shockley *v.* Fisher, 75 Mo. 501.

2. In De Ruyter *v.* St. Peter's Church, 3 Barb. Ch. (N. Y.) 119, the court by Walworth, Ch., said: "No person can suppose that a corporation which by its charter is to exercise its franchises and carry on its ordinary business by officers and agents elected or appointed in a particular manner, can transfer all its franchises and business to other persons, to be exercised by them as general trustees. Hence the question has frequently arisen and been discussed whether a corporation can make an assignment of its property to a trustee to sell the same and apply the proceeds to the payment of its debts, or whether the directors or trustees of the corporation must themselves sell the property and distribute the proceeds, or transfer the property directly to the creditors in payment of their debts. And it appears to be settled by a weight of authority which is irresistible, that a corporation has the right to make an assignment in trust for its creditors and may exercise that right to the same extent and in the same manner as a natural person, unless restricted by its charter or by some statutory provision." Lenox *v.* Roberts, 2 Wheat. (U. S.) 373; Haxtun *v.* Bishop, 3 Wend. (N. Y.) 13; Pope *v.* Brandon, 2 Stew. (Ala.) 401; 20 Am. Dec. 49; State *v.* Bank of Maryland, 6 Gill & J. (Md.) 205; 26 Am. Dec. 561; Warner *v.* Mower, 11 Vt. 385; Flint *v.* Clinton Co., 12 N. H. 431; and see *Ex parte* Conway, 4 Ark. 304; Hopkins *v.* Gallatin Turnpike Co., 4 Humph. (Tenn.) 403; Susquehanna Canal Co. *v.* Bonham, 9 W. & S. (Pa.) 27; 42 Am. Dec. 315; Dana *v.* Bank of U. S., 5 W. & S. (Pa.) 223. In De Ruyter *v.* St. Peter's Church, 3 N. Y 242, the court by Ruggles, J., said: "The power of a corporation to assign its property in trust for the payment of

6. Holding in Trust.—A religious corporation cannot act as a trustee in relation to matters in which it has no interest.[1] Courts of equity have jurisdiction over religious societies so far as to protect them in the exercise of their duties as trustee,[2] and to restrain attempted evasions of their obligations.[3]

7. Borrowing Money.—An incorporated religious association may borrow money and bind itself, while an unincorporated association may not, those who, in the latter case, receive the money, binding themselves individually.[4]

Where the object for which the money is borrrowed is a necessary and legitimate one, it is not necessary that authority to borrow be expressly granted to the trustees in whose name it

its debts cannot at this day be doubted. It has been settled not only in this State, (Haxtun *v.* Bishop, 3 Wend. (N. Y.) 13), but in *New Hampshire, Vermont, Pennsylvania, Mary and, Tennessee, Alabama* and *Arkansas.* . . . There is no solid distinction between the corporation of St. Peter's Church "(a religious corporation)" and a bank or railroad company with respect to its power of making an assignment for the payment of its debts, excepting that in the case of this corporation it must be made with the concurrence of the court of chancery. There is no allegation against the fairness and honesty of the transaction. It was the duty of the trustees to cause the debts to be paid and this mode of doing it does not seem to be liable to any legal obligation."

1. *In re* Howe, 1 Paige (N. Y.) 214, the court, by Walworth, Ch., said, "It is a general rule that corporations cannot exercise any powers not given to them by their charters of Acts of Incorporation; and for that reason they cannot act as trustees in relation to any matters in which the corporation has no interest. But wherever property is devised or granted to a corporation, partly for its own use and partly for the use of others, the power of the corporation to take and hold the property for its own use carries with it, as a necessary incident, the power to execute that part of the trust which relates to others." See also First Universalist Soc. *v.* Fitch, 8 Gray (Mass.) 421; Gram *v.* Prussia etc. Soc., 36 N. Y. 161; CHARITIES, vol. 1, p. 122.

2. Isham *v.* First Presbyterian Church, 63 How. Pr. (N. Y.) 465, and cases cited.

3. Where members of a church organization had enjoyed the benefit of a decree rendered in a suit brought there for but not in its name, it was held, that a bill in its name could not be maintained to compel an account and to evade the portions of the decree unfavorable to it." Third Ref. Dutch Church's appeal, 88 Pa. St. 503.

See also, as bearing on the subject, *supra*, this title, *Powers in Relation to Property—In General.*

4. See generally, Hills *v.* Bannister, 8 Cow. (N. Y.) 31. But see Brockway *v.* Allen, 17 Wend. (N. Y.) 41; Taft *v.* Brewster, 9 Johns. (N. Y.) 334; 6 Am. Dec. 280; White *v.* Skinner, 13 Johns. (N. Y.) 307; 7 Am. Dec. 381; Randall *v.* Van Vechten, 19 Johns. (N. Y.) 60; 10 Am. Dec. 192; Seaber *v.* Hawks, 5 Moore & P. 549; Bushong *v.* Taylor, 82 Mo. 660; Peoples Bank *v.* St. Anthony's Roman Catholic Church, 109 N. Y. 512; 39 Hun (N. Y.) 498; (but see Columbia Bank *v.* Gospel Tabernacle Church, 57 N. Y. Super. Ct. 149;) Linn *v.* Carson, 32 Gratt. (Va.) 170.

In Jeft *v.* York, 12 Cush. (Mass.) 196, the court said: "If the defendant professed to act and borrow money, and give a note for it, which is a nullity, for a body not incorporated, and having no power to contract, and before paying it over to such unincorporated associates, the lender demands it back, it must be deemed to be money advanced to the agent on a consideration which has failed and therefore must be deemed in law money had and received to the lender's use, and money had and received will lie for it."

A misnomer will not vitiate the corporate act of borrowing money if in truth the act was that of the corporation.

New York African Soc. *v.* Varick, 13 Johns. (N. Y.) 38.

is done; and a note given by them is properly admitted in evidence.[1] But the president and secretary of an incorporated religious society have not implied authority to issue such a note under such circumstances; and they will be personally liable thereupon if they do.[2] A bishop of the Roman Catholic church is not liable for money borrowed by a parish priest for the use of the church, the bishop's connection with the money being such as arises from his relations to the church and its pastors as their bishop.[3]

XI. Liabilities—1. Contracts.—A religious corporation which is a member of the synod of the denomination may be bound by contracts made by the synod.[4]

Expenditures and disbursements made by the trustees of a religious society in good faith and with reasonable prudence, even though they exceed the amount of the trust funds in their hands, should be allowed by the society and reimbursed to the trustees. The amounts so paid may be charged upon the trust estate.[5] Where the minister of a parish makes repairs upon the parsonage at his own expense this is not a charge upon the parish.[6]

Power given to the standing committee of a religious society "generally to manage the business of the society, expending only such sums of money as the society shall place at their disposal," does not include the power to bind the society to pay for legal services employed by them in defending a suit against the society.[7]

1. First Baptist Church *v.* Caughey, 85 Pa. St. 271. But in Packard *v.* Universalist Society, 10 Met. (Mass.) 427, the court, by Dewey, J., said: "There is nothing in the nature of the business to be done or the duties which devolve upon the treasurer of such corporations (religious corporations) that can require or justify the giving of negotiable instruments binding the society without being authorized by a special vote to that effect. Webber *v.* Williams College, 23 Pick. (Mass.) 302." And see Hayward Pilgrim Soc, 21 Pick. (Mass.) 270; Kupfer *v.* South Parish, 12 Mass. 185; Episcopal Charitable Soc. *v.* Episcopal Church, 1 Pick. (Mass.) 372.

2. Cattron *v.* First Universalist Soc., 46 Iowa 106; Jefts *v.* York, 64 Mass. 394; Randall *v.* Van Vechten, 19 Johns. (N. Y.) 60; 10 Am. Dec. 193; People's Bank *v.* St Anthony's Roman Catholic Church, 109 N. Y. 512.

3. Leahey *v.* Williams, 141 Mass. 345.

4. McLaughlin *v.* Concordia College, 20 Mo. App. 42.

5. Bradbury *v.* Birchmore, 117 Mass. 569, and the regularly constituted officers of a church acting in good faith will be protected by law. Lucas *v.* Case, 9 Bush (Ky.) 297.

6. Greene *v.* First Parish, 10 Pick. (Mass.) 500. In this case it was held that where, after the dissolution of the ministerial relation, the parish voted to reimburse the minister for the expense of his repairs, the vote was not binding, the parish having no authority to incur debts not founded on a beneficial equivalent.

It was held in Bailey *v.* M E. Church, 71 Me. 472, that in the absence of legislative permission, a parish cannot contract a debt for the erection of a meeting-house; and that any contract made for materials to enter into its construction is *ultra vires* and cannot be enforced. As to the conditions under which the votes of a majority of the members of a church will control the action of the corporation, see Horton *v.* Baptist Church etc., 34 Vt. 309; Stanton *v.* Camp. 4 Barb. (N. Y.) 274; Devoss *v.* Gray, 22 Ohio St. 157.

7. Child *v.* Christian Soc., 144 Mass. 473. See also Sawyer *v.* Methodist

The deacons of an unincorporated religious society, who are *ex officio* agents for the management of its property, cannot be held personally liable on a contract made by other agents of the society, unless it be shown that the former participated in the appointment of the latter, or in some way ratified such contract.[1] A resolution of a church vestry that "The vestry, or those of them who will consent to the plan, will agree to complete the church edifice on their own responsibility," imposes no personal liability on the members of the vestry; and their impression that such liability exists, without any act to fix it, will not vary the legal situation.[2] The administrator of a deceased clergyman may reach a fund created for his support to satisfy a judgment obtained by him as administrator against the society; and, a large part of the fund having been expended in defending the action which resulted in the judgment, those individuals who were members of the society at the time of the intestate's death may be held liable for the deficiency.[3]

A minister who is entitled to the possession of parsonage land cannot sell the crops growing thereon when he ceases to be the minister over that parish and removes to another congregation. His vendee has not such title to the crop as will support an action against one who has taken it from the land; and a disclaimer of title by the officers of the church will not support the vendee's title.[4]

Church music in small country villages or hamlets is usually gratuitous; the mere fact that one sings in a choir or plays on an instrument as an accompaniment on occasions of church service on the Sabbath raises no implied pecuniary liability against the church corporation; in order to recover it must be proven that there was an actual employment and promise binding on the corporation.[5]

2. Torts.[6]—It has been held in *Massachusetts* that trover or replevin is maintainable in the name of a parish for the recovery of the parish records;[7] and that a religious society or parish

Episcopal Soc., 18 Vt. 405; Winship *v.* Smith, 61 Me. 118.

For a case where the attorney at law employed was one of the trustees of the society, see Cicotte *v.* St. Anne's Church, 60 Mich. 552; where the sexton was also vestryman and treasurer of the society. See St. Jude's Church *v.* Van Denberg, 31 Mich. 287. See also St. Patrick's Roman Catholic Church *v.* Abst, 76 Ill. 252; Sawyer *v.* Methodist Episcopal Soc., 18 Vt. 405; Winship *v.* Smith, 61 Me. 118.

1. Devoss *v.* Gray, 22 Ohio St. 159.

2. Vincent *v.* Chapman, 10 Gill & J. (Md.) 279. See also Sheeby *v.* Blake, 72 Wis. 411.

3. Biglow *v.* Congregational Soc., 11 Vt. 283; 15 Vt. 370.

4. Debow *v.* Colfax, 10 N. J. L. 128.

5. Van Buren *v.* Reformed Church, 62 Barb. (N. Y.) 495.

6. See CORPORATIONS, vol. 4, p. 250; also the various substantive titles, such as LIBEL AND SLANDER, etc.

7. In First Parish *v.* Stearns, 21 Pick. (Mass.) 148, the court, by Morton J., said: "We have no doubt that either trover or replevin will lie in this case. Sawyer *v.* Baldwin, 11 Pick. (Mass.) 492. The property of the records is in the parish. The clerk is the officer designated by law to hold and keep them; if any stranger gets possession of them

may maintain trespass against one who without right has ploughed up a portion of its land used for purposes incidental to a place of worship.[1]

A religious corporation may maintain an action against a railroad corporation for nuisance in disturbing the use of a church; and damages may be given, not only for depreciation in the value of the property but for discomfort and inconvenience caused to the congregation and tending to destroy the use of the building for church purposes.[2]

Town or parish officers are not liable in case of damages arising from their neglect of duty, in the absence of any statute giving such remedy to the town or parish.[3]

A representation to a bishop or church judicatory having power to hear and examine and redress grievances in respect to the character or conduct of a minister of the gospel, is *prima facie* a privileged communication, and, if made in good faith, an action of slander does not lie against the party presenting it; but if false, impertinent, or made without probable cause or belief in its truth, the action lies. The *onus* of proving falsehood and malice is on the plaintiff.[4]

the parish may take them from him by the proper action, or recover damages for their destruction or detention. A mandamus would doubtless be a more appropriate and effectual remedy to compel the delivery of the records to the legal officer. Com. *v.* Athearn, 3 Mass. 285." See also Foster *v.* Essex Bank, 17 Mass. 503; 9 Am. Dec. 168, where the court, by Parker, C, J., said: "An action of trover would lie against the corporation if they should refuse to deliver the property on demand; and assumpsit might also be maintained, it being settled by the later authorities that either action may be maintained against an incorporated company, as well as against a natural person, although the doings on which the action is founded are not verified by the seal of the corporation. See opinion of Mr. Justice Story in Bank of Columbia *v.* Patterson."

1. First Parish *v.* Smith, 14 Pick. (Mass.) 297.

2 In Baltimore etc. R. Co. *v.* Fifth Baptist Church, 108 U. S. 317, the court, by Field, J., said: "Whatever prevents the comfortable use of the property for that purpose by the members of the corporation or those who by its permission unite with them in the church, is a disturbance and annoyance as much so as if access by them to the church was impeded and rendered inconvenient and difficult. The purpose of the organization is thus thwarted. It is sufficient to maintain the action to show that the building of the plaintiff was thus rendered less valuable for the purposes to which it was devoted. The liability of the defendant for the annoyance and discomfort caused is the same also as that of individuals for a similar wrong. The doctrine which formerly was sometimes asserted that an action will not lie against a corporation for a tort is exploded. The same rule in that respect now applies to corporations as to individuals. They are equally responsible for injuries done in the course of their business by their servants. This is so well settled as not to require the citation of any authorities in its support."

3. First Parish *v.* Fiske, 8 Cush. (Mass.) 264; 54 Am. Dec. 755; White *v.* Phillipston, 10 Met. (Mass.) 108; Trafton *v.* Alfred, 15 Me. 258; Kendall *v.* Stokes, 3 How. (U. S.) 87; Com. *v.* Genther, 17 S. & R. (Pa.) 135; Wilson *v.* Mayor etc. of N. Y., 1 Den. (N. Y.) 595; 43 Am. Dec. 719.

4. In O'Donaghue *v.* McGovern, 23 Wend. (N. Y.) 26, the court, by Cowen, J., said: "Churches in this country are, in a legal point of view, no more than other societies, voluntarily organized by our citizens, with such gradations of officers and judicatories as may subserve the purposes of moral and religious redress. The proper

X. Actions—1. By Society.—An incorporated religious society can bring suit only in the name of the society, through, or by the board of trustees, or an authorized agent of one body or the other, or both.[1]

If the fact of incorporation is denied it must generally be proved.[2] But one who has made a contract with the trustees of a religious society may be estopped from denying their power to contract.[3]

An unincorporated religious society may sue on a contract made by it for the purposes of the society, though no persons are named as trustees or committeemen.[4] A motion for an injunction to restrain persons claiming to be trustees, but who are not, from interfering in the management and control of the society property is properly brought in the corporate name of the real trustees and not in the name of the State.[5]

channel being pursued . . . the church member in question is entitled to the same measure of protection, as if he had, when writing the libel set forth in the declaration, been engaged in seeking the removal of an inferior officer at the hands of a superior, created by the constitution or the law."

For a priest to say in the pulpit, of a physician, that his civil marriage following a divorce should debar him from employment by members of the parish and from social intercourse under a penalty of a loss, on the part of the members disregarding the injunction, of the ministrations of the church, is actionable *per se* and will support a verdict. Morasse *v.* Borchu, 151 Mass. 567. And see Fitzgerald *v.* Williams, 148 Mass. 462.

1. M. E. Church *v.* Sherman, 36 Va. 404; Leftwick *v.* Thornton, 18 Iowa 56; Drumheller *v.* First Universalist Church, 45 Ind. 275. See also Skinner *v.* Richardson, 76 Wis. 464; Curd *v.* Wallace, 7 Dana (Ky.) 190.

The trustees of a voluntary religious association, may, for and in behalf of all the members, sue to establish a will making a devise to the society. Lilly *v.* Tolbein, 103 Mo. 477.

One of several trustees can sue in behalf of the society where it cannot bring the action because the act complained of is the act of the other trustees. Stokes *v.* Phelps' Mission, 47 Hun (N. Y.) 570; Berryman *v.* Reese, 11 B. Mon (Ky.) 287; Associate Ref. Church *v.* Theological Seminary, 4 N. Y. Eq. 77. See also Fink *v.* Umscheid, 40 Kan. 271, holding also that one may sue for all equally interested.

2. M. E. Union Church *v.* Picket, 23 Barb. (N. Y.) 436; M. E. Church *v.* Tryon, 1 Den (N. Y.) 451. But see Skinner *v.* Richardson, 76 Wis. 464; Townsend *v.* First Freewill Baptist Church in Lowell, 6 Cush. (Mass.) 279. And see Corporations, vol. 4, p. 284, *et seq.*, for a full discussion of this subject.

3. Skinner *v.* Richardson, 76 Wis. 464; Columbia Bank *v.* Gospel Tabernacle Church, 57 N. Y. Supr. Ct. 149.

4. Phipps *v.* Jones, 20 Pa. St. 260; 59 Am. Dec. 708.

5. Trustees *v.* Hoessli, 13 Wis. 348. Where power "to meet, choose officers, levy taxes, and repair the meeting house" was granted by act of the legislature to part of the members of a religious society it was held that power to sue for the destruction of the meeting house was included. Tilden *v.* Metcalf, 2 Day (Conn.) 259.

Where a church congregation was divided and a division of its property also took place, the trustees of one portion, appointed for the purpose of collecting its debts, are the proper persons to sue on a bond given by the other portion, through its representative, for the payment of money due to the plaintiffs. Arts *v.* Guthrie, 75 Iowa 674.

And a committee appointed for the purpose may maintain an action to protect the congregation in its rights and it is not necessary that the members of the committee should be members of the congregation. The evidence of appointment is the entry on the church records made by the secretary. Humphrey *v.* Burnside, 4 Bush (Ky.) 215; Hadden *v.* Chorn, 8 B. Mon. (Ky.) 70.

The Statute of Limitations runs against the vestry and wardens of a church, as such, as against any other persons.[1]

2. Against Society.—An incorporated religious organization or society can be sued only by its corporate name; a suit against its trustees, designating them as trustees of the corporation, is not a suit against the corporation, the designation added being merely "*descriptio personæ*."[2]

In case suit cannot, for any reason, be brought against the corporation by its corporate name, the individual corporators may be sued collectively. If they are too numerous to admit of their all being brought before the court, one or more may be sued and may defend for the whole. In the case of a Roman Catholic church being party defendant the bishop of the diocese in which the church is situated should be made a party.[3]

An error made in suing a church as such, when, by statute, the suit should have been brought against its trustees, cannot be taken advantage of on appeal when it has been overlooked in the court below.[4] Service of process in the suit must be made upon officers of the religious corporation who are *de facto* in possession of their offices; and a default based upon service made otherwise will be vacated.[5]

An organization under a charter and user of its powers proves the existence of a corporation *de facto* sufficient to bind it under a contract.[6] Where a religious corporation is sued on an agree-

1. Vestry etc. of St. Bartholomews *v.* Cantey, 3 McCord (S. Car.) 317.

2. Tartar *v.* Gibbs, 24 Md. 323; African M. Bethel Church *v.* Carmack, 2 Md. Ch. 143.

But see opposite rule in M. E. Church *v.* Garnsey, 55 Ill. 132; Willard *v.* M. E. Church, 66 Ill. 55. See also Wilkins *v.* St. Mark's P. E. Church, 52 Ga. 351.

3. Keller *v.* Tracy, 11 Iowa 530; Jung *v.* Neraz, 71 Tex. 396; Sheeby *v.* Blake, 72 Wis. 411.

4. M. E. Church *v.* Garnsey, 66 Ill. 132.

5. Berrian *v.* Methodist Society, 4 Abb. Pr. (N. Y.) 424.

6. Ebaugh *v.* German Ref. Church, 3 E. D. Smith (N. Y.) 60; Willard *v.* M. E. Church, 66 Ill. 55.

In M. E. Union Church *v.* Pickett, 19 N. Y. 482, the court, by Selden, J., said: "The answer in this case having denied that the plaintiffs were ever incorporated as alleged in this complaint, it was incumbent upon them to prove their incorporation upon the trial. The defendant's counsel insists that the certificate introduced for that purpose was insufficient to support the issue on the part of the plaintiffs; because the act for the incorporation of religious societies requires certain preliminary acts in order to incorporate under it, which acts being virtually conditions precedent to the creation of such a corporation, must be proved before its existence can be established. The preliminary acts referred to are: the giving of the notice in the manner required by the third section of the act; the assembling of the male members of the church or congregation, pursuant to such notice; the selection in the proper manner of the proper person to preside at such meeting; the election of trustees; and the making, acknowledging, and recording of the certificate of the presiding officers. It is obvious that if religious corporations are bound whenever they bring a suit to prove a strict compliance with the statute in respect to all these preliminary circumstances, it would be impossible for them in most cases to enforce their rights in a court of law. If these facts must be proved in one case, they must in all, and corporations may thus be called upon fifty years after the events took place to furnish proof of their

ment executed under the corporate seal and attested by the proper officers, a presumption of authority to make the contract arises, and the burden of proof rests on those who denied the authority.[1] A religious corporation may sue a majority of the individuals who compose it.[2]

In an action by a minister to recover his salary in *New Jersey*, it is not necessary for him to show that the trustees have acted as a corporation in engaging his services.[3]

3. **Mandamus.**—Mandamus will not lie to compel a religious society to restore to membership one expelled by a decree of the duly constituted authorities for cause;[4] nor where the expulsion was not a corporate act and did not affect property or civil rights of the expelled member;[5] nor where he desires to be restored only to simple membership unconnected with any claim to exercise any office or franchise or to hold or enjoy rights of property.[6]

A peremptory mandamus may issue against the trustees of a religious society, at the petition of its members, ordering the admission to the performance of his duties of a preacher who has been duly appointed by the bishop of the Methodist Episcopal Church to administer to a congregation.[7]

occurrence. The statute has provided for no record evidence on the subject, except in respect to those facts required to be inserted in the certificate of organization. But a rule so inconvenient as that contended for by the defendant's counsel has never yet been established in regard to any class of corporations. On the contrary, it has been repeatedly held that, as against all persons who have entered into contracts with bodies assuming to act in a corporate capacity, it is sufficient for such bodies to show themselves to be corporations *de facto*. This cannot be done by simply showing that they have acted as corporations for any period of time, however long. Two things are necessary to be shown in order to establish the existence of a corporation *de facto*, viz: 1. The existence of a charter or some law under which a corporation with the powers assumed might lawfully be created, and 2: A user by the party to the suit, of the rights claimed to be conferred by such charter or law. (U. S. Bank *v.* Stearns, 15 Wend. (N. Y.) 314.) The rule established by law as well as by reason is, that parties recognizing the existence of corporations by dealing with them have no right to object to any irregularity in their organization and any subsequent abuse of their powers not connected with such dealing. As long as these are overlooked or tolerated by the State, it is not for individuals to call them into question." See also Vernon Soc. *v.* Hills, 6 Cow. (N. Y.) 23; 16 Am. Dec. 429; Brouwer *v.* Appleby, 1 Sandf. (N. Y.) 158; Eaton *v.* Aspinwall, 19 N. Y. 119; Remington Paper Co. *v.* O'Dougherty, 65 N. Y. 571.

1. Bowen *v.* Irish etc. Congregation, 6 Bosw. (N. Y.) 245; Whitmore *v.* Fourth Cong. Soc., 2 Gray (Mass.) 306.

2. African M. Bethel Church *v.* Carmock, 2 Md. Ch. 143.

3. Miller *v.* Baptist Church, 18 N. J. L. 251; see also Van Vlieden *v.* Welles, 6 Johns. (N. Y.) 85.

4. State *v.* Hebrew Congregation, 31 La. Ann. 205; 33 Am. Rep. 217.

5. Sale *v.* First Regular Baptist Church, 62 Iowa 26; 49 Am. Rep. 136.

6. People *v.* German etc. Church, 3 Lans. (N. Y.) 434.

Where the fact of expulsion is not proved and the answer concedes the member's rights, the petition will be dismissed. Lernix *v.* Harmony Soc., 3 Wall. Jr. (U. S.) 87.

7. People *v.* Steele, 2 Barb. (N Y.)

An irregularity in the election of officers of a religious society, whereby two sets of officers are created, each claiming to be entitled to the possession and control of the temporalities of the society, must be taken advantage of by those claimants who are out of possession without delay.[1]

Mandamus will issue at the petition of the rector of a church to compel the attendance of vestrymen at a meeting of the vestry, where such meeting is necessary and cannot be held without their presence thereat; and if the purpose is merely to secure a meeting, a peremptory writ will issue.[2]

But mandamus will not issue at the petition of a rector, to compel the officer having charge of the corporate seal to affix it to an agreement for consolidation with another church, where the papers show that the members are divided in opinion on the subject, but do not show what proportion favor the consolidation; and where further proceedings in the matter of consolidation have been enjoined in an action in another court on the ground of irregularity in the meeting at which the consolidation was authorized, a mandamus will be denied.[3]

Mandamus will lie to compel the rector of a church to give the statutory notice of the annual election of vestrymen; and where it appears that the rector's refusal is based upon a scheme for the consolidation of his church with another in which he is personally interested the mandamus will be peremptory, and a referee will be appointed to see that the writ is obeyed and to act as an inspector of election.[4]

Mandamus will not lie to control the decision of ecclesiastical courts as to what constitutes an offense against the word of God.[5]

4. Quo Warranto.—A person's right to act as trustee of a religious corporation is determinable by proceedings in *quo warranto;* equity will not entertain a bill for that purpose.[6] Irregularities in the charter of a church corporation can be reached in the same way only, and at the suit of the attorney-general.[7] Where the majority of a church, pretending, contrary to the fact, that a portion of the trustees elected have resigned and refused to act, proceed to elect others in their place, without notice to the minority of the congregation, and such others wrongfully assume to act, the law furnishes an appropriate remedy against them by

397; People *v.* Couley, 42 Hun (N. Y.) 98.

1. Smith *v.* Erb, 4 Gill (Md.) 437.

2. People *v.* Winans (Supreme Ct.), 9 N. Y. Supp. 249; Lyell *v.* St. Clair Co., 3 McLean (U. S.) 581; Smith *v.* Portage Co., 9 Ohio 25; Johnston *v.* Herkimer Co., 19 Johns. (N. Y.) 272.

3. People *v.* Blackhurst (Supreme Ct.), 11 N. Y. Supp. 675.

4. People *v.* Hart. 11 N. Y. Supp. 673.

5. German Ref. Church *v.* Seibert, 3 Pa. St. 282.

6. Appeal of Nolde (Pa. 1888), 15 Atl. Rep. 777.

7. Christ's Church Charter, 8 Pa. Co., Ct. Rep. 28.

quo warranto or by a bill in equity to restrain their unlawful acts.[1] If the relator took part in the election of the trustees, he cannot have leave to file an information in the nature of a *quo warranto* charging them with unlawfully acting as trustees.[2] *Quo warranto* is not the proper method to determine who are lawful trustees, in a suit to recover possession of church property.[3]

5. **Injunction.**—Where one has been chosen to fill an office, as trustee of a religious society, while still the *de facto* incumbent of another office in the church, an injunction will not issue to restrain him from performing the duties of the second office.[4] Where the trustees of a church, governed solely by the wish of a majority of the members, close the church against the duly appointed preacher, they may be restrained by injunction.[5] The court will enjoin a majority of the corporation from violating an article in the charter, and a pastor from officiating as such when he is ineligible.[6] A trustee, who has ceased to be a member of the society and has thereby, under a statute, rendered his office vacant, may be enjoined from acting as trustee.[7]

An officer who has been disturbed or ousted from his office, as the minister or steward of a church, has no remedy by injunction at the instance of a part of the members of the church or congregation; the remedy is by mandamus at the relation of the officer.[8]

A part, even a minority, of the trustees may obtain an injunction against a diversion of the church property to the uses of any other than its own denomination; and, by the attempt so to divert the property of the society, they cease to be trustees and may be enjoined accordingly.[9]

The committee of an ecclesiastical society may defend the society against an application for an injunction forbidding the sale of pews, or against any legal proceedings endangering either the existence of the corporation or its rights of property. The

1. Nelson *v.* Benson, 69 Ill. 27.
2. People *v.* Moore, 73 Ill. 132.
3. Gaff *v.* Greer, 88 Ind. 122; 45 Am. Rep. 449.
4. Hagner *v.* Hayberger, 7 W. & S. (Pa.) 104; 42 Am. Dec. 221.
5. Whitecar *v.* Michenor, 37 N. J. Eq. 6.
6. Sawer's Appeal, *81 Pa. St. 182.
7. First Ref. Presbyterian Church *v.* Bowden, 10 Abb. N. Cas. (N. Y.) 1.
8. Tartar *v.* Gibbs, 24 Md. 323.
9. First Ref. Presbyterian Church *v.* Bowden, 10 Abb. N. Cas. (N. Y. 1.
In the absence of any showing that a religious society was unable to assemble in the usual manner, or that there were no assessors or standing committee of the parish, or that they unreasonably refused to call a meeting, an organization effected at a meeting called by a justice of the peace will be perpetually enjoined from taking possession of the society's property, as against a *de facto* organization, which, prior to such meeting, was in peaceable possession of the property and exercise of the corporate functions. Reformed Methodist Soc. *v.* Draper, 97 Mass. 349; Clark *v.* Evangelical Society, 12 Gray (Mass.) 17.

cost of the defense must be met by the society. But proceedings affecting only the committee personally, as to test the legality of their election, must be met by the committee personally.[1]

An injunction will not issue to restrain proceedings under an agreement on the ground that the agreement was made unlawfully, where the statute has provided a tribunal before which the legality of the agreement may be tried.[2]

XI. Dissolution.[3]—The dissolution of a religious society may take place for different reasons and in different ways; for example, by lapse,[4] by nonuser,[5] by misuser,[6] for breach of trust,[7] by

1. Harbison *v.* First Presbyterian Soc., 46 Conn. 529; 33 Am. Rep. 34.

2. Maclaury *v.* Hart, 121 N. Y. 636; *reversing*, 10 N. Y. Supp. 125.

A court of equity will restrain all persons from officiating in churches under the jurisdiction of the Reformed Dutch Church of the United States who do not preach the doctrine and the entire system of Calvanistic theology as received and taught by the synod. Suter *v.* Spangler, 4 Phila. (Pa.) 331. See also Cammeyer *v.* United German Lutheran Churches, 4 Edw. Ch. (N. Y.) 223.

3. See Corporations, vol. 4, pp. 294–306.

4. Roman Catholic Church *v.* Texas etc. R. Co., 41 Fed. Rep. 564, holding that at the expiration of its charter the title to its property vests in its members, who may reincorporate; *In re* Orthodox Congregational Church, 6 Abb. N. Cas. (N. Y.) 398.

5. 2 Kent's Comm. 245; 1 Bl. Comm. 485. But see Oakes *v.* Hill, 14 Pick. (Mass.) 442; Tobey *v.* Wareham Bank, 13 Met. (Mass.) 440; Vernon Soc. *v.* Hills, 6 Cow. (N. Y.) 23; 16 Am. Dec. 429, and cases there cited; Reformed Dutch Church *v.* Brandow, 52 Barb. (N. Y.) 236; Deming *v.* Buleston, 35 N. Y. Supr. Ct. 312; Hardon *v.* Newton, 14 Blatchf. (U. S.) 379; Cahill *v.* Kalamazoo Mut. Ins. Co., 2 Dougl. (Mich.) 124; 43 Am. Dec. 457; Worley *v.* Thayer, 3 Fed. Rep. 748; Lehigh Bridge Co. *v.* Lehigh Coal etc. Co., 4 Rawle (Pa.) 9.

6. Slee *v.* Bloom, 5 Johns. Ch. (N. Y.) 379, where Ch. Kent, said: "A corporation aggregate . . . may be dissolved if it becomes incapable of continuing its corporate succession, or executing its corporate functions, as by the death of all its members, or the destruction of an integral part of it, or it may be dissolved by surrender of its franchises into the hands of the government, or by forfeiture of its charter through abuse or neglect of its franchises, . . . but that a corporation is to be adjudged dissolved for nonuser or misuser of its franchises, until it has been called upon to answer for the breach of trust is nowhere assumed. The contrary doctrine is universally taught, and it is founded on very obvious principles of justice." And see cases cited in the opinion.

The remedy for misuser or nonuser is by action of law by *scire facias* instituted by the attorney-general. Attorney Genl. *v.* Stevens, 1 N. J. Eq. 369; 22 Am. Dec. 526; Merrick *v.* Brainard, 38 Barb. (N. Y.) 595; Patrick *v.* Ruffners, 2 Rob. (Va.) 209; 40 Am. Dec. 740; State *v.* Fourth N. H. Turnpike, 15 N. H. 162; 41 Am. Dec. 690. And the forfeiture must be ascertained and declared by regular process of law. Vernon Soc. *v.* Hills, 6 Cow. (N. Y.) 23; 16 Am. Dec. 429; Allen *v.* New Jersey Southern R. Co., 49 How. Pr. (N. Y.) 17; Persse etc. Paper Works *v.* Willet, 1 Robt. (N. Y.) 147; Importing etc. Co. *v.* Locke, 50 Ala. 334; State *v.* Real Estate Bank, 5 Ark. 595; 41 Am. Dec. 109; Penobscot Boom Corp. *v.* Lamson, 16 Me. 224; 33 Am. Dec. 656; Hestonville etc. R. Co. *v.* Philadelphia, 89 Pa. St. 218; Strong *v.* McCagg, 55 Wis. 628; People *v.* Kingston etc. Turnpike R. Co., 23 Wend. (N. Y.) 221; Persse etc. Paper Works *v.* Willett, 19 Abb. Pr. (N. Y.) 433; Ahrens *v.* State Bank, 3 S. Car. 407.

7. Thompson *v.* People, 23 Wend.

reason of death of all its members, or the destruction of an integral part of it,[1] by escheat,[2] or by agreement of the parties.[3]

The court will not decree the dissolution of a religious corporation against the protest of a minority of the members, if it holds real and personal property in trust for proper purposes of its organization. Proof that the property is in an unprosperous condition and that its present church edifice is unfit for the purpose is immaterial.[4]

(N. Y.) 566; People *v.* Bristol etc. Turnpike Road, 23 Wend. (N. Y.) 235; Ottaquechee Woolen Co. *v.* Newton, 57 Vt. 468.

1. Slee *v.* Bloom, 5 Johns. Ch. (N. Y.) 365, and cases there cited; State *v.* Real Estate Bank, 5 Ark. 595; 41 Am. Dec. 109; Chicago L. Ins. Co. *v.* Needles, 113 U. S. 585; Barclay *v.* Talman, 4 Edw. Ch. (N. Y.) 123.

2. Late Corporation of the Church of Jesus Christ *v.* U. S., 136 U. S. 1.

3. A testator devised real estate in trust to apply the income to the maintenance of a pastor or elder in a church, in a town where the testator resided, of a certain faith and practice, so long as the members of that church or their successors should maintain the visibility of a church in such faith and order. Afterwards the only two members of the church, at a meeting called by public notice, voted and resolved that they would no longer endeavor to maintain the appearance of a visible church, and declared the church dissolved and extinct. *Held*, that the church was thereby dissolved, and ceased to be a visible church, and that the trustee held the estate as a resulting trust for the testator's heirs at law." Esterbrooks *v.* Tillinghast, 5 Gray (Mass.) 17. See also *In re* New South Meeting House, 13 Allen (Mass.) 497.

4. *In re* Old South Meeting House, 95 Mass. 504, the court by Bigelow C. J., said: "By virtue of our inherent powers as a court of law or in the exercise of a general chancery jurisdiction we have no authority to pass such a decree (of dissolution) except in case of an abuse of corporate powers on a proceeding for the forfeiture of a charter. By the rules of the common law the only modes in which the existence of a corporation could be terminated were by act of the legislature, by the death of all the corporate members, by a forfeiture of the franchise or by a surrender of the charter to the government." But see Old South Soc. *v.* Crocker, 119 Mass. 27; 20 Am. Rep. 299, where the court by Wells, J., said: ". . . . But we think it is equally clear that the vote of a majority of the pew holders or members of the society is not of itself a sufficient authority to enable the corporation to make the sale, nor a sufficient reason to justify this court in authorizing it to be made. The trust is one in which each individual member of the society has an interest as an intended beneficiary, and a right to be heard upon the question of the proper administration of the trust in reference to its original character and purpose, and the effect of the purposed change upon all the members, the minority as well as the majority. It is incumbent upon those who seek to make the change to satisfy the court that it is reasonably required for the accommodation of the society as a whole, and that the proposed change will not subject the minority to an unreasonable sacrifice of interest or convenience, or in any way work injustice to them."

Cady *v.* Centreville Knit Goods Mf'g. Co., 48 Mich. 133; Attorney Gen'l *v.* Bank of Michigan, Harr. (Mich.) 315; Strong *v.* McCagg, 55 Wis. 624; Slee *v.* Bloom, 5 Johns Ch. (N. Y.) 366; Van Pelt *v.* U. S. Shoe-Heel Co., 35 N. Y. Super. Ct. 116; Davis *v.* Mayor etc. of N. Y., 2 Duer (N. Y.) 663; People *v.* Mayor etc. of N. Y., 32 Barb. (N. Y.) 102; People *v.* Albany etc. R. Co., 24 N. Y. 261; 82 Am. Dec. 295; People *v.* Miner, 2 Lans. (N. Y.) 407; Smith *v.* Lockwood, 13 Barb. (N. Y.) 219; Hordon *v.* Newton, 13 Blatchf. (U. S.) 378; Gaylord *v.* Fort Wayne etc. R. Co., 6 Biss. (U. S.) 206; Attorney-Gen'l *v.* Reynolds, 1 Eq. Cas. Abr. 131; Verplank *v.* Mercantile Ins. Co., 1 Edw. Ch. (N. Y.) 84.

RELIGIOUS WORSHIP—(See also WORSHIP).—See note 1.

RELOCATE.—See LOCATE, vol. 13, p. 995.

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REMAINDERS AND EXECUTORY INTERESTS.—(See also ADVERSE POSSESSION, vol. 1, p. 224; ESTATES, vol. 6, p. 875; DEBTS OF DECEDENTS, vol. 5, p. 206; ISSUE, vol. 11, p. 868; LIMITATIONS, vol. 13, p. 667; LIMITATIONS IN INSTRUMENTS, vol. 13, p. 773; LEGACIES AND DEVISES, vol. 13, p. 7; REVERSIONS; WILLS; WASTE.)

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1. The residence of a priest or clergyman is not exempt from taxation as a "building for religious worship," under Public Laws, cap. 533, April 14, 1876, because it contains one room set apart as a chapel for religious worship. St. Joseph's Church *v.* Assessors of Taxes, 12 R. I. 19. The court by Durfee, C. J., said: "The assessment is complained of because it covers lands and buildings which the petitioners claim are exempt from taxation under the clause of cap. 533, above recited, as being used exclusively for religious worship. The building in question is the parsonage or residence of the priest or clergyman of the church. It is a dwelling-house. It contains a room which is used as a chapel in the celebration of certain services and sacraments of the Roman Catholic Church, and for that reason it is contended that it is entitled to exemption as a building for religious worship. But we do not see how an entire house becomes a building used exclusively for religious worship merely because one room in it is used for religious worship, when all the other rooms are devoted to personal or domestic uses. At the utmost, exemption could be claimed, on that account, only for the room which is used as a chapel. Neither do we think the building is, under the statute, a 'building for religious worship,' because it is occupied by a priest or ecclesiastic, who is peculiarly consecrated by his own vows and by the discipline and canons of his church to religious offices. Even such a person has secular necessities to which his dwelling-house is subservient. And see Gerke *v.* Purcell, 25 Ohio St. 229, 248." And in that case it was said: "It is not required that the ground should be indispensable to the use of the building as a place of worship. If the ground is no more than is reasonably appropriate to the purpose, and is used for no other, it comes fairly within the limits prescribed by the constitution and the statute. One of the conditions prescribed by the statute is, that the ground, in order to be exempt, must not be used with a view to profit. This excludes, no doubt, not only ground used for present profit, but such as may be held by way of investment for prospective profit. But a parsonage, although built on ground which might otherwise be exempt as attached to the church edifice, does not come within the exemption. The ground in such case is appropriated to a new and different use. Instead of its being used exclusively for public worship, it becomes a place of private residence. Nor does it make any difference that, by the usages of the church, the presence of a priest or pastor is essential to conduct the services of public worship. Other persons are necessary to carry on public worship as well as a minister to conduct the services."

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I. Remainders—1. Definition and Characteristics—*a.* At Common Law.—A remainder as conceived by the common law, may be defined as "a remnant of an estate in lands and tenements expectant upon a particular estate created together with the same at one time."[1] As distinguished from a reversion, it is an

policy of insurance was conditioned to be void "if the dwelling house should become vacant or unoccupied, and so remain." It was held, that a temporary cessation to occupy the house, which did not continue until the fire, did not avoid the policy. The court by Beasley, C. J., said: "Remain for what period unoccupied? I think, clearly to the time of the fire. This is the reasonable construction, for it suspends the policy while the building is without an occupant, and thus the company is completely secured against such increase of risk as arises from that circumstance." See also Fire Insurance, vol. 7, p. 1036.

1. Co. Litt. 143*a*. "The remainder is a residue of an estate in land depending upon a particular estate and created together with the same." Co. Litt. 49*a*.

"The term remainder is sometimes used in a lax sense to denote any kind of subsequent interest or the limitation thereof. But a limitation of a remainder, strictly so called, is a clause creating or transferring an estate or interest in lands or tenements, which is limited, either directly or indirectly, to take effect in possession or in enjoyment or in both, subject only to any term of years or contingent interest that may intervene, immediately after the regular expiration of a particular estate of freehold previously created together with it, by the same instrument out of the same subject of property." Smith Ex. Int., § 159.

The term remainder is a relative expression implying that some part of the estate is previously disposed of. 2 Bl. Com. 165. Hudson *v.* Wadsworth, 8 Conn. 359.

"A remainder is an estate limited to commence after the determination of a particular estate, previously limited by the same deed or instrument out of the same subject of property." 1 Prest. Est. 90.

The necessity for a deed arises solely from the provisions of 8 & 9 Vict., ch. 106. Before the Statute of Frauds, at common law, a particular estate followed by a remainder might have been created by feoffment without writing. Since the passage of the statute, which is in force in nearly all the *United States* (see Frauds, Statute of, vol. 8, p. 657), a writing is necessary; but in the absence of special statutory provision, other than the Statute of Frauds, there would seem to be no reason why the writing should be a deed.

Cornish pronounces Lord Coke's definition inaccurate and substitutes his own: "An estate in lands, hereditaments, or chattels real, limited to one who may take a new estate therein, on the natural determination of a particular estate in the same subject-matter, created either in fact or in contemplation of law, together with such particular estate and forming to certain purposes but one estate therewith." Cornish, Essay on the Doctrine of Remainders, 1827, p. 66.

estate created by act of parties, and not by operation of law;[1] as distinguished from an executory interest, limited upon an estate less than a fee, whether by way of use or devise, it is a future estate which is so limited as to await the regular determination of the estates which precede it, and to take effect in possession immediately upon their regular determination, whereas an executory interest is so limited as to take effect in possession, either in derogation of the preceding estate, or upon the expiration of an interval of time after its regular determination.[2] Thus if land be limited to A for life and after his death to B and his heirs forever, A's life estate is called the particular estate, as being only a small part or *particula* of the inheritance of which the remainder is limited over to B. B's remainder cannot take effect in possession until the regular determination of the particular estate, and must then take effect immediately. On the other hand, if the limitation be to A for life, but in case A refuse to take the name and arms of the testator, to B in fee,[3] or to A for life, and ten years after his decease to B in fee, B has only an executory interest, good by way of devise or conveyance to uses but bad by conveyance at common law.[4] Any number of particular estates, each less than the fee, may precede the remainder,[5] in which case each estate in the series will be a remainder to all the estates which precede it, and a particular estate to those which follow. Thus if land be limited to A for life, remainder to B in tail, remainder to C in fee, B's estate tail both supports C's

It is believed that Lord Coke's definition, as explained by the text, is sufficiently accurate for all practical purposes.

The *New York* Rev. Stat. define a remainder as "An estate limited to commence in possession at a future day, on the determination, by lapse of time or otherwise, of a precedent estate, created at the same time." They also declare that when a future estate is dependent on a precedent estate it is a remainder and may be created and conveyed as such. 1 *New York* Rev. Stat. 723, §§ 10, 11.

Blackstone defines a remainder as "an estate limited to take effect and to be enjoyed after another estate is determined." 2 Bl. Com. 164.

This definition is manifestly incomplete, in that it fails to bring out the fact that the remainder and the particular estate are but different parts of the same estate.

Washburn defines a remainder as "an estate or interest in lands or tenements to take effect in possession or enjoyment immediately upon the determination of a prior estate, which is created at the same time, and by the same act or instrument, and upon which such first mentioned interest is made to depend." 2 Wash on Real Prop. 223. See Doe d. Poor *v.* Considine, 6 Wall. (U. S.) 474; Booth *v.* Terrell, 16 Ga. 20; Brown *v.* Lawrence, 3 Cush. (Mass.) 387; Fearne C. R. 3, and Butler's note.

In conclusion it should be observed that the term remainder is applied both to the limitation creating and the estate created.

1. 2 Bl. Com. 175.

"A reversion is the residue of an estate left in the grantor to commence in possession after the determination of some particular estate granted out by him. 2 Bl. Com. 175. See REVERSIONS.

2. Wms. Real Prop. 222, 241; Challis' Real Prop. 61, 62; Smith's Ex. Int., § 149, *et seq.;* Phillips *v.* Wood (R. I.); 15 Atl. Rep. 88. See *infra*, this title, § II, 1.

3. See *infra*, this title, § II, 4, *c*.

4. See *infra*, this title, § II, 4, *b*.

5. 2 Wash. Real Prop. 222.

remainder and is itself supported by A's life estate upon which it depends. In such case the particular estate and all the remainders expectant thereon constitute but one fee simple.[1] So out of an estate in remainder which is already *in esse*, other estates may be derived, with regard to which the remainder itself will be a reversion.[2] Therefore it may be laid down:

1. That every remainder of freehold created by a common-law conveyance requires a particular estate to support it. If the remainder be vested, the particular estate may consist of a term of years; if contingent, the particular estate must be of freehold. The reason for this distinction is that in the former case the feudal seisin is in the remainder-man subject to the term,[3] but in the latter the remainder-man is incapable of taking the feudal seisin

1. 2 Bl. Com. 164.

2. 2 Bl. Com. 164. See 1 Prest. Est. 123.

3. "An interest of freehold duration, which is limited after, and only preceded by, a term for years, may be designated a remainder in relation to the prior term for years, so far as regards the possession or beneficial interest. For, as the termor has the possession with or without the exclusive beneficial interest, for the period of his term, the person to whom the freehold is limited may truly be said to have the remainder or remaining part of that possession, or beneficial interest which was parted with or devised by the person who granted or devised the term and freehold, and of which the termor has the first part under such grant or devise.

But, an interest of the measure of freehold, limited after, and only preceded by, a term for years, is not a remainder at all in the ordinary sense of the word remainder, when used with reference to a freehold interest. For it is not a remainder as regards the seisin, property or ownership. As in the case supposed, there is no other preceding interest than a term for years; and, as a term for years is a mere right extending to the possession, with or without the exclusive beneficial interest, and not a portion of the seisin, property or ownership, it follows that the freehold interest cannot be said to be a remainder, remnant, residue, or remaining portion of the seisin, property or ownership.

The truth is, that (setting aside cases of augmentative limitations) an interest of the measure of freehold, limited after, and only preceded by a term for years, is, in regard to the seisin, property or ownership, either a present vested interest, subject to a chattel interest, operating by way of exception out of the freehold, or seisin, property or ownership, and by way of suspension of one or more of its ordinary concomitants or incidents, namely, the possession, with or without the exclusive beneficial interest, for the period of the term; or else it is a springing interest, which is good, if limited by way of use or devise, though void, if limited by deed, at common law. And if a freehold interest is limited to a person in being and ascertained to take effect on the certain regular expiration of a term for years, in possession, without being preceded by any other freehold interest, such freehold interest is a present vested interest, subject to the term, as regards the possession, with or without the exclusive beneficial interest.

For in such case, the freehold interest is only postponed until the expiration, and for the sake of a prior chattel interest; and as such prior interest does not extend to the seisin, property or ownership, but only to the possession, with or without the beneficial interest, there is no reason to suppose that anything but the possession, with or without the beneficial interest, was intended to be postponed.

That such a freehold is a vested interest, either present or future, no one will dispute. If it is a future vested interest, it must be either a remainder or a reversion. But we have seen that it is not a remainder, as regards the seisin, property or ownership; and it is obvious that it is not a

pending the contingency upon which the remainder depends, and it must therefore vest in the tenant of the particular estate which must accordingly be of freehold.[1] No remainder can be limited after an estate at will or at sufferance, for such an estate is of a nature so slender and precarious that it is not regarded as a portion of the inheritance.[2]

2. The remainder must commence or pass out of the grantor at the time of the creation of the particular estate.[3] A conveyance by the grantor of his reversion afterwards does not convert the reversion into a remainder; it still remains a reversion, though vested in the transferee.[4] In some States a conveyance of a fee reserving a life estate in the grantor has been sustained as a remainder, although such a conveyance would seem to be void as creating a freehold *in futuro* unless the whole fee be held to pass out of the grantor at the time of the conveyance subject to the life estate reserved.[5]

reversion. And, therefore, it must be a present vested interest, though subject to the preceding term.

The most simple illustration of this occurs in cases where the freehold interest is limited to take effect on the effluxion of the given number of years of which the term consists: as, where land is limited to A for twenty-one years, and then to B for life.

But, the same rule applies where the term is rendered determinable by means of a special or collateral limitation, on the dropping of a life or lives; and it is for so great a number of years that there is not a common possibility of the life or lives enduring beyond it; and the freehold interest is limited to take effect on the dropping of a life or lives; as, where the land is limited to A for ninety-nine years, if B so long live; and on the death of B, to C for life. For, in such case, the freehold interest is as much limited to take effect on the certain expiration of the term, as if it had been limited to take effect on the effluxion of the given number of years; because the dropping of the life or lives is an event which must happen within the given number of years constituting the term, and is an event on which the term must cease." Smith Ex. Int., § 245–252. See Challis' Real Prop. *61; 2 Washb. Real. Prop. (5th ed.) 584.

1. See *infra*, this title, notes 3 and 4.

2. 2 Bl. Com. 166. "Besides if it be a freehold remainder, livery of seisin must be made at the time of its creation; and the entry of the grantor to do this determines the estate at will in the very instant in which it is made; or if the remainder be a chattel interest, though perhaps the deed of creation might operate as a future contract, if the tenant for years be a party to it, yet it is void by way of remainder; for it is a separate independent contract, distinct from the preceding estate at will; and every remainder must be a part of one and the same estate, out of which the preceding particular estate is taken." 2 Bl. Com. 167.

3. 2 Bl. Com. 167. "It is this which induces the necessity at common law of livery of seisin being made on the particular estate, whenever a freehold remainder is created. For if it be limited even on an estate for years, it is necessary that the lessee for years should have livery of seisin in order to convey the freehold from and out of the grantor, otherwise the remainder is void. Not that the livery is necessary to strengthen the estate for years; but as livery of the land is requisite to convey the freehold, and yet cannot be given to him in remainder without infringing the possession of the lessee for years, therefore the law allows such livery made to the tenant of the particular estate to relate and inure to him in remainder, as both are but one estate in law." 2 Bl. Com. 167.

4. Smith's Ex. Int., § 375–382.

5. Fish *v.* Sawyer, 11 Conn. 550; Bissell *v.* Grant. 35 Conn. 296; Abbott *v.* Holman, 72 Me. 298; Waston *v.* Cressy, 79 Me. 383. *Compare Georgia* Code, 1882, §§ 2247, 2691.

3. The remainder must vest in the grantee during the continuance of the particular estate or *eo instanti* that it determines,[1] otherwise it will not take effect in possession immediately on the determination of the particular estate[2] and the freehold will be in abeyance.[3]

In *England* it seems clear that such a limitation by way of conveyance to uses would be good, since in such conveyances a freehold may be well limited to commence *in futuro*, but that if limited by common-law conveyance, it could only be sustained where the premises conveyed the fee, and the reservation is stated in the *habendum*, in which case the fee is regarded as vesting immediately although restrained in its enjoyment by the *habendum*. Goodlittle d. Dodwell *v.* Gibbs, 5 B. & C. 716.

In Bissell *v.* Grant, 35 Conn. 296, the English position was rejected, the court holding that the conveyance of a fee reserving a life estate in the grantor worked a conveyance of the remainder only; and therefore did not extinguish an easement in the grantor appurtenant to the fee.

A contrary view was taken in White *v.* Hopkins (Ga.), 4 S. E. Rep. 863, where the plaintiff's intestate executed an instrument whereby, for the consideration of services rendered by defendant, he conveyed to him certain lands, with reservation that the title should remain in the grantor until his death, and thereupon vest immediately in the defendant, and it was held that the instrument was a deed, taking effect immediately, and conveyed a present interest in the land, subject to a life-estate in the grantor.

A freehold *in futuro* may be conveyed either by a deed of bargain and sale, or by a covenant to stand seised. Bell *v.* Scannon, 15 N. H. 381; Simmons *v.* Augustin, 3 Port. (Ala.) 69.

Care must, however, be taken not to confound such conveyances with those really testamentary.

A conveyance in the usual form, but containing the words, "to commence after the death of both of said grantors," and "it is hereby understood and agreed between the grantors and the grantee that the grantee shall have no interest in the said premises as long as the grantors, or either of them, shall live," was held not to create a present estate to commence *in futuro*, but to be in the nature of a will revocable at the grantor's option. Seaver *v.* Gauss, 62 Iowa 314. See also DEBTS OF DECEDENTS, vol. 5, p. 312.

1. 2 Bl. Com. *168.

2. 2 Bl. Com. *168. "As, if A be tenant for life, remainder to B in tail, here B's remainder is vested in him, at the creation of the particular estate to A for life; or if A and B be tenants for their joint lives, remainder to the survivor in fee, here, though during their joint lives, the remainder is vested in neither, yet on the death of either of them, the remainder vests instantly in the survivor, wherefore both these are good remainders. But, if an estate be limited to A for life, remainder to the eldest son of B in tail, and A dies before B hath any son, here the remainder will be void, for it does not vest in any one during the continuance, nor at the determination, of the particular estate; and even supposing that B should afterwards have a son, he shall not take by this remainder; for, as it did not vest at or before the end of the particular estate, it never can vest at all, but is gone forever. And this depends upon the principle before laid down, that the precedent particular estate, and the remainder are one estate in law; they must therefore subsist and be *in esse* at one and the same instant of time, either during the continuance of the first estate, or at the very instant when that determines, so that no other estate can possibly come between them." 2 Bl. Com. 168.

3. "By the feudal law the freehold could not be vacant, or, as it was termed in abeyance. There must have been a tenant to fulfill the feudal duties or returns, and against whom the rights of others might be maintained. If the tenancy once became vacant, though but for one instant, the lord was warranted in entering on the lands; and the moment the particular estate ended by the cession of the tenancy, all limitations of that estate were also at an end. From these principles are deduced the rules that no freehold remainder can be well created unless it is supported by an immediate estate of

4. No remainder can be limited after a fee, for when the whole estate is disposed of there is nothing to limit over.[1] This, of course, does not preclude the creation of alternative or substitutional fees.[2] A base or determinable fee is, however, directly within the principle, and no estate limited thereon can take effect except as an executory interest by way of use or devise.[3]

5. No remainder can be so limited as to take effect in possession in derogation or defeasance of the particular estate.[4]

6. No remainder can be limited to take effect in possession on the expiration of an interval of time after the determination of the particular estate.[5]

freehold, vested in some person actually in existence, who may answer the *præcipe* of strangers, and also that it is necessary that the remainder should take effect during the existence of such particular estate, or *eo instanti* that it determines." Watk. on Conv. 94.

1 2 Bl. Com. *164; Allen *v.* Fogler, 6 Rich (S. Car.) 54. But a devise to a trustee and his heirs for and during the natural life of the *cestui que trust* creates merely an estate *pur auter vie* in the trustees, after which a remainder may be limited. *In re* Kenyon (R. I.); 20 Atl. Rep. 294.

2. 2 Wash. Real Prop. (5th ed.) 587; 2 Flint Real Prop. 265. See *infra*, this title, § I, 3, *c*.

3. 2 Wash. Real Prop. (5th ed.) 593. See Blanchard *v.* Blanchard, 1 Allen (Mass.) 226; Dias *v.* Horry, 2 Hill Eq. (S. Car.) 244.

4. Challis' Real Prop. 62; Williams' Real Prop. 267. Care must, however, be taken to distinguish a remainder limited to commence in defeasance of the particular estate, from a remainder limited after a preceding estate, determinable by a condition subsequent, the remainder itself being limited to take effect on the determination of the prior estate without regard to or dependence upon the condition. In the former case the entry for breach of the condition destroys the remainder; in the latter the remainder takes effect, destroying the grantor's right of entry and avoiding the condition. Fearne's Cont. Rem. 270; 1 Prest. Est. 91; Challis' Real Prop. 63.

So also where the prior estate is so expressly confined and limited by the very words of its creation that it cannot endure beyond the happening of the contingency upon which it is to fail, as where an estate is given *durante viduitate*, a remainder may well be limited to take effect upon its determination. In such case the remainder obviously takes effect upon the natural determination of the prior estate and not in defeasance of it. "The true point of distinction, as I take it, between such conditional limitations as are and such as are not remainders, in the strict sense of the word, lies here: The former are limited to commence where the first is by the very nature and extent of its original limitation to expire or determine; whereas the latter are limited so as to be independent of the measure or extent originally given to the first estate, and to take effect in possession, upon an event which may happen before the regular determination to which that prior estate is liable from the nature of its original limitation, and so far as to rescind it. And in this latter case, I apprehend it is the same whether the whole fee is disposed of in the first limitation or not." Fearne's Cont. Rem. 13.

Thus a limitation over, after a devise to "A so long as she remains testator's widow, or till marriage," is good by way of remainder; but a limitation over to the widow for life, provided that if she marry her interest shall at once cease, and the land immediately vest in B and his heirs, gives B an executory interest. Fearne's Cont. Rem. 10, Butler's note.

5. Challis' Real Prop.; Watk. Conv. 174, 277; 2 Flint's Real Prop. 258; Burt. Real Prop., § 28–30; Prest. Est. 93; Wms. Real Prop. 197. See Wilkes *v.* Lion, 2 Cow. (N. Y.) 389; Hennessy *v.* Patterson, 85 N. Y. 91.

The particular estate sustains the seisin with which the grantor parted when he created the limitation until the remainder-man is ready to take; hence if there is a break or an interval between the one and the other, the second estate would be simply a freehold *in futuro*, and in no legal sense a remainder

7. A remainder-man always takes by purchase, and never by descent.[1]

8. Though privity of estate exists between the remainder-man and the life tenant, no tenure exists, but both under the statute of *quia emptores terrarum*,[2] hold under the chief lord of the fee.[3]

b. UNDER AMERICAN STATUTES.—In *New York, Indiana, Michigan, Wisconsin, Iowa, Minnesota, Nebraska, Virginia, West Virginia, Kentucky, Missouri, Texas, California, Dakota, Georgia, Mississippi, Arizona, Vermont* and *Arkansas*, a freehold estate may commence *in futuro* by deed or will, with or without the intervention of a precedent estate.[4] In *New York, Indiana, Michigan, Wisconsin, Minnesota, California* and *Dakota* any contingent remainder is valid, if it would be valid as a conditional limitation;[5] in *Virginia, West Virginia* and *Kentucky* any estate which would be good by way of executory devise is equally good if created by deed.[6] In *Alabama*, contingent remainders are abolished, but any estate may be created by deed or will to take effect as an executory devise.[7] In *New York, California, Dakota* and *Georgia* a fee may be limited upon a fee, upon a contingency which must occur within the time prescribed by the Rule against Perpetuities.[8] In *New York, Michigan, Wisconsin, Minnesota, California, Dakota, Virginia, West Virginia, Kentucky* and *Georgia*, the failure of the particular estate does not defeat

or part of the original seisin. 2 Wash. Real Prop. (5th ed.) 586.

1. 2 Wash. Real Prop. (5th ed.) 586; Dennett *v.* Dennett, 40 N. H. 504.

2. 18 Edw. I, ch. 1.

3. Wms. Real Prop. 250. This constitutes the chief difference between a remainder and a reversion. Of course, as no tenure exists, no rent service is incident to a remainder. Wms. Real Prop. 250. Hence also the remainder-man is not bound by the life tenant's leases. Coakley *v.* Chamberlain, 8 Abb. Pr. N. S. (N. Y.) 37; 38 How. Pr. (N. Y.) 483.

4. Stimson's Am. Stat. Laws, § 1421; *New York*, Rev. Stat., pt. 2, ch. 1, tit. 2, § 24; *Indiana*, Rev. Stat. 1881, § 2959; *Michigan*, Ann. Stat. 1882, § 5540; *Wisconsin*, Rev. Stat. 1878, § 2040; *Iowa*, Rev. Code 1880, § 1933; *Minnesota*, Gen. Stat. 1878, ch. 45, § 24; *Nebraska*, Comp. Stat. 1881, pt. 1, ch. 73, § 52; *Virginia*, Code 1873, ch. 112, § 5; *West Virginia*, Rev. Stat. 1878, ch. 82, § 5; *Kentucky*, Gen. Stat. 1888, ch. 63, art. 1, § 6; *Missouri*, Rev. Stat. 1879, § 3945; *Texas*, Rev. Stat. 1879, § 556; *Georgia*, Code 1882, § 2691, 2247; *Mississippi*, Code 1880, § 2187; *California*, Civ. Code, §§ 5767, 5773; *Dakota*, Civ. Code, §§ 224, 230; *Arizona*, Rev. Stat. 1887, § 222.

In *Vermont*, a freehold may be limited in a deed to commence *in futuro*, under the local conveyancing statutes, although the Statute of Uses is not in force in that State. Gorham *v.* Daniels, 23 Vt. 600.

So in *Arkansas*, because in that State lands are held in *allodium*. Bouch *v.* Nicks, 50 Ark. 367.

5. Stimson's Am. Stat. Law, § 1426; *New York*, Rev. Stat. pt. 2, ch. 1, tit. 2, § 27; *Indiana*, Rev. Stat. 1881, § 2960; *Michigan*, Ann. Stat. 1882, § 5543; *Wisconsin*, Rev. Stat. 1878, § 2051; *Minnesota*, Gen. Laws, 1878, ch. 45, § 27; *California*, Civ. Code, § 5778; *Dakota*, Civ. Code, § 235.

6. Stimson's Am. Stat. Law, § 1421; *Virginia*, Code 1873, ch. 112, § 5; *West Virginia*, Rev. Stat. 1878, ch. 82, § 5; *Kentucky*, Gen. Stats. 1888, ch. 63, art. 1, § 6.

7. *Alabama*, Code 1876, § 1420, 2180.

8. Stimson's Am. Stat. Law, § 1424; 2 *New York*, Rev. Stat. (7th ed.), pt. 1, ch. 2 tit. 1, § 24; *California*, Code, 1876, § 5773; *Dakota*, Civ. Code, 1883, § 230; *Georgia*, Civ. Code, 1882, § 2247.

the remainder.[1] In *New York*, *Michigan*, *Wisconsin*, *Minnesota*, *California*, *Dakota* and *Idaho*, successive estates for life can only be limited to persons in being at their creation,[2] nor can any remainder be limited upon an estate for the life of any other person or persons than the first grantee or devisee of such estate unless such remainder be in fee; nor upon such an estate in a term for years unless it be for the whole residue of the term.[3] In *New York*, *Michigan*, *Wisconsin* and *Minnesota*, where a remainder is limited upon more than two successive estates for life, all the life estates subsequent to those of the two persons first entitled thereto are void, and the remainder takes effect at once upon their determination as if no other life estate had been created.[4] In *California*, *Dakota* and *Idaho*, a remainder limited upon estates for life of persons not in being, takes effect immediately.[5] In *New York*, *Michigan*, *Wisconsin* and *Minnesota*, when a remainder is limited upon the life estate of the grantee or devisee and more than two persons are named as the persons during whose lives the life estate shall continue the remainder takes effect immediately upon the death of the two persons first named as if no other *cestui que vie* had been introduced.[6] In

1. See *infra*, this title, § I, 3, *g*, (2).

2. Stimson's Am. Stat. Law, § 1422; *New York*, Rev. Stat. (7th ed.) pt. 2, ch. 2, tit. 2, § 17; How. Ann. Stat. *Michigan*, § 5533; *Wisconsin*, Rev. Stat. 1878, § 2041; *Minnesota*, Gen. Stat. 1878, ch. 45, § 17; *California*, Civ. Code, § 5774; *Dakota*, Civ. Code, § 231; *Idaho*, Rev. Stat 1887, § 2852.

3. *New York*, Rev. Stat. (7th ed.) pt. 2, ch. 1, tit. 2, § 18; How. Ann. Stat. *Michigan*, § 5534; *Wisconsin*, Rev. Stat. 1878, § 2042; *Minnesota*, Gen. Stat., ch. 45. § 18.

See *California*, Civ. Code, § 5775; *Dakota*, Civ. Code, § 232; *Idaho*, Rev. Stat. 1887, § 2853.

4. *New York*, Rev. Stat. (8th ed.) pt. 2, ch. 1, tit. 2, § 17; How. Ann. Stat. *Michigan*, § 5533; *Wisconsin*, Rev. Stat. 1878, § 2041; *Minnesota*, Gen. Stat., ch. 45, § 17.

See also *California*, Civ. Code, § 5774; *Dakota*, Civ. Code, § 231; *Idaho*, Rev. Stat. 1887, § 2852.

The provision of *New York* Rev. Stat. 723, § 17, declaring that "where a remainder shall be limited on more than two successive estates for life, all the life estates subsequent to those of the two persons first entitled thereto shall be void, and upon the death of those persons the remainder shall take effect," refers only to vested, not to contingent remainders, and executes the remainders in possession only in favor of such ascertained persons as, except for the void life estate, would, under the will or deed, be entitled to the immediate possession.

It is no objection to the validity of a remainder in fee that it is limited in favor of persons not in being when the limitation is created, or who are not ascertainable until the termination of the precedent estate, provided the contingency upon which it depends must happen within or not beyond the prescribed period for the vesting of estates. Purdy *v.* Hoyt, 92 N. Y. 446.

Testator devised land to his two sisters for their use and benefit, with equal shares in the profits, the management to be in the hands of one named as executrix, and the estate, on their decease unmarried and without issue, to go to testator's nephews and their issue. *Held*, that the provision did not suspend the power of alienation beyond two lives in being at the death of testator, and was therefore valid. McGrath *v.* Van Stavoren, 8 Daly (N. Y.) 454.

5. *California*, Civ. Code, § 5774; *Dakota*, Civ. Code, § 231; *Idaho* Rev. Stat. 1887, § 2852.

6. *New York*, Rev. Stat., pt. 2, ch. 1, tit. 2, § 19; How. Ann. Stat. *Michigan*, § 5535; *Wisconsin*, Rev. Stat. 1878, § 2043; *Minnesota*, Gen. Stat., ch. 45, § 19.

Indiana and *Tennessee* a contingent remainder of freehold may be created expectant upon the determination of a term of years;[1] so also in *New York*, *Michigan*, *Wisconsin* and *Minnesota*, provided such remainder be so limited that the contingency must occur within the Rule against Perpetuities.[2] In *New York*, *Michigan*, *Wisconsin*, *Minnesota*, *California*, and *Dakota* no estate for life can be limited as a remainder on a term of years except to a person in being at the creation of such estate.[3] In the last six States it is also provided that no future estate shall be invalid on account of the improbability of the contingency on which it is to take effect,[4] and the contingency upon which a remainder is limited may operate to abridge the precedent estate.[5] The general tendency of this legislation is to abolish all real distinction between remainders and executory interests creating in effect a species of estate in expectancy, which differs in many essential particulars from anything known to the common law.[6] The various modifications in the common law doctrines upon the subject, produced by this legislation, will be noticed in connection with the subjects to which they relate.[7]

2. Vested and Contingent Remainders Defined and Distinguished— *a.* ESSENTIAL CHARACTERISTICS—A CRITERION SUGGESTED. —A vested remainder is an estate to take effect after another estate for years, life or in tail, which is so limited that if that particular estate were to expire or end in any way at the present

1. Stimson's Am. Stat. Law, § 1424; *Indiana*, Rev. Stat. 1881, § 2959; *Tennessee*, Stat. 1884, § 2816.

2. *New York*, Rev. Stat., pt. 2, ch. 1, tit. 2, § 24; How. Ann. St., *Michigan*, § 5536; *Wisconsin*, Rev. Stat. 1878, § 2044; *Minnesota*, Gen. Stat., ch. 45, § 20.

3. *New York*, Rev. Stat., pt. 2, ch. 1. tit. 2, § 21; How. Ann. Stat., *Michigan*, § 5537; *Wisconsin*, Rev. Stat. 1878, § 2045; *Minnesota*, Gen. Stat., ch. 45, § 21; *California*, Civ. Code, § 5777; *Dakota*, Civ. Code, § 234.

4. *New York*, Rev. Stat., pt. 2, ch. 1, tit. 2, § 26; *Michigan*, Ann. Stat., § 5542; *Wisconsin*, Rev. Stat. 1878, § 2050; *Minnesota*, Gen. Stat. ch. 45, § 26; *California*, Civ. Code, § 5697; *Dakota*, Civ. Code, § 189.

5. *New York*, Rev. Stat., pt. 2, ch. 1, tit. 2, § 27; *Michigan*, Ann. Stat., § 5543; *Wisconsin*, Rev. Stat. 1878, § 2051; *Minnesota*, Gen. Stat, ch. 45, § 27; *California*, Civ. Code, § 5778; *Dakota*, Civ. Code. § 235. So in *Idaho*, Rev. Stat. 1887, § 2854.

6. It is true that in several of the above States the statute provides that "when a future estate is dependent upon a precedent estate, it may be termed a remainder and may be created and transferred by that name." *New York*, Rev. Stat., pt. 2, ch. 1, tit. 2, § 11; *Michigan*, Ann. Stat., § 5527; *Wisconsin*, Rev. Stat., § 2035; *Minnesota*, Gen. Stat., ch. 45, § 11; *California*, Civ. Code, § 5769; *Dakota*, Civ. Code, § 226; Comp. Laws, 1887, § 2742.

Yet it is submitted in view of what has been said in the text that the statutory remainder does not depend upon the particular estate in the sense in which that term is used by the common-law writers. In fact it merely follows after the precedent estate, and the context shows the word is used to distinguish a future estate of this kind from one that is not preceded by another estate. For text of the *New York* statute upon which all the above acts are modeled, see opinion of Woodruff, J., in Lyon *v.* Littell, 41 N. Y. 76, stated *infra*, this title.

In *Georgia* "an estate in remainder is one limited to be enjoyed after another estate is determined, or at a time specified in the future. *Georgia*, Code, 1882, § 2263.

7. See *infra*, this title, § I, 2, *a*; I, 3, *a* (3); I 3, *g* (2).

time, some certain person who was *in esse* and answered the description of the remainder-man during the continuance of the particular estate, would thereupon become entitled to the immediate possession irrespective of the concurrence of any collateral contingency.[1] Such a remainder confers a present fixed right to the

1. Judge Sharswood defines a vested remainder as "an estate to take effect after another estate for years, life or in tail, which is so limited that if that particular estate were to expire or end in any way at the present time. some certain person would become thereupon entitled to the immediate enjoyment." 2 Bl. Com. 164, n. (2).

This definition would seem to be defective, in that by its terms it would include cases of the fourth class of contingent remainders—see *infra*, this title, § I, 3, *a* (1)—in which the persons who are to take are ascertained immediately upon the determination of the particular estate. Thus a devise to "A for life and after his death to such of his children as may be living at the time of his decease" would seem to fall directly within the definition, since the gift to the children is so limited that if A's life estate were to expire "in any way at the present time some certain person (viz., A's child or children now living, who would at once answer the description) would thereupon become entitled to the immediate enjoyment." Yet unquestionably the great weight of authority is that such a remainder is contingent, because until the death of the life tenant there is no one who answers the description. (See *infra*, this title, § I, 2, *a*.) The definition in the text, it is submitted, avoids this difficulty by requiring the remainder-man to be ascertained during the continuance of the particular estate and not merely *eo instanti* it determines.

Examples.—A vested remainder may be created either by the words "to A for life, remainder to B." Miller *v.* Caragher, 35 Hun (N. Y.) 485, or by the words to "A for life, and after his decease to B." Doe d. Poor *v.* Considine, 6 Wall. (U. S.) 253; O'Donnell *v.* Smith, 142 Mass. 505.

So where an indefinite number of life estates are intended to be created, the mode adopted is as follows: "To A for his life, and after his decease to B for his life, and after his decease to C for his life, and so on. This method of limitation is quite sufficient for the purpose, although it by no means expresses all that is meant. The estates of B and C and the rest are intended to be as immediately and effectually vested in them as the estate of A; so that if A were to forfeit his estate, B would have an immediate right to the possession; and so again C would have a right to enter whenever the estates of both A and B might determine. But owing to the necessary infirmity of language, all this cannot be expressed in the limitations of every ordinary deed. The words 'and after his decease,' are therefore considered a sufficient expression of an intention to confer a vested remainder after an estate for life." Wms. Real Prop. 207.

New Hampshire.—In Hall *v.* Nute, 38 N. H. 422, and Hayes *v.* Tabor, 41 N. H. 528, a remainder in the form to A for life and on his decease to B, was held to be contingent, on the ground that if A determined his estate by forfeiture or merger in his lifetime, B's estate, being expressly limited to take effect on A's death, would thereby be defeated, because from the time when A's life estate should thus be terminated to the time of his decease there would be no particular estate to support the remainder, and of course the remainder would fail. Mr. Gray, in a note to § 105 of his work on Perpetuities, characterizes these two cases as "inexplicable aberrations of an able and learned but eccentric court;" without precedent and probably without following. *Compare* Kennard *v.* Kennard, 63 N. H. 303.

These decisions are open to two objections: (1) They impart contingency into the words *at*, *on*, *upon*, preceding the death of the life tenant, whereas the settled construction is that these words merely state the time when the remainder is to take effect in possession; (2) The only effect of the termination of A's estate by forfeiture (if such a thing were possible) or renunciation, is that B's remainder would thereby be accelerated. Furthermore, it seems well settled that if the person to take is ascertained, and the remainder is

future enjoyment,[1] which rises to the dignity of an estate in the land, and invests the remainder-man with a portion of the seisin, property or ownership.[2]

A remainder is contingent when it is so limited as to take effect to a person not *in esse*, or not ascertained, or upon an event which may never happen or may not happen until after the determination of the particular estate. Thus a remainder to the unborn child of A, or the right heirs of J S or to A for life, and after the death of B, to C, is contingent until A has a child, J S dies and his right heirs ascertained, or B dies in the lifetime of A.[3] In each of these cases it will be observed that whether or not the remainder will ever take effect in possession depends upon the concurrence of a collateral contingency irrespective of its own duration, and hence it has been said that the non-existence in a vested remainder and the existence in a contingent remainder of a contingency irrespective of its own duration upon

not affected by any collateral contingency, it cannot be destroyed by forfeiture, merger, surrender, disseisen or any other act on the part of the life tenant, and that these only affect contingent remainders. Archer *v.* Jones, 26 Miss. 583; Moore *v.* Luce, 29 Pa. St. 260; Foster *v.* Marshall, 22 N. H. 491; Jackson *v.* Schoonmaker, 4 Johns. (N. Y.) 390; Jackson *v.* Mancius, 2 Wend. (N. Y.) 368; 4 Kent (10th ed.) 240; Wms. Real Prop. 207.

1. 2 Bl. Com. 168; 1 Prest. Est. 65; Cuyler *v.* Ferrill, 1 Abb. (U. S.) 169. See Curtis *v.* Fowler (Mich.), 33 N.W. Rep. 696.

In Doe *v.* Considine, 6 Wall, (U. S.) 474, the court by Swayne, J., said: "A vested remainder is where a present interest passes to a certain and definite person but to be enjoyed *in futuro*. Jackson *v.* Sublett, 10 B. Mon. (Ky.) 467.

2. Smith Ex. Int. § 171. 1 Prest. Est. 65; Jackson *v.* Sublett, 10 B. Mon. (Ky.) 467.

Such a remainder is transmissible and may be devised, assigned and limited over. O'Donnell *v.* Smith, 142 Mass. 505; Glidden *v.* Blodgett, 38 N. H. 74; Grant *v.* Townsend, 2 Hill (N. Y.) 554; Farrow *v.* Farrow, 12 S. Car. 168; Davis *v.* Bawcum, 10 Heisk. (Tenn.) 406; Cook *v.* Hammock, 4 Mass. 467; Dorsey *v.* Smith, 7 Har. & J. (Md.) 345; Redstrake *v.* Townsend, 39 N. J. L. 379; Swett *v.* Thompson, 149 Mass. 302; Flanders *v.* Greeley, 64 N. H. 357; Marley *v.* Rodgers, 5 Yerg. (Tenn.) 217; Loring *v.* Carnes, 148 Mass. 223; Bufford *v.* Hollman, 10 Tex. 560.

A testator devised land to his wife during life or widowhood, directing that, upon her death or marriage, the proceeds of its sale be divided equally among his children. *Held*, that each child took a vested interest transmissible at his or her death to his or her real or personal representatives; and on the death of one of them before the widow's death or marriage, his or her share would vest in his personal representatives as personalty, and not in his or her heirs. Green *v.* Davidson, 4 Baxt. (Tenn.) 488.

A vested remainder may be transferred by deed. Pearce *v.* Savage, 45 Me. 90. And is liable to sale under execution against the remainder-man during the term of the life tenant. Ellwood *v.* Plummer, 78 N. Car. 392; Den. *v.* Hillman, 7 N. J. L. 180; Harrison *v.* Maxwell, 2 Nott. & M. (S. Car.) 347.

Even though the remainder be subject to a divesting contingency. Lufburrow *v.* Koch, 75 Ga. 448.

A vested remainder-man may mortgage his interest. Flanders *v.* Greeley, 64 N. H. 357.

Although there has been an equitable conversion, under the will, of the realty into personalty. Andress' Estate, 14 Phila. (Pa.) 240; 99 Pa. St. 421.

A condition forbidding remainder-men in fee from assigning their interests before the estate vested in possession has been held void. Hall *v.* Tufts, 18 Pick. (Mass.) 455.

3. 1 Prest Est. 77; Fearne's Cont. Rem. 3, 9.

which the possession or enjoyment strictly depends, is that which constitutes the fundamental distinction between them, as regards their mode of creation and forms a true tangible and practical criterion for determining to which of the two species a remainder belongs.[1] Two things should be noted: (1) The defeasibleness of the right of possession or enjoyment does not make a remainder contingent, for to that, every remainder affected with a divesting condition is subject, nor does the fact that the remainder may never take effect in possession, for to that kind of uncertainty every remainder for life is subject, since it is quite possible that the remainder-man may die before the determination of the particular estate.[2] (2) The

1. Smith Ex. Int., § 177; Weehawken Ferry Co. *v.* Session, 17 N. J. Eq. 475.

"A vested remainder, if defined without reference to the right of possession or enjoyment, or the possession or enjoyment itself (which is perhaps the most scientific and accurate mode), may be defined to be a portion of the seisin, property, or ownership, of the measure of freehold, next after a preceding freehold estate, and actually acquired by, and residing in the person who is said to have such vested remainder. A contingent remainder on the other hand may be defined to be a portion of the seisin, property or ownership, of the measure of freehold, which is next after a preceding freehold estate, and is not yet acquired by the person who is said to have such contingent remainder, but is appointed, by the terms of the grant or devise, to be acquired by, and to reside in him, in a contingent event.

"A vested remainder, if defined with reference to the right of possession or enjoyment (which is the mode adopted by Fearne), may be defined to be, one that is so limited to a person in being and ascertained, that (subject to any such chattel or other interest collateral to the seisin, property or ownership, as extends to the possession or enjoyment) it is capable of taking effect, in possession or enjoyment, on the certain determination of the particular estate without requiring the concurrence of any collateral contingency.

"A vested remainder, if defined with reference to the possession or enjoyment itself, may be defined to be, a remainder which, as regards the possession or enjoyment, or both, (subject to any such chattel or other interest collateral to the seisin, property or ownership, as extends to the possession or enjoyment,) does not strictly depend on any uncertainty at all, or any other uncertainty than that of its enduring beyond the preceding interest. A contingent remainder, on the other hand, is one which, as regards the possession or enjoyment, does strictly depend on a contingency irrespective of its own duration." Smith Ex. Int. §§ 171–176.

2. Fearne's Cont. Rem. 216; Kennard *v.* Kennard, 63 N. H. 303. "It is not the uncertainty of enjoyment in future, but the uncertainty of the right to that enjoyment, which marks the difference between a vested and contingent interest." 4 Kent Com. 206; Wiggin *v.* Perkins, (N. H.) 2 N. E. Rep. 896; Lehndorf *v.* Cope, 122 Ill. 317; Weehawken Ferry Co. *v.* Session, 17 N. J. Eq. 475; Schmaung *v.* Gross, 132 Mass. 142.

"Wherever the preceding estate is limited to determine upon an event which certainly must happen; and the remainder is so limited to a person *in esse* and ascertained, that the preceding estate may by any means, determine before the expiration of the estate limited in remainder, such remainder is vested. On the contrary, wherever the preceding estate (except in cases to be hereafter noticed as exceptions. See *infra*, this title, § I, 3, *a* (2) is limited so as to determine only on an event which is uncertain, and may never happen; or wherever the remainder is limited to a person not *in esse* or not ascertained; or wherever it is limited so as to require the concurrence of some dubious, uncertain event, independent of the determination of the preceding estate and duration of the estate limited in remainder, to give it a capacity of taking effect; then the remainder is contin-

fact that the remainder from the very instant of its creation is capable of taking effect in possession or enjoyment at any moment the possession or enjoyment may become vacant by the determination of the particular estate does not, as is frequently asserted,[1] necessarily show that it is vested, nor yet is it quite accurate to say that "when it is certain that the remainder may take effect in possession, on the determination of the preceding estates of freehold, at whatever time and however early, and by whatever means, these estates may determine," the remainder must be considered as vested.[2] Thus if an estate be limited to two for life, remainder to the survivor of them in fee, the remainder is contingent, for until one of them die, it is uncertain which will be the survivor;[3] or if land be limited to A for life, remainder to "such of his children as shall be living at his decease," each child has but a contingent remainder during A's life, since until his death it is impossible to tell which of the children will answer the description,[4] and yet inasmuch as under both these limitations the person or persons who are to take are ascertained immediately on the determination of the particular estate, the remainders may well be said to be capable of taking effect in pos-

gent." Fearne's Cont. Rem. 217; McArthur *v.* Scott, 113, U. S. 340; Sager *v.* Galloway, 113 Pa. St. 500, 509; Hudson *v.* Wadsworth, 8 Conn. 348; Pechim's Estate, 13 Phila. (Pa.) 323. See this criterion severely criticised. Smith Ex. Int. § 258 p. [119].

The principle is perhaps more neatly expressed in Sager *v.* Galloway, 113 Pa. St. 509, where the court by Trunkey, J. said: "Where a remainder is so limited as to take effect in possession, if ever, immediately upon the determination of the particular estate, which estate is determined by an event that must unavoidably happen by the efflux of time; the remainder vests in interest as soon as the remainder-man is *in esse* and ascertained; provided nothing but his own death before the determination of the particular estate will prevent such remainder from vesting in possession."

Hence it was held in *Nebraska* that under the homestead act which provides that "if the homestead was selected from the separate property of either husband or wife, it vests on the death of the person from whose property it was selected in the survivor for life and afterwards in his or her heirs forever, subject to the power of the decedent to dispose of the same, except the life estate of the survivor, by will," the interest of the heir of the selector during the life of the survivor, was a vested remainder. Schuyler *v.* Hamice, 47 N. W. Rep. 932.

1. Fearne's Cont. Rem. 216; 4 Kent Com. 202; Mercantile Bank *v.* Ballard, 83 Ky. 481; Myers *v.* Adler, 6 Mackey (D. C.) 515; Kennard *v.* Kennard, 63 N. H. 303; Thaw *v.* Ritchie (D. C.), 4 Cent. Rep. 597; Hudson *v.* Wadsworth, 8 Conn. 359.

2. Suggested by Preston as a good criterion. 1 Prest. Est. 79.

3. Fearne's Cont. Rem. 9.

4. 4 Kent (12th ed.) 203, N. 1, per Holmes; Fearne's Cont. Rem. 9: Price *v.* Hall, L. R., 5 Eq. 402; Rhodes *v.* Whitehead, 2 Dr. & S. 532; Holmes *v.* Prescott, 10 Jur. N. S. 507; White *v.* White, 86 Ky. 602; Augustus *v.* Seabott, 3 Metc. (Ky.) 155; Richardson *v.* Wheatland, 7 Met. (Mass.) 169; Olney *v.* Hull, 21 Pick. (Mass.) 311; Thompson *v.* Ludington, 104 Mass. 193; Colby *v.* Duncan, 139 Mass. 398; Hunt *v.* Hall, 37 Me. 333; Roundtree *v.* Roundtree, 26 S. Car. 450; Paul *v.* Frierson, 21 Fla. 529; Stephens *v.* Evans, 30 Ind. 39; Teets *v.* Weise, 47 N. J. L. 154; Mercantile Trust and Deposit Co. *v.* Brown (Md.), 17 Atl. Rep. 937; Dean *v.* Nicholas, 25 Ohio L. J. 278; Grier *v.* McAfee, 82 N. Car. 187; Callahan's Estate, 13 Phila. (Pa.) 230; Allsmiller *v.* Treutchenicht, 5 S. W. Rep. 746; Appeal of Com. Title Ins. & Trust Co., 126 Pa. St. 223. *Contra*, Crox-

session or enjoyment at any moment the possession or enjoyment may become vacant by the death of the life tenant, and may even be said to be certain to take effect on that event unless the remainder-men predecease the life tenant. A moment's consideration shows that the apparent anomaly arises from the fact that whether the remainders will ever take effect in possession really depends upon two contingencies, (1) whether the remainder-men answer the description, (2) whether they survive the life tenant, and that the first depends upon the second and seems to be merged in it, whereas in reality, until the life tenant dies, it always exists, and affects the remainders with a contingency irrespective of their own duration. It is therefore submitted that, in order that a remainder may vest in interest, not only must it be capable of taking effect in possession at any moment the possession may become vacant, but there must also be some certain and determinate person *in esse* and ascertained who answers the description of the remainder-man at some time during the continuance of the particular estate and not merely at its determination.[1]

all *v.* Shererd, 5 Wall. (U. S.) 288; Kumpe *v.* Coons, 63 Ala. 452; Smith *v.* West, 103 Ill. 338; Wood *v.* Robertson, 113 Ind 323, as to which cases see *infra*, this title, note 1, p. 845.

1. Mr. Gray, in a note to § 108 of his work on Perpetuities, suggests that much of the difficulty and ambiguity in the definitions and conception of vested remainders "has arisen from considering them apart from the persons to whom they belong. A vested remainder is *ex vi termini* vested in somebody, and if the subject is approached from the side of the remainder-man, some of the difficulty disappears." This seems to have been the thought underlying Blackstone's definition, "Vested remainders (or remainders executed whereby a present interest passes to the party, though to be enjoyed *in futuro*) are where the estate is invariably fixed to remain to a determinate person, after the particular estate is spent." 2 Bl. Com. 168. The definitions and criterion suggested in the text, it is believed, avoid this difficulty.

The fact that the necessity for having a person *in esse* who answers the description during the continuance of the particular estate and not merely one who will answer it, if he survives the life tenant, has been so frequently overlooked, can be easily explained by the fact that the distinction is rarely of importance except where the remainder-man answers the description *eo instanti* the particular estate determines. Where the remainder-man is *in esse* and designated by name and not by description, the only question presented is whether the limitation is such as to create an estate capable of taking effect in possession immediately, should the possession become vacant. Thus, where the limitation is to A for life, and after his decease to B (a person *in esse* and designated by name) the sole question presented is whether B's remainder can take effect in possession at any moment the particular estate expires. So, if the limitation is to A for life, and after his decease to the eldest son of B, and B has no son, it is perfectly clear that until B has a son the remainder is contingent, because if at any time before B had a son the particular estate were to expire or end in any way, the estate in remainder would be incapable of taking effect in possession. In neither of these cases, therefore, is it worth while to consider the necessity of the remainder-man answering the description during the continuance of the particular estate. But if the limitation were to A for life, remainder to the eldest son of B living at A's decease, and B had a son in full life, it is clear that immediately on A's death, that son would answer the description of "B's eldest son living at A's decease," and that the remainder would be capable of taking effect in possession at any time the possession might become vacant. Yet such a re-

Thus, if land be limited to the use of A for life, remainder to the use of the oldest son of B for life, subject to a power of revocation and new appointment by C, the remainder is contingent until B has a son, in whom it vests immediately at his birth, because from that time on there is some one *in esse* who answers the description to whom the estate may take effect in possession at any moment the possession becomes vacant by the death of A. And yet, if C revokes B's use, thereby divesting him of all interest in the property, or if B dies before A or surrenders to the reversioner, the estate will never take effect in possession.[1] The American cases upon the subject may be divided into two classes: (1) Those based upon the common law which it is believed will be found to sustain the foregoing principles, and (2) Those based upon the definition of a vested estate contained in the *New York* Revised Statutes, in which a future estate is declared to be vested "when there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate," thus making the test depend solely upon the present capacity to take effect in possession if the possession were to become vacant, without regard to whether or not there is a person *in esse* capable of answering the description of the remainder-man before the determination of the particular estate.[2] It may well be doubted whether this piece of legislative definition was intended to change the common law; the probability is that its framers considered it a peculiarly happy instance of the codification of the existing law on the subject; even Chancellor Kent says that it "appears to be accurately and fully expressed."[3] The *New York* court of appeals has, however, decided that, by eliminating the personal element from the notion of a vested remainder, it has made a vested estate under the statute something

mainder is unquestionably contingent, since till A's death no one answers the description, Robertson *v.* Wilson, 38 N. H. 48; Wendell *v.* Crandall, 1 N. Y. 491. See Fearne's Cont. Rem. 9, 309, 310.

Manifestly the same difficulty will arise in every instance in which the remainder-man is to be ascertained immediately on the determination of the particular estate. Hence the inefficiency of the ordinary criterion and the need to modify it as suggested in the text.

1. See Smith Ex. Int., § 180.

So a devise of all the testator's property "in trust for the joint support and maintenance of my mother . . . and my sister . . . during the natural life of my said mother, and upon her decease I give, devise, and bequeath all the residue and remainder thereof to my said sister," creates a vested remainder in the sister, though in the administration of the trust the whole estate may be exhausted. Mitchell *v.* Knapp, 8 N. Y. Supp. 40.

2. *New York* Rev. Stat., pt. 1, ch. 1, tit. 2, § 13.

For substance of this act, see opinion of Woodruff, J., in Lyon *v.* Littell, 41 N. Y. 76, quoted *infra*, note 1, p. 845.

Similar provisions exist in *Michigan*, *Minnesota*, *Wisconsin*, *California*, *Dakota*, *Idaho* and *Georgia*.

Stimson's Am. Stat. Law, § 1350, and Supplement; *Michigan* Ann. Stat. 1882, § 5529; *Wisconsin* Rev. Stat. 1878, § 2037; *Minnesota* Gen. Stat. 1878, ch 45, § 13; *California* Civ. Code, §§ 5693-4-5; *Dakota* Civ. Code, 1883, §§ 185, 187; *Idaho* Rev. Stat. 1887, § 2830, 2831; *Georgia*, Code, 1882, § 2265.

3. 4 Kent Com. *202.

other and different from anything known to the common law, as might have been expected, upon the authority of Kent's statement, the decisions of the *New York* courts, under the statute, have been accepted and followed in other States as authoritative expositions of the nature of a vested remainder at common law, and great confusion has naturally arisen.[1]

1. In the first place, it should be observed that where the persons to take as remaindermen are designated by name, and are *in esse*, no better criterion can be found than that suggested by Fearne's Cont. Rem. 215, the present capacity to take effect in possession immediately if the possession were to become vacant, and upon this point there seems to be little variance. Myers *v.* Adler, 6 Mackey (D. C.) 515; Doe d. Poor *v.* Considine, 5 Wall. (U S); Jones *v.* Habersham, 107 U. S. 174; Hudson *v.* Wadsworth, 8 Conn. 359; *In re* Kenyon (R. I.), 20 Atl. Rep. 294; Black *v.* Williams, 57 Hun (N. Y.) 280; Hoover *v.* Hoover, 116 Ind. 498; Lehndorf *v.* Cope, 122 Ill. 381; Scofield *v.* Alcott, 120 Ill. 362; Mercantile Bank *v.* Ballard, 83 Ky. 481; Bowling *v.* Dobyns, 5 Dana (Ky.) 434; Jackson *v.* Sublett, 10 B. Mon. (Ky.) 467; Wallace *v.* Minor (Va.), 10 S. E. Rep. 423; Kennard *v.* Kennard, 63 N. H. 303.

Nor does there seem to be any question that where the persons to take in remainder are designated by description and persons *in esse* answer the description during the continuance of the particular estate, the remainder vests in such persons, in the absence of some collateral contingency, precisely as though they had been designated by name in the original limitation. McArthur *v.* Scott, 113 U. S. 340; Sager *v.* Galloway, 113 Pa. St. 509; *In re* Kenyon (R. I.), 20 Atl. Rep. 294; McDaniel *v.* Allen, 64 Miss. 417. See King, 1 W. & S (Pa.) 205; Bentley *v.* Long, 1 Strobh. Eq. (S. Car.) 43; Doe *v.* Provoost, 4 Johns. (N. Y.) 61.

But where the limitation is so framed that the persons to take as remainder-men under the description are determined the very instant the particular estate expires, the question arises whether, in the absence of any collateral contingency, a person who would answer the description if he survived the life tenant, takes a contingent remainder or a vested remainder subject to being divested in the event of his death before the life tenant. Upon this question the American cases may be divided into two distinct groups. (1) Those based upon the common law which holds that the remainder is necessarily contingent, because until the death of the life tenant it is impossible to tell who are entitled to take under the description. Hence under a limitation over to "such children as may be living at the time of the death of the life tenant," each child has been held to take a contingent remainder. Colby *v.* Duncan, 139 Mass. 398; Hunt *v.* Hall, 37 Me. 333; Teets *v.* Weise, 47 N. J. L. 154; Mercantile Trust and Deposit Co. *v.* Brown (Md.), 17 Atl. Rep. 937; Dean *v.* Nicholas, 25 Ohio L. J. 278; Paul *v.* Frierson, 21 Fla. 529; Grier *v.* McAfee, 82 N. Car. 187; Augustus *v.* Seabolt, 3 Metc. (Ky.) 155; White *v.* White, 86 Ky. 602; Callahan's Estate, 13 Phila. (Pa.) 230; Allsmiller *v.* Freutchenicht, 5 S. W. Rep. 746.

So a devise to A for life, and at his decease to his eldest male heir, gives A's heir apparent only a contingent remainder, as. till A's decease, he does not answer the description. Alberson *v.* Randall, 13 R. I. 71.

So where the gift over is to eldest surviving son in fee. Robertson *v.* Wilson, 38 N. H. 48.

A testator devised land to his daughter H during her life, and to her husband W during his life, and at the decease of H and W to be divided among the heirs of each. *Held*, that the remainder, after the termination of the life estates of H and W, was contingent until the death of H, and vested, on her death, in those who were then her heirs at law. Richardson *v.* Wheatland, 7 Met. (Mass.) 169.

Nor does a provision by which the heirs of such of the children as die during the life of the tenant for life are substituted in their place, give the children a vested remainder. Hunt *v.* Hall, 37 Me. 363.

A executed to B a deed of trust: "For the sole and separate use, profit and enjoyment of my said wife, Martha

B. Frierson, subject to her entire control and management for and during her natural life, and at her death the said property shall be divided equally among such of her children by me begotten as she may leave surviving her, the child or children of a deceased child to take that portion to which its parent would have been entitled." *Held*, that the language created a contingent remainder, dependent upon survivorship, and that the "children of a deceased child," upon the decease of the parent, who was one of the children of the grantor described above, had the same contingent interest as the deceased parent. Paul *v.* Frierson, 21 Fla. 529. the court by McWhorter, C. J., saying: "Two things were necessary to determine the right, the death of Mrs. Frierson, and the fact that Mrs. Paul was living at the time of her death. It was uncertain whether the right to the estate would ever vest in Mrs. Paul, and this uncertainty made her interest in it contingent. See 4 Kent's Com., p. 202; Hurlbert *v.* Emerson, 16 Mass. 241; Olney *v.* Hull, 21 Pick. (Mass.) 311. The provision in the deed of trust, that the child or children of a deceased child should take that portion to which its parent would have been entitled had no other purpose or effect than that the children of the deceased child should be entitled to the same estate that their parent might have enjoyed in case he or she had lived.

"It cannot be claimed that their rights were other than those of the deceased parent, or that a remainder which had never vested in said parent should by that parent's death become vested in them, without its being so provided in the deed of trust."

As to necessity of children surviving their parents, *compare* Hudgens *v.* Wilkins, 77 Ga. 555; Post *v.* Horning, 43 Hun (N. Y.) 637; WILLS.

So a devise to one for life, and then to the children surviving the life tenant is a contingent remainder to the children who may be then living. Roundtree *v.* Roundtree, 26 S. Car. 450; Olney *v.* Hull, 21 Pick. (Mass.) 311; Woelpper's Appeal, 126 Pa. St. 562.

But unless the language clearly indicates that the word surviving referred to the death of the life tenant, it will be taken to refer to the death of the testator, and the remainder will vest in the children then living, subject to open and let in others after born. Ross *v.* Drake, 37 Pa. St. 375; Foster *v.* Wetherill, 11 Phila. (Pa.) 172; White *v.* White, 7 S. W. Rep. 26. This, however, only affects the application of the principle.

For discussion of words of survivorship, see WILLS.

(2) Cases founded upon the definition of a vested estate contained in the *New York* Rev. St. pt. 2, ch. 1, tit. 2. § 13, under which it is held that where the limitation is so framed that the persons to take as remainder-men under the description, are determined *eo instanti* the particular estate expires, one who will answer the description if he survives the life tenant, takes a vested interest, subject to being divested in the event of his death before the life tenant. Thus, in Moore *v.* Littel, 41 N. Y. 66, the leading case on the subject, it was held that since the revised statutes of *New York*, which abrogate the rule in Shelley's Case, and enact that the persons who, on the termination of the life estate, shall be the heirs of the tenant for life shall be entitled to take as purchasers by virtue of the remainder limited to them, a grant to one "for and during his natural life, and after his decease to his heirs and their assigns forever," gave to his children a vested interest in the land, under the statutory definition, which like other gifts to a class, opened to let in after born children, and might be wholly defeated as to the interest of any one child, by his death before that of his father, the court by Woodruff, J., saying: "By the statute (1 *New York* Rev. Stat. 722, ch. 1, tit. 2, art. 1) estates, in respect to their nature and duration, are divided into estates of inheritance, estates for life, estates for years, and estates at will, and by sufferance.

"Estates, as respects the time of their enjoyment, are divided into estates in possession and estates in expectancy.

"An estate in expectancy is where the right to the possession is postponed to a future period.

"Estates in expectancy are divided into estates commencing at a future day, denominated future estates and reversions.

"A future estate is an estate limited to commence in possession at a future day, either with or without the intervention of a precedent estate, or on the determination by lapse of time, or otherwise, of a precedent estate, created at the same time, and where a future

estate is dependent upon a precedent estate, it may be termed a remainder, and may be created and transferred by that name.

"Future estates are either vested or contingent. They are vested where there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate. They are contingent whilst the person to whom, or the event upon which they are limited to take effect, remains uncertain.

"Here, discarding all the abstruse and refined discussions and disputes as to what constitutes an estate and what a mere possibility or expectation (so far as material to the present inquiry), we have a series of statute definitions, under which a remainder expectant upon the determination of the estate of a tenant for life is declared to be: 1st, an 'estate in expectancy;' 2nd, a 'future estate;' and it is either vested or contingent.

"If there 'is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the precedent estate, then that remainder is vested' within the terms of the statute. It is not 'a person who now has a present fixed right of future possession or enjoyment,' but a person who would have an immediate right if the precedent estate were now to cease. I read this language according to its ordinary and natural signification, and if you can point to a human being and say as to him, 'that man or woman by virtue of a grant of a reremainder. would have an immediate right to the possession of certain lands if the precedent estate of another therein should now cease,' then the statute says he or she has a vested remainder.

"It was argued on this appeal, that definitions of vested and contingent remainder in adjudged cases, and text writers, have not been successfully attempted, and that our revisors did not attempt to alter the law, nor do more than describe what had already been adjudged to be vested and what to be contingent.

"In my opinion they have defined a vested remainder in terms that do clearly avoid much of the uncertainty in which the subject was before involved, and in such terms that it is now true, that if there be a person in being of whom it can be positively averred that if the estate for life were now to cease, he would have an immediate right of possession, he has a vested remainder, and notwithstanding subsequent events may defeat it, the operation of the statute itself is to make them subsequent conditions. Why was a remainder to the heirs of A, after the expiration of the life estate of B. contingent at the common law? Because B might die before it was ascertained who are the heirs of A.

"Why is it said that a remainder to the heirs of A, after the determination of a life estate in A is contingent? Because the life estate may, at the common law, be determined before it is as certained who are the heirs of A.

"Hence the introduction, into the various definitions, of the qualification so much insisted upon in the argument of this appeal, that no estate can vest until the person in whom it is to vest shall be ascertained; and from this it follows, if there be some condition which must be fulfilled, before the person who will take on the determination of the precedent estate is known, there can be no vested remainder.

"But here suppose, that the one sole condition, to wit: The determination of the precedent estate is all that is necessary to entitle a person *in esse* to take, it is not denied that such person has a vested remainder. Why, then, if the precedent estate can only be determined by the death of the life tenant, and by that death the heirship is alike also determined, is not the statute definition in all respects satisfied? It makes the precise case described, and I deny the right to interpolate qualifications drawn from the refined reasoning of cases or text-books, prior to the statute, to limit the operation of its plain terms . . . Without enlarging further, the statute, rejecting technical expressions and phrases heretofore employed, meant by person, just what it expresses and no more. 'When there is a person in being,' means when you can point to a human being, man, woman or child; and 'who would have an immediate right to the possession of the lands upon the ceasing of the precedent estate,' means that if you can point to a man, woman or child who, if the life estate should now cease, would *eo instanti et ipso facto*, have an immediate right of possession, then the remainder is vested

and, by necessary consequence, all the contingencies which may operate to defeat the right of possession are to operate, and only to operate as conditions subsequent."

See Sheridan *v.* House, 4 Keys (N. Y.) 569; 4 Abb. App. Dec. (N. Y.) 218; House *v.* Jackson, 50 N. Y. 161; *In re* Brown, 29 Hun (N. Y.) 412; Lockman *v.* Reilley, 29 Hun (N. Y.) 434; Hennessy *v.* Patterson, 85 N. Y. 104; Purdy *v.* Hayt, 92 N. Y. 456.

Similar legislation, apparently framed upon the provisions of the *New York* Rev. Stat., exist in *Michigan*, *Minnesota*, *Wisconsin*, *California*, *Dakota*, *Idaho*, and *Georgia*.

Stimson's Am. Stat. Law, § 1350 and Supplement; *Michigan*, Ann. Stat. 1882, §§ 5528–9; *Wisconsin*, Rev. Stat. 1878, §§ 2033–2037; *Minnesota*, Gen. Stat. 1878, ch. 45, §§ 9–13; *California*, Civ. Code 5693–5, 5767–9; *Dakota*, Civ. Code 1883, 185, 187, 224, 225; *Idaho*, Rev. Stat. 1887, 2830, 2831; *Georgia*, Code, 1882, §§ 2263–2265.

As to the earlier *New York* decisions, see Adams *v.* Beekman, 1 Paige (N. Y.) 631; Hawley *v.* James, 3 Paige (N. Y.) 318; 16 Wend. (N. Y.) 61; *In re* Ryder, 11 Paige (N. Y.) 185; Campbell *v.* Rawson, 18 N. Y. 418; Williamson *v.* Field, 2 Sandf. Ch. (N. Y.) 533; Doe *v.* Provoost, 4 Johns. (N. Y.) 61; Wendell *v.* Crandall, 1 N. Y. 491.

For a severe criticism of the principle of Lyon *v.* Littell, 41 N. Y. 66, see 6 Alb. L. J. 361.

How far that case would be followed to-day may be questioned. See Dana *v.* Murray, 26 N. E. Rep. 21, 25.

The principle of the *New York* decisions bears no analogy to Hopper *v.* Demarest, 1 Zab. (N. J.) 525; 2 Zab. (N. J.) 599, 612, where it was held that under the *New Jersey* statute which provides that where lands are devised to A for life, and after his death to his heirs, heirs of his body or issue, the land shall vest in the children of the devisee equally to be divided between them as tenants in fee, the share of any deceased child to go to his issue, the children of the life tenant take vested remainders, and if one of the children die, leaving issue without having aliened, his interest will go to his issue, since in the latter State the devolution is expressly marked out by the statute.

On the authority of the *New York* decisions, based upon the statutory definitions, and in reliance upon Kent's statement in 4 Kent Com. *203, that the statutory definition accurately expressed the common-law notion of a vested remainder, it was said by Swayne, J., in Croxall *v.* Shererd, 5 Wall. (U. S.) 288, that, "where an estate is granted to one for life, and to such of his children as should be living after his death, a present right to future possession vests at once in such as are living, subject to open and let in after born children, and to be divested as to those who shall die without issue," and was held by the Supreme Court of *Alabama* that under a devise to B, a married woman for life and "after her death to her children then living," the children took vested remainders. "The death of Mrs. B could happen before the death of any of her children, and if it did the gift in remainder would immediately vest in possession." Kumpe *v.* Coons, 63 Ala. 448, 452. It will be observed that this reasoning is identical with that followed in the *New York* cases, and depends entirely upon the position that a remainder is necessarily vested if there is a present capacity to take effect in possession at any moment the possession becomes vacant. In Smith *v.* West, 103 Ill. 332, a similar decision was made upon the authority of Moore *v.* Littell, 41 N. Y. 72. *Compare* Cheney *v.* Teese, 108 Ill. 479; Scofield *v.* Alcott, 120 Ill. 362; Lehndorf *v.* Cope, 122 Ill. 318; Haward *v.* Peavey, 128 Ill. 430; Siddons *v.* Cockrell, 131 Ill. 653. So also in *Indiana*. Davidson *v.* Koehler, 76 Ind. 398; Wood *v.* Robertson, 113 Ind. 323. But *compare* Stevens *v.* Evans, 30 Ind. 39; Hoover *v.* Hoover, 116 Ind. 498.

Mr. Gray, in his work on Perpetuities, § 107, note 2, suggests that in Croxall *v.* Shererd, 5 Wall. (U. S.) 288; Kumpe *v.* Coons, 63 Ala. 448; Smith *v.* West, 103 Ill. 332, an expression of opinion upon the point in question was not really necessary to a decision upon the merits. At any rate it would seem that these decisions as well as those in *Indiana* and *New York* present an exceptional view of the subject and cannot be safely relied upon as a correct exposition of the common-

A contingent remainder does not rise to the dignity of an estate in the land and confers no interest in the seisin; strictly speaking it is not an estate at all, but a mere chance of having one, if the contingency turn out favorably to the remainder-man;[1] if the remainder-man be ascertained a possibility coupled with an interest devisable,[2] transmissible,[3] and in equity assignable;[4] if not, a bare possibility[5] incapable of either devise, transmission[6] or assignment.[7] The better opinion is that a contingent remain-

law conception of a remainder in other jurisdictions.

1. Smith's Ex. Int., § 172; Wms. Real Prop. 23, 233; 2 Cruise Dig. 333; 2 Wash. Real Prop. 263.

2. Fearne's Cont. Rem. 366; note (g), per Baker; 2 Wash. Real Prop. 263; 4 Kent Com. 261; Roe d. Perry *v.* Jones, 1 H. Bl. 33; Roe d. Noden *v* Griffiths, 1 W. Bl. 606; Loring *v.* Arnold, 15 R. I. 429; Hennessy *v.* Patterson, 85 N. Y. 91; Kenyon *v.* See, 94 N. Y. 563.

3 Fearne's Cont. Rem. 364; 4 Kent Com. 262; 2 Wash. Real Prop. 263; 1 Prest. Est. 76; Roe d. Noden *v.* Griffiths, 1 W. Bl. 606; Loring *v.* Arnold, 15 R. I. 429; Chess's Appeal, 87 Pa. St. 362; Buck *v.* Lantz, 49 Md. 439; Selna's Estate, Myr. Prob. (Cal.) 233; Clark *v.* Clark, 19 S. Car. 345.

4. 1 Prest. Est. 76, 89; 2 Wash. Real Prop. 263; 4 Kent. Com. 261, 262; Robertson *v.* Wilson, 38 N. H. 48. See Fortesque *v.* Sattlethwaite, 1 Ired. (N. Car.) 570.

Contingent remainders, when the owner is ascertained, at common law, might be bound by estoppel, as by feoffment fine, common recovery or indenture of lease, or released to the terretenant or owner having the seisin, though not to a stranger, but could not be conveyed by deed. 2 Prest. Abst. 284; 1 Prest. Est. 76, 89; Fearne Cont. Rem. 365, 557; 2 Cruise Dig. 333; Lampet's Case, 10 Rep. 46; Roe *v.* Jones, 1 H. Bl. 33; Roe *v.* Griffiths, 1 W. Bl. 606; Row *v.* Dawson, 2 Lead. Cas. Eq. (4th Am. ed.) 1531; Christmas *v.* Oliver, 10 B & C. 181; Robertson *v.* Wilson, 38 N. H. 48; Harman *v.* Christopher, 34 N. J. Eq. 459; Nelson *v.* Combs, 3 Har. (N. J.) 27; See Variek *v.* Edwards, 5 Den. (N.Y.) 664.

So if he conveys premises by a warranty deed, and his privies are estopped by his covenants of title from afterwards claiming the land, and it seems that under such a title the grantee may maintain ejectment. Robertson *v.* Wilson, 38 N. H. 48; Fortesque *v.* Sattlethwaite, 1 Ired. (N. Car.) 566. See Christmas *v.* Oliver, 10 B. & C. 181; Bush *v.* Marshall, 6 How. (U. S.) 284; Van Rensselaer *v.* Kearney, 11 How. (U. S.) 294; Jarvis *v.* Aikins, 25 Vt. 635; Pope *v.* Henry, 24 Vt. 560; Fortesque *v.* Fenner, 1 Ired. (N. Car.) 566; Variek *v.* Edwards, 5 Den. (N. Y.) 664.

In many States statutes provide that contingent remainders and executory devises may be transferred by deed. See *infra*, this title, § II, 5, *l*, note.

5. As to possibilities, see *infra*, this title, § II, 5, *l*, note.

6. 4 Kent. Com. *262; 1 Pres. Est. 75; Wms. Real Prop. 277; Fearne Cont. Rem. 364; Loring *v.* Arnold (R. I.) 3 N. E. Rep. 528; De Lassus *v.* Greenwood, 71 Mo. 371. See Jackson *v.* Waldron, 13 Wend. (N. Y.) 178.

7. Tiedeman Real Prop. § 411; Dana *v.* Murray (N. Y.) 26 N. E. Rep. 25; Jackson *v.* Waldron, 13 Wend. (N. Y.) 178; Loring *v.* Arnold, 15 R. I. 428; Taylor *v.* Stewart (N. J.), 18 Atl. Rep. 456. See Watson *v.* Watson, 3 Jones (N. Car.) Eq. 400; Young *v.* Young, 97 N. Car. 132.

Even in such cases, however, Mr. Tiedeman is of opinion that the covenants in a warranty deed would estop the covenantor from claiming the remainder as against his grantee. Tiedeman Real Prop. § 411, note. *Compare infra*, this title, § II, 5, *l*. note.

While, however, the weight of authority sustains the text, the question is by no means free from doubt; in Harris *v.* McElroy, 45 Pa. St. 220, a contingent remainder to such children living as should be living at the death of the life tenant was said to be a contingent interest which may be "sold, assigned or devised," and in Noyson *v.* Tyler, 80 Ky. 358, a conveyance of such an interest was said to be valid in equity. See further Robertson *v.* Wilson, 38 N. H. 48; Wilcox *v.* Daniels (R.I.), 2 N. E. Rep. 507; Stover *v.* Eycle-

der-man can maintain a bill in equity to restrain waste,[1] although he cannot sue at law to recover damages for the injury to the place wasted until his interest becomes vested.[2]

An estate limited upon a contingency to which the effect of a condition subsequent is given vests at once, subject to be divested upon the happening of the contingency, even though it must happen, if at all, before the remainder takes effect in possession. Thus if lands be limited to A for life and after his death to B and his heirs, but if B dies before A, then to C, it is clear that if the condition ever affects B's estate, it will prevent its taking effect in possession; after it has once vested in possession, it will never divest it.[3] The great difficulty in such cases is to determine whether the condition is really precedent or subsequent, and this will depend upon whether it is incorporated into the gift to or description of the remainder-man, or is added as a separate clause after words which have already given a vested interest.[4]

shimer, 46 Barb. (N. Y.) 84; 1 Prest. Est. 75; 2 Prest. Abst. 95; Fortesque *v.* Sattlethwaite, 1 Ired. (N. Car.) 566.

In *Massachusetts* such an interest has been held to pass to an assignee in bankruptcy. Putnam *v.* Story, 132 Mass. 211; *contra* Bristol *v.* Atwater, 50 Conn. 402; 1 Prest. Est. 76.

1. Fearne's Cont. Rem., § 562, note (h) by Butler. Williams *v.* Bolton, 3 P. D. 268 n.; Robinson *v.* Tilton, 3 Atk. 209; Cowerd *v.* Meyers, 99 N. Car. 198.

But in Paul *v.* Frierson, 21 Fla. 529, it was held that a contingent remainderman could not maintain a bill to review a decree directing a sale of the premises.

Compare, *infra*, this title, § II, 5, *i.*

2. Sager *v.* Galloway, 113 Pa. St. 500· Hunt *v.* Hall, 37 Me. 363.

After his interest has vested he may maintain a bill in equity to recover for waste done pending the contingency. Garth *v.* Colton, 1 Ves. Sen. 524.

3. 2 Wash. Real. Prop. (5th ed.) 629; Gray Perpetuities, §§ 102, 104; Bromfield *v.* Crowder, 1 Bos. & P. 313; Doe d. Hunt *v.* Moore, 14 East 601; Edwards *v.* Hammond, 3 Lev. 132; Blanchard *v.* Blanchard, 1 Allen (Mass.) 223; Manice *v.* Manice, 43 N. Y. 380; see Security Co. *v.* Hardenburgh, 53 Conn. 169; Vanderwalker *v.* Rollins, 63 N. Car. 460; Coward *v.* Wells, 5 Lea (Tenn.) 682.

4. Gray Perpetuities, § 108; Lantz *v.* Prescott, 144 Mass. 505; Wainwright *v.* Sawyer, 150 Mass. 168; Blanchard *v.* Blanchard, 1 Allen (Mass.) 223; Collins *v.* Collins, 40 Ohio St. 353. See further upon the subject, Harrison *v.* Foreman, 5 Ves. J. 207; Belk *v.* Slack, 15 Eng. Ch. Rep. 238; Hutchinson *v.* Stephens, 15 Eng. Ch. Rep. 241; Thaw *v.* Ritchie, 136 U. S. 519; Carver *v.* Jackson, 4 Pet. (U. S.) 91; Hudgens *v.* Wilkins, 77 Ga. 555; Darnell *v.* Barton, 75 Ga. 377; Drew *v.* Drew, 66 Ala. 455; Roundtree *v.* Roundtree (S. Car.), 2 S. E. Rep. 474; Archer *v.* Ellison (S.Car.), 5 S. E. Rep. 713; Ewing *v.* Shropshire (Ga.), 7 S. E. Rep. 554; Leroy *v.* Charleston, 20 S. Car. 71; Hathaway *v.* Harris, 84 N. Car. 96; Grier *v.* McAfee, 82 N. Car. 187; Withers *v.* Sims, 80 Va. 651; Mercantile Bank *v.* Ballard, 83 Ky. 481; Kemp *v.* Bradford, 61 Md. 330; Bailey *v.* Love, 67 Md. 592; Jeffers *v.* Lampson, 10 Ohio St. 101; Baker *v.* McGrew, 41 Ohio St. 113; Security Co. *v.* Hardenburgh, 53 Conn. 169; Lavery *v.* Egan, 143 Mass. 389; Hall *v.* Nute, 38 N. H. 422; Sager *v.* Galloway, 113 Pa. St 500; Com. *v.* Hackett, 102 Pa. St. 11; Way *v.* Gest, 14 S. & R. (Pa.) 40; Den *v.* Crawford, 8 N. J. L. 90; Teets *v.* Weise, 47 N. J. L. 154; Howell *v.* Tomkins, 42 N. J. Eq. 405; Hennesy *v.* Patterson, 85 N. Y. 91; Bennett *v.* Garlock, 17 N. Y. Sup. Ct. 339; Jackson *v.* Winne, 7 Wend. (N. Y.) 47.

A testator after devising to his wife all the income of all his real and personal property during her natural life, devised to five of his children as follows: "All the property both real and personal that may be left at the death of my wife to be divided equally

between the last five named children; and provided, furthermore, that if any of the last five named children die before my wife, then the property to be equally divided between the survivors." *Held*, that the children named took vested remainders defeasible on condition subsequent which they could convey by deed in the lifetime of their mother. Blanchard *v.* Blanchard, 1 Allen (Mass.) 223.

In the above case the court by Hoar, J., said: "There are no words of contingency, such as, 'if they shall be living at her death,' or 'to such of them as shall be living.' 'the usual and proper phrases to constitute a condition precedent, but a direct gift of all the property left after the life estate previously carved out. The difficulty arises from the remaining sentence, which is a proviso containing a limitation over all of the estate thus devised to the children respectively, upon the contingency of either of them dying before their mother, either with or without issue. Although this is in the form of a proviso, yet there are numerous cases in which a limitation thus expressed has been held to qualify in its inception the interest or estate before devised, and to make that contingent which would otherwise have been vested. And there is no doubt that if the effect of this clause is to limit the remainder to such of the children named as should survive their mother, then it is a contingent remainder. And this is the construction urged on behalf of the petitioner. But if, on the other hand, it can be regarded as a devise in fee to the five children, subject to be divested upon a condition subsequent, with a limitation over on the happening of that contingency, then the children named took a vested remainder in fee; the limitation would have taken effect, if at all, only as an executory devise; and, as the contingency never happened, the fee became absolute."

A testator having devised his farm to his wife for life, in lieu of dower, and all his household goods to remain in her possession during her lifetime, further provided, "at the death of my said wife the real estate aforesaid, and such part of my household goods as may then remain unconsumed and unexpended, I give and devise to my two sons, A and B and their heirs. If, however, either of my two sons should die leaving no children at their decease, then the share of said property above devised to such deceased son is to go into the possession of the surviving son. If, in case both of my sons, A and B, should die leaving no heirs, then the property above described to be equally divided among my heirs." *Held*, that the two sons each took a remainder in fee simple in one undivided half of the lands, defeasible upon the contingency of the death of either without children, and leaving the other surviving. Collins *v.* Collins, 40 Ohio St. 353. See Jeefers *v.* Lampton, 10 Ohio St. 101.

The distinction between a gift to such children as shall attain twenty-one and a gift to particular persons, on their attaining that age is this: "You find the donee in one case is settled and fixed, the gift is made to him, but there are certain words which express contingency as to the time when he is to take. That is the way the court has got out of the difficulty. Vice-Chancellor Shadwell and Chief Justice Best said: 'We have found the donee and we have only got to ascertain the time when he is to take.' In the other case you have not found the donee, and you do not arrive at him until the period arrives at which he shall be found."

Wood V. C., in Holmes *v.* Prescott, 10 Jur., N. S. 507, 572.

See Price *v.* Hall, L. R., 5 Eq. 399, 402; Rhodes *v.* Whitehead, 2 Dr. & Sm. 532; Thomson *v.* Ludington, 104 Mass. 193; Olney *v.* Hall, 21 Pick. (Mass.) 311. *Compare* remarks of Stuart, V C., in Browne *v.* Browne, 3 Sm. & G. 568.

Upon this question the leading case of Egerton *v.* Earl Brownlow, 4 H. L. Cas. 1, is of interest in that it seems to have been held in that case for the first time that a contingent gift or interest has a real existence, capable, as much as a vested interest or estate of being operated upon by a condition subsequent, and being made to cease and become void. The Earl of Bridgewater by his will devised very large real estates to trustees to make a settlement according to the limitations mentioned in the will. One of these limitations was "to Lord Alford for and during the term of ninety-nine years, if he shall so long live;" remainder to trustees during his life to preserve contingent remainders; "remainder to the use of the heirs male of his body, with remainder, in default of such issue

to the use of C. H. C. for the term of ninety-nine years, if he shall so long live;" remainder to trustees to preserve contingent remainders; "remainder to the use of the heirs male of the body of C. H. C., subject, nevertheless, as to the several uses and estates so to be limited to Lord Alford and C. H. C., and to the trustees during their respective lives, and to the heirs male of their respective bodies, to the several provisos for the determination thereof hereinafter contained." The testator then declared "that in the settlement to be made pursuant to this my will, my said estates are not to be limited successively to the use of the first and other sons of Lord Alford, or of C. H. C., in tail male, but to the heirs male of their respective bodies, in the words of this my will, it being my intention that the vesting of my estates in the heirs male of their respective bodies shall be suspended during the lives of the said Lord Alford and C. H. C., respectively." The testator then provided, "that if Lord Alford shall die without having acquired the title of Duke or Marquis of Bridgewater to him and the heirs male of his body, then, and in such case, the use and estate hereinbefore directed to be limited to the heirs male of his body shall cease and be absolutely void." There was a similar proviso as to Lord Alford acquiring such title within five years after he should succeed to be Earl Brownlow, and unless he did so, the testator directed that the estate limited, etc. (as before), "shall thenceforth cease and be absolutely void; and my real estates hereinbefore devised shall thereupon go over and be enjoyed according to the subsequent uses and limitations declared and directed by this my will, as if the said Lord Alford were actually dead without issue male." Lord Alford entered into possession of the estates, but died without acquiring either of the titles, leaving an heir male. *Held*, that the estate thus created in favor of Lord Alford's heirs male was not affected by the proviso, which was a condition subsequent, and which was void, as being against public policy, and therefore that the eldest son of Lord Alford was entitled to the estates as heir male under the limitation. "The limitation to Lord Alford with remainder to his issue male as purchasers, may possibly be regarded as an entire limitation, and taking effect in Lord Alford's life, so that the condition subsequent could operate upon it. Without denying that this is a possible view of the matter, it may be said that we are not driven to it in order to give the proviso the effect which it plainly was framed to have as contemplating a contingency that should determine an existing estate. For there would, independent of Lord Alford's estate, be an existing remainder, contingent indeed, and in two ways contingent, both contingent during the particular estate and subject to the further contingency of the dignity not being acquired; a contingency which, if operating by way of condition precedent, prevents the remainder from arising; if operating by way of condition subsequent destroys that remainder or causes it to cease." Per Lord Brougham, p. 168.

"As the use or estate was only to cease or be void on the given event, on the death of Lord Alford, before which time it could not vest, as it was to cease and be void before it had ever existed, it has been contended, and the majority of the learned judges have adopted the position that, by reason of the contingency, the words "cease and be void" can have no correct and appropriate application to the use and estate referred to. It is said that the use and estate not being vested, it cannot cease and be void, and consequently the proviso cannot operate as a cesser or determination; and that, to have any effect, the proviso must be construed as a declaration that the acquisition of the prescribed dignity should operate as a condition precedent to any estate arising or vesting; in which case the legality or illegality of such condition precedent is immaterial. . . . It seems to me that the expression here used is perfectly correct as applied to the gift or the interest made or created by the limitation; for a contingent gift or interest has an existence, capable, as well as a vested interest or estate, of being made to cease and become void. The vesting has nothing whatever to do with the question; it is perfectly immaterial. In the one case a contingent gift or interest exists; in the other case, an actual estate exists; the two things are very different, but each exists, and each may properly be made to cease and become void. And, indeed, a use *eo nomine*, though it be only inceptive, inchoate, or potential,

may be properly said to exist, and to cease and become void, as well as a use clothed with the actual seisin, or, in other words, an actual estate. Who can deny that even a chance may exist, and a chance be made to cease?

"My lords, it may be admitted that it was the object of the proviso and the intention of the testator that the use of the estate to the heirs male of Lord Alford should not effectually vest at his death, otherwise than in the event of his having acquired the title of Duke or Marquis of Bridgewater. But it should be observed that that object and intention would be equally accomplished by construing the condition, if valid, a condition subsequent. But it seems to be further contended, not only that such was the intention of the testator, but that the effect of the proviso was that, from the very necessity of the case, the use or estate to the heirs male of Lord Alford could not vest at his death otherwise than in the event of his having acquired the title of Duke or Marquis of Bridgewater; and that therefore the proviso, coupled with the limitation to which that proviso relates, virtually amounts to two conditions precedent, such as these: 'If Lord Alford should acquire the title of Duke or Marquis of Bridgewater, then to his heirs male; but if he should not have acquired that title, then over;' which is what is commonly called a contingency with a double aspect; and that, consequently, the proviso, as regards the use to the heirs male of Lord Alford, is, in fact, a condition precedent, and attended with the incidents of a condition precedent. This reasoning, however, appears to me to be fallacious, and little short of confounding things which are essentially different. For, as the very learned editor of Gilbert on Uses (page 177) observes, 'The distinction is very refined, but is certainly well established, that if an estate be limited to A until B return from Rome, and after B's return, to C, the limitation to C is a good contingent remainder; whereas, if the estate is limited to A for life, with a proviso that if B return from Rome the estate shall go to C, in this case the limitation to C, although precisely the same as the former in effect, is not a remainder, but what is generally termed a conditional limitation.' The very affirmative words which have been constructively supplied in the present case, viz.: 'If Lord Alford should acquire,' etc., are wanting; we have only the negative words, 'if he should die without having acquired,' etc., which constitute a condition precedent in regard to the acceleration of the posterior uses, but a condition subsequent as regards the prior use to the heirs male of Lord Alford. Take the words as they stand, and then, according to their *prima facie* and technical import, what the testator says is this, not that an estate to the heirs male is to arise on a given contingency, which would be a condition precedent; but that an estate previously directed to be limited to the heirs male should cease on a given contingency, which is a condition subsequent, as little are we authorized (I conceive) to supply the affirmative words above mentioned, as we should be authorized to supply the collateral limitation 'until B shall return from Rome' in the example just given of a conditional limitation by the learned editor of Gilbert on Uses. To do so would be to translate the testator's language into words of a different legal import, and thereby, as I shall presently endeavor to show, defeat instead of effectuate his intention. The mere fact that if the condition determines the use at all, it must determine if before ever it could vest even in interest, does not show that it was a condition precedent; it may virtually have the effect of a condition precedent in this respect, without being a condition in its form, or of the nature of one, and without being attended with the incidents of a condition precedent.

"My Lords, it appears to have been assumed that, according to the definition, and, indeed, according to the import of the very term itself, a condition, to be a condition subsequent, must necessarily be a condition to defeat a use or estate subsequently to its having become actually vested, that is, vested in interest at least. It is true, indeed, that ordinarily the use or estate which is defeated by a condition subsequent has become vested before the time when the condition defeats it; and it may be admitted, at least for the sake of argument, that one reason why a condition subsequent was so called, is that it is a condition which ordinarily defeats a use or estate subsequently to its vesting. But although this may

A vested remainder subject to a divesting contingency, has, until the contingency happens, all the incidents of an indefeasible interest;[1] if the contingency never happens or becomes impossible, the estate becomes absolute.[2]

b. REMAINDERS TO A CLASS—(See also ESTATES, vol. 6, p. 875;[3] LEGACIES AND DEVISES, vol. 13, p. 7;[4] WILLS).—In the absence of a contrary intent, a remainder limited to a

be one circumstance from which it may have derived its name, yet its nature is not necessarily restricted to the thing from which its name is derived. Although the condition may have received that name because such an operation is ordinarily incidental to it, yet even if this were the only reason why the condition was entitled a condition subsequent, that fact would not prove that in all cases the use or estate to be defeated must be actually vested before the condition operates. But there is another reason why a condition subsequent may have received that name. A condition may be called precedent when it precedes, and because it precedes, the words of gift; and a condition may be called subsequent when it follows, and because it follows, the words of gift, whether that gift is vested at the time when the condition (which follows it) is to operate or not. Regularly a condition precedent does in form precede, and a condition subsequet does in form follow the words of gift; and in all cases a condition precedent does, in substance, and by construction, at least, precede the gift, and a condition subsequent does, in substance and by construction, at least follow the gift; for, if the gift is to arise upon a condition, such condition must in substance precede the gift; and if the gift is to be defeated, or the use or estate is to cease or determine by the condition, such condition must in substance follow the gift: the gift in the latter case must have an existence antecedent to the operation of the condition which is to defeat it, or cause it to cease or determine." Per Lord Truro, p. 182-187.

1. Lang *v.* Prescott, 144 Mass. 505; Blanchard *v.* Blanchard, 1 Allen (Mass.) 223; Watson *v.* Cressey, 79 Me. 383; Wainwright *v.* Sawyer, 150 Mass. 168; Lufburrow *v.* Koch, 75 Ga. 448. See Mercantile Bank *v.* Ballard, 83 Ky. 481; Hills *v.* Barnard (Mass.), 25 N. E. Rep. 96; 9 L. R. A. 211.

One of the most important practical distinctions between a contingent remainder and a vested remainder subject to a divesting contingency is that the former is subject to be defeated by reason of the failure of the particular estate, while the latter is not. Price *v.* Hall, L. R., 5 Eq. 399; Browne *v.* Browne, 3 Sm. & G. 568. A vested remainder subject to a divesting contingency is freely alienable, Wainwright *v.* Sawyer, 150 Mass. 168; Jefers *v.* Lampson, 10 Ohio St. 101; Watson *v.* Cressey, 79 Me. 383, and has been held subject to levy and sale. Lufburrow *v.* Koch, 75 Ga. 448.

2. Blanchard *v.* Blanchard, 1 Allen (Mass.) 223; Fitzwater's Appeal, 94 Pa. St. 141; Fields *v.* Whitfield, 101 N. Car. 305.

A will gave property to a daughter, and provided that in case she should die "single," all the property left her should go to A, and that if A should die before the daughter, "then the disposal of the property is left to the said daughter." The daughter married while A was alive. *Held* that, upon her marriage, the property vested in her absolutely. Davison's Appeal, 1 Pa. Supr. Ct. Cas. 185; 16 Atl. Rep. 598.

Where a remainder is given to a certain child and any other child or children that his mother may thereafter have, with a provision that the property shall go to other persons, in case of the death of such child or children under lawful age without leaving any descendant, after the death of the mother without leaving any other child, the child first named, on reaching the age of twenty-one years, has an absolute estate. Thompson *v.* Ballard, 70 Md. 10.

When a prior estate is vested by a devise, but subject to be divested upon the happening of a contingency, the contingency must take place literally, or the prior estate will not be divested. Illinois L. & L. Co. *v.* Bonner, 75 Ill. 315.

3. Vol. 6, p. 890.

4. Vol. 13, p. 60.

class vests in such of the objects as are *in esse*, and answer the description at the death of the testator or the delivery of the deed, subject to open and let in those afterwards born before the determination of the particular estate.[1] If none of the class are *in esse* the remainder vests in the objects as they come *in esse*, during the continuance of the particular estate.[2] But in either case those born after the determination of the particular estate will be excluded.[3] The principle is equally applicable to gifts to children or more remote relatives, as grandchildren, brothers, sisters, nephews, nieces and cousins;[4] but in

1. Hawkins on Wills *72; Theobald on Wills 244; 2 Jarman on Wills (5th ed.) *167; 2 Redf. on Wills *11; O'Hara, Int. of Wills. 289; Smith Ex. Int., § 704; Minnich *v.* Batdorff, 5 Pa. St. 503; Ross *v.* Drake, 37 Pa. St. 375; Ballard *v.* Ballard, 13 Pick. (Mass.) 41; Porr *v.* Considine, 6 Wall. (U. S.) 458; Moore *v.* Dimond, 5 R. I. 129; Rudebaugh *v.* Rudebaugh, 72 Pa. St. 271; Lane *v.* Brown, 20 Hun (N. Y.) 382; Walters *v.* Crutcher, 15 B. Mon. (Ky.) 2; Turner *v.* Patterson, 5 Dana (Ky.) 296; Goodwin *v.* Goodwin, 48 Ind. 584; Richey *v.* Johnson, 30 Ohio St. 288; Walker *v.* Johnston, 70 N. Car. 576; Nichols *v.* Denny, 37 Miss. 60; Crosby *v.* Smith, 3 Rich. Eq. (S. Car.) 244; Hills *v.* Simonds, 125 Mass. 536.

So, as to bequests of personalty. Jones' Appeal, 5 R. I. 129; Ward *v.* Tompkins, 30 N. J. Eq. 3; Barnum *v.* Barnum, 42 Md. 251; 2 Jarman on Wills (5th ed.) *156.

Where land deeded to a person for life with remainder to his children by his wife and to their heirs and assigns forever, is sold in the lifetime of said person for the support of the children already born, the estate of the afterborn children which vests in them upon their birth, is not affected by such sale, inasmuch as the title of the other children was subject to be divested to the extent that there might be after born children. Graham *v.* Houghtalin, 30 N. J. L. 552.

In *Tennessee* the rule seems to be reversed, and in the absence of a contrary intent the class is not ascertained till the death of the life tenant. Parish *v.* Groomes, 1 Tenn. Ch. 581.

2. Smith Ex. Int., § 704; 2 Jarman on Wills (5th. ed.) 167; Ayton *v.* Ayton, 1 Cox 327; Ross *v.* Adams, 4 Dutch. (N. J.) 160; Cote *v.* Von Bronnhorst, 41 Pa. St. 243; Cooper *v.* Hepburn, 15 Gratt. (Va.) 559; Olmstead *v.* Dunn, 32 Ga. 850; Gourley *v.* Woodruff, 42 Vt. 395. "There is no doubt but that upon an ordinary limitation by way of remainder to a class, as children, grandchildren, etc., all who come *in esse* before the particular estates end, and the limitation takes effect in possession, are to be let in and take a vested estate as soon as they come *in esse*, and that they and their representatives will take as if they had been *in esse* at the testator's death. This is settled by Baldwin *v.* Carver, 1 Cowp. 309; Roe *v.* Perryn, 3 T. R. 484; Doe *v* Dorrell, 5 T. R. 518; Meredith *v.* Meredith, 10 East 303 and Right *v.* Creber, 5 Bar. & Cres. 866." Bayley, J., in Doe. d. Long *v.* Prigg, 8 B. & C. 235.

3. Smith Int. Ex. § 704; Ayton *v.* Ayton, 1 Cox 327.

"For a similar rule to that which applies to an entire property limited in remainder to one person, requiring that it should vest before that period, applies to the individual share of any property limited to a class of persons.

The application, however, of such a rule to the vesting of the individual shares, after the aggregate property has vested in some one of the class, must depend on different reasons from those above mentioned in relation to an entire property limited in remainder to one person; since there is a tenant of the freehold, and there is an uninterrupted connection between the particular estate and the remainder. The application of the rule to the vesting of the individual shares, in the given case, appears rather to be grounded upon a principle of convenience and to be analogous to those cases of personal estate bequeathed to a class of persons, in which those alone are admitted who come *in esse* before the period of distribution."

Smith Ex. Int., § 704, 705.

4. Hawkins on Wills *72; 2 Jarman on Wills (5th ed.) *160; Temer, L. J., in

regard to bequests to other classes or objects, the tendency of the decisions seems to be to confine the gift to such persons as answer the description at the death of the testator.[1]

c. REMAINDERS AFTER AN ESTATE TAIL.—A remainder limited on an estate tail, without reference to a failure of issue at any particular time, and without requiring the concurrence of any collateral contingency, is strictly and properly a vested remainder; such a remainder is distinguished from contingent remainders of the first class,[2] by the fact that though the failure of issue may not happen till a very distant period, and though it is entirely uncertain when it will happen, yet a failure at some time or other is considered sure to happen.[3] The fact that such a remainder may be barred by a common recovery or deed provided by statute in lieu thereof, merely affects it with a divesting contingency and does not affect the question of vesting.[4] But if the remainder be limited to take effect on the regular expiration of an estate tail by reason of a failure of issue at a particular time, as, for instance, at the death of the tenant in tail, it will be contingent.[5] In many States, estates tail are abolished by statute, and words which formerly created such interests now create a fee simple;[6] in some, the estate tail is converted into a

Baldwin *v.* Rogers, 3 D. M. & G. 649, 656; Balm *v.* Balm, 3 Sim. 492; Devisme *v.* Mello, 1 B. C. C. 537; Doe d. Stewart *v.* Sheffield, 13 East 526. See Shultleworth *v.* Grears, 4 My. & Cr. 35; Cort *v.* Windsor, 1 Coll. 320; *In re* Partington's Trust, 3 Gif. 378; Leake *v.* Robinson, 2 Mer. 363.

1. 2 Jarman on Wills (5th ed.), *160; Theobald on Wills, 264. 280. See also 2 Jarman on Wills (5th ed., by Randolph and Talcott), ch. 28, note 16, ch. 29, note 34.

Turner, L. J., in Baldwin *v.* Rogers, 3 D. M. & G. 649, 657, expressed the opinion that gifts to next of kin were subject to open up. Upon this point as well as upon the question how far gifts to more remote relations than those specified in text, are subject to open, the authorities do not agree. For further discussion see WILLS.

Transmissibility.—In cases falling within the rule, the interest of a member of the class, who dies before the period of distribution being vested, is, of course, transmissible. 2 Jarman on Wills (5th ed.), *157, 158, *citing* Attorney Gen'l *v.* Crispin, 1 B. C. C. 386; Devisme *v.* Mello, 1 B. C. C. 537; Middleton *v.* Messenger, 5 Ves. 136. See also Ballard *v.* Ballard, 18 Pick. (Mass.) 44.

2. See *infra*, this title, § I, 3, *a*, (1).

3. Smith Ex. Int., §§ 192–193.

4. Gray's Perpetuities, § 112.

5. Smith Ex. Int., § 194, *citing* Driver d. Edgar *v.* Edgar, Cowp. Rep. 379; Fountain *v.* Gooch, 4 Bac. Abr. (5th ed.) 262, tit. Legacies and Devises (D); also *state* Fearne's Cont. Rem. 427.

"If, therefore, land be limited to A and the heirs of his body, and if A die without leaving issue of his body living at his decease, to C in fee, the failure of issue of A may take place either on the death of A or at a subsequent time. In the proposed case, it is intended, that if the estate tail expire in consequence of there being no issue able to inherit it at A's decease, C shall have the land; but that if it expire in consequence of such issue's being alive at the decease of A, and afterwards failing, C shall not have the land. Now, during A's life it is uncertain in which of these modes the estate tail will expire; the remainder, therefore, evidently depends on a contingent determination of the preceding estate." Fearne's Cont. Remainders 5, note (d), per Butler.

6. Stimson's Am. Stat. Law, § 1313; *New York*, Rev. Stat., pt. 2, ch. 1, § 2; *Indiana*, Rev. Stat. 1881, § 2958; *Michigan*, Ann. Stat. 1882, § 5519; *Wisconsin*, Rev. Stat. 1878, §§ 2027, 2028; *Minnesota*, Gen. Stat. 1878, ch. 45, § 3; *Virginia*, Code 1873, ch. 112;

life estate in the first donee with remainder in fee to the person to whom the estate would pass at common law on his death;[1] or to the children of the first donee as tenants in common.[2] Under this legislation, it would seem that a remainder after an estate tail is void, except in those States in which a remainder may be limited after a fee, in which case it will take effect as a contingent limitation upon a fee should the first taker die without issue living at the time of his death.[3]

d. LIMITATIONS IN DEFAULT OF APPOINTMENT.—A limitation in default of appointment, is a sentence in which an estate is limited to a person, in case of the non-exercise of a power of appointment, and the effect of which is to create a vested interest, subject to be defeated by the exercise of the power.[4]

e. UNDER WHAT CIRCUMSTANCES PARTICULAR WORDS AND PHRASES WILL BE HELD TO CREATE A VESTED INTEREST.—See WILLS.

f. OF THE RULE THAT AN INTEREST WILL BE HELD TO BE VESTED RATHER THAN CONTINGENT.—See WILLS.

g. UNDER WHAT CIRCUMSTANCES A CONTINGENCY AFFECTING ONE OF A SERIES OF LIMITATIONS WILL BE HELD TO AFFECT ALL.—See WILLS.

h. CONSTRUCTION OF DIVESTING CLAUSES.—See WILLS.

§ 9; *West Virginia*, Rev. Stat. 1878, ch. 82, § 9; *North Carolina*, Code 1883, § 1325; *Kentucky*, Gen. Stat. 1873, ch. 63, art. 1, § 8; *Tennessee*, Code, 1884, § 2813; *California*, Civil Code. § 5763; *Dakota*, Civil Code, § 220; *Alabama*, Code, 1876, § 2179; *Mississippi*, Code, 1880, § 1190; *Florida*, Dig. 1881, art. 92, § 11; *Missouri*, Rev. Stat. 1879, § 3940.

In *Pennsylvania* estates tail are good if created before 1855 until docked by deed as provided by statute, if created after that date words which would create an estate tail at common law are construed under the act of Apr. 27, 1855, § 1, Laws of *Pennsylvania*, 1855, p. 368, to create a fee simple.

1. Stimson's Am. Stat. Law, 1313; *Vermont*, Rev. Law 1880, § 1916; *Illinois*, Rev. Stat., ch. 30, § 6; *Missouri*, Rev. Stat. 1879, § 3941; *Arkansas*, Dig. 1884, § 643; *Colorado*, Gen. Stat. 1883, § 203.

2. Stimson's Am. Stat. Law, § 1313; *Connecticut*, Rev. Stat. 1875, Tit. 18, ch. 6, § 3; *New Jersey*, Rev. Stat. 1877, Descent, 11; *Ohio*, Rev. Stat. 1880, § 4200; *New Mexico*, Comp. Laws, 1884, § 1423.

For futher discussion of Estates Tail see ESTATES, vol. 6, p. 879.

3. See *New York*, Rev. Stat., Pt. 2, ch. 1, Tit. 2, § 4; *Indiana*, Rev. Stat. 1881, § 2958; *Michigan*, Ann. Stat. 1882, § 5520; *California*, Civ. Code, § 5764; *Dakota*, Civ. Code, § 221; *Virginia*, Code 1873, ch. 112, § 9; *West Virginia*, Rev. Stat. 1878, ch. 82, § 9; *Kentucky*, Gen. Stat. 1873, ch. 63, Art. 1, § 8.

So in *Georgia*, where, if an estate tail would be implied, by common law rules of construction, a life estate is created in the first taker, with remainder over in fee to his children and their descendants; if none, the remainder over in fee takes effect to the beneficiaries intended by the maker of the instrument. *Georgia* Code 1882, § 2250.

Compare supra, § I, 1, *b*.

In States in which the tail is good until docked by the mode provided by statute, and there is no act providing that words creating at common law a fee tail shall be construed a fee simple, there would seem to be no reason to doubt that a remainder may be limited after an estate tail as at common law.

4. Smith Ex. Int., § 115; *In re* Kenyon (R. I.) 20 Atl. Rep. 294; Grosvenor *v.* Bowen, 15 R. I. 549; Rhodes *v.* Shaw (N. J.), 11 Atl. Rep. 116; Sandford *v.*

3. Contingent Remainders—*a.* CLASSIFICATION—(1) *Fearne's Division.*—For convenience Fearne divides remainders into four classes:

I. Where the remainder depends entirely upon a contingent determination of the preceding estate itself; as if A makes a feoffment to the use of B, till C returns from Rome, and after such return of C then to D and his heirs.

II. Where the contingency on which the remainder is to take effect, is independent of the determination of the preceding estate; as if a lease be made to A for life, remainder to B for life, but if B dies before A remainder to C for life.

III. Where the remainder is limited to take effect on an event which though sure to happen some time or other, yet may not happen till after the determination of the particular estate; as if a lease be made to J S for life and after the death of J D the lands to remain over to another in fee.

IV. Where a remainder is limited to a person not in being or not ascertained at the time when such limitation is made; as if a lease be made to one for life, remainder to the right heirs of J S who is living, or to the first son of B who has no son then born; or if an estate be limited to two for life, remainder to the survivor of them in fee.[1]

Blake, 45 N. J. Eq. 247; Williamson *v.* Holmes, 4 Rich. Eq. (S. Car.) 475; Hawley *v.* James, 5 Paige (N.Y.) 318; Scofield *v.* Olcott, 120 Ill. 362.

Under 3 *New York* Rev. St. (7th ed.), p. 2176, § 13, defining a "vested remainder" to be one where there is a person in being who would have an immediate right to the possession upon the ceasing of the precedent estate, a devise in trust to pay the income of a fund to D for life, and so much of the principal as shall be necessary for his support, the residue, after the death of D, to go to J, vests a remainder in J, which does not fail by the death of J in D's lifetime, but upon the termination of the life estate goes to J's representatives. Van Axte *v.* Fisher, 4 N. Y. Supp. 173.

So a devise to a person after the payment of debts and legacies confers an immediately vested estate. Scofield *v.* Olcott, 120 Ill. 362; Little's Appeal, 117 Pa. St. 14.

A power of appointment may be extinguished by a conveyance in which the remainder-man and the devisee of the power join. Grosvenor *v.* Bowen, 15 R. I. 549.

1. Smith Ex. Int., §§ 184-187; Fearne's Cont. Rem. 5-9; Challis' Real Prop. 98-106.

"It must be particularly observed, that, in the first class, the remainder depends entirely on a contingent determination of the preceding estate; for it has been shown that a remainder may be limited on a contingent determination of the particular estate, and yet be vested, so long as it is also capable of taking effect in possession on the certain expiration of that estate, without regard to any collateral contingency (*Compare supra*, this title, § I, 2, *a*). In the second and fourth classes of contingent remainders, the remainder may be limited on the certain expiration of such estate; but yet it is contingent in respect to the person of the grantee, or in regard to some collateral events constituting a condition precedent which must be fulfilled before the remainder would be capable of taking effect in possession or enjoyment. And though, in the third class, the event, when viewed by itself, is not contingent because it must happen some time or other, yet the remainder does not depend on the mere occurrence of that event irrespective of any particular time, but on the fact of its occurring before the expiration of the preceding estate, which is strictly a contingency. And hence all the kinds of

In regard to the first class it should be observed that B takes an estate for his own life which may be determined either by the death of B or the return of C, but it is only in the event of the latter determination that D's remainder is limited to take effect. Until C's return, D's remainder is contingent because should B's estate determine by his death before the return of C, D would not be duly qualified to take.[1] Furthermore, inasmuch

contingent remainders, even where they are limited on the certain expiration of the particular estate, do, according to the foregoing definition, strictly depend on a contingency irrespective of their own duration. The several kinds may all be combined in the same limitation, as in the case of a limitation to A, till B returns from Rome, and after the return of B and C from Rome, and the death of D, to the sons of A, in tail male, who shall first or alone attain the age of twenty-one years." Smith Ex. Int. § 188–191.

1. Challis' Real Prop. 99; Fearne's Cont. Rem. 5, and note (1.) by Butler.

Preston severely criticises Fearne's first class of contingent remainders, on the ground that the contingency which affects the remainder consists in the fact that C may never return, and not in the fact that the particular estate may determine before that event. "Should the possession fall, as it may before the event shall arise (viz., C's return), the donee of the remainder would not be entitled to the possession immediately. Therefore, and because the rise of that event is uncertain, and may not happen, the remainder limited to take effect on that event, must necessarily be contingent. It is not the event which is to determine the preceding estate, but the event which is to give effect to the remainder which distinguishes a vested remainder from one which is contingent. Though the event on which the preceding estate is to determine, be the same event as that on which the remainder is to commence, still the remainder is not contingent. because the preceding estate is to determine on a contingency but because the remainder is to commence on that event." 1 Prest. Est., 71.

This position seems to be sustained by the principle that a remainder limited to a person *in esse* and ascertained, to take effect by words of express limitation, on the determination of the preceding estate, is vested, 1 Prest. Est. 70, as well as by the fact that Willes, C. J., in Parkhurst *v.* Smith, Willes Rep. 327, expressly stated that there were but two sorts of contingent remainders: (1) where the person to whom the remainder was limited was not *in esse*, (2) where the commencement of the remainder depended upon some matter collateral to the determination of the particular estate, thereby omitting Fearne's first class, and by the further fact that that case was clearly decided without regard to the existence of such a class. On the other hand Smith (Ex. Int. § 258) sustains the accuracy of Fearne's classification with great ability even against the authority of the House of Lords. The truth seems to be that D's remainder in the above illustration is subject to two contingencies: (1) that C return, (2) that he return in the lifetime of B. In other words, not only is it uncertain whether the event upon which the remainder depends will determine the preceding estate, but whether that event will ever happen, and in the existence of this double contingency it differs from remainders of the other classes. It therefore seems rather captious to treat the two distinct contingencies as identical. The controversy is perhaps not of much practical interest since the classification is so firmly imbedded in the literature of the profession that it cannot be ignored.

Remainders of First Class Distinguished from Conditional Limitations.—Remainders of this class differ from conditional limitations after a life estate to which they bear a superficial resemblance, in that the former are limited to commence where the first estate is, by the very nature and extent of its original limitation, to expire or determine; whereas the latter are limited so as to be independent of the measure or extent originally given to the first estate, and to take effect in possession, upon an event which may happen before the regular determination, to which that first estate is liable from the nature of its original

limitation, and so as to rescind it. Fearne's Cont. Rem. 14.

"Thus, if I limit an estate to the use of A for life, or to the use of A indefinitely, provided that when C returns from Rome it shall thenceforth immediately be to the use of B in fee; here the first estate is an estate for the life of A (not an estate limited only till C's return, as in the former cases), the remnant therefore, of the whole fee in this case is what remains expectant on the determination of A's life estate, by such events as a life estate is liable to be determined by; and, therefore, when after such a limitation to A, I limit the use to B from C's return to Rome, and so take up and make such new estate to commence and take effect in possession, not from any regular determination of the estate before limited to A (his estate being for life, and not merely until C's return from Rome, as in the former cases), but from an event which may happen sooner, it is evident this limitation to the use of B is not confined to the remnant of the estate expectant on the particular estate before given to A, but may eventually interfere with, and in part repeal and defeat that first estate, instead of awaiting its regular expiration or determination." Fearne's Cont. Rem. 14, 15.

In this connection it may be well to observe, "that the original limitation of an estate may be said to be absolute, when nothing is incorporated into it, which may operate to determine it before the period, at which, without such an incorporation, it would have expired. Thus, limitations to A for his own or another's life, or to A and the heirs of his body, standing singly, are independent and absolute limitations; but limitations to A for his life, if he shall so long continue single, or to A and the heirs of his body, if he and they shall so long continue lords of the manor of Dale, are, in their original limitations said to be determinable estates, as by the original limitation, A's supposed estate for life will expire on his marriage; and his supposed estate tail will expire on his or his issues ceasing to be lords of the manor of Dale.

Still the determining qualities introduced by these expressions into the original limitations are considered not to be extrinsic or collateral to those limitations, but to be incorporated into and to make a part of them, and to form with them, their original measure. On this account, whether the determining event does not happen, so that the first estate endures to the period at which, if no such determining quality had been introduced into the limitation, that estate would have expired, or the determining event does happen so that the first estate ceases before the period at which, without the introduction of each determining quality, it would have expired, still it is equally supposed to have filled its original measure, and to expire at a term originally fixed for its expiration. On this ground in the cases proposed, whether A's supposed life estate expire by his death or marriage, or his supposed estate tail expire by failure of issue of his body or his or their ceasing to be lords of the manor of Dale, the estate is considered in law to expire equally at the period fixed for its term by the original limitation.

Thus the second limitation in the two last proposed cases, has all the properties of a remainder, and consequently is a remainder, and not a conditional limitation. But if the lands had been limited to A for life with a proviso, that if he married, his estate for life should cease, or if the lands had been limited to A in tail with a proviso that on A or his issue's ceasing to be lords of the manor of Dale, A's estate tail should cease, the case would be wholly different, the events for the cessor of the estates not being inserted in, and therefore making no part of the original limitations; but being introduced subsequently into, and therefore being wholly distinct and separate from them. It is this different manner of framing the limitations which gives them their different nature and effect. Perhaps the difference is artificial, and such as common sense alone would not teach; but in legal construction and in several legal consequences of great importance to the interest of the parties claiming under such limitations, the distinction is established. On this ground, between conditional limitations and the first class of contingent remainders mentioned by Mr. Fearne, there is the same difference as between those limitations and other contingent remainders." Fearne's Cont. Rem. p. 10, note (*h*) by Butler.

Conditional limitations are void, if inserted in a common law conveyance; but may be sustained in a conveyance by way of use or devise, in which case the interest created is commonly called a shifting use or executory devise.

as the event upon which the remainder is to vest will also determine the particular estate, the remainder cannot vest during the continuance of the particular estate, but only *eo instanti* it determines. Contingent remainders of the third class differ from those of the second in that the uncertain event is sure to happen, and hence the remainder is contingent only by reason of the rule of law which requires a remainder to vest during the continuance of the particular estate or *eo instanti* it determines, whereas in the second class the happening of the uncertain event is made a condition precedent to the vesting.[1] In the fourth class the contingency consists in the uncertainty whether the remainder-man will be ascertained or come into being during the continuance of the particular estate.[2]

The merits of Fearne's classification have been questioned. Cruise, Smith and Challis regard it as accurate. Kent, Woodeson, Cornish and Preston seem to be of opinion that Blackstone's division of remainders into those limited to take effect to a dubious and uncertain person, or upon a dubious and uncertain event, is all that can be desired.[3]

Whatever may be its merits, Fearne's classification has become a part of the literature of the profession, and an understanding of it is essential to a mastery of the subject.

(2) *Exceptions*—(a) **Limitations to Trustees to Preserve Contingent Remainders.**—Limitations to trustees to preserve contingent remainders bear a superficial resemblance to contingent remainders of the first class. In cases of this description the estate is conveyed to the use of A for life; and after the determination of that estate by forfeiture or otherwise in his lifetime, to the use of B and his heirs, during the life of A in trust for A and to preserve the contingent remainders; and after the decease of A to the use of the first and other sons of A successively in tail male. Here the preceding estate may determine in either of two ways: A's forfeiture of his life estate or A's decease.[4] The estate of

See *infra*, this title, § II, 2.

1. Challis' Real Prop. 101.

2. Challis' Real Prop. 103, 104.

Thus in the illustration of a lease to A for life, and after his decease to the right heirs of J S (a person in full life), it is clear that the heirs of J S cannot be ascertained till after his death under the principle *nemo est heres viventis*. "It might at first be thought that the remainder is vested in the heir presumptive or heir apparent; but as the heir is, by the limitation, to take as a purchaser, and as the purchaser is to be the person who in fact comes within the description of heir, it is clear that the remainder cannot vest in the heir presumptive or apparent, so long as his heirship remains only presumptive or apparent, because such a person may not, in fact, ever be the true heir at all, and therefore may never be qualified, under the terms of the limitation, to take the estate at all." Challis' Real Prop. 103, 104,

3. 4 Kent Comm. *208 n. (b).

4. Fearne's Cont. Rem. 5, note (d) per Butler.

"Limitations in trust, to preserve contingent remainders, were not executed by the Statute of Uses, the legal estate in such cases remaining in the trustees. (Fletcher on the Estates of Trustees, 24, 114; Willis on Trustees, 37, 149; Lewin on Trusts and Trustees, 2, 4, 7, 21, 102–3.) These limitations, as the phrase imports, were designed to preserve the remainders, while con-

tingent, from being defeated by the destruction or determination, designed or casual, of the particular estate on which they depend, a hazard to which interests of this description are, in various ways, greatly exposed. (2 Bl. Com. 171–2; Burton on Real Prop., 246.) The usual form of these settlements, where they prevail, is to convey the estate for life directly to the person who is to hold and enjoy it for that period, with remainder, for the same time, to trustees and their heirs, in trust to preserve the contingent limitations, and followed by such remainders over as might be declared in the deed or devise by which the settlement was made. (Bl. Com. 171–2; Burton on Real Prop., 246; 2 Cruise's Dig. 273, ch. 7; 4 Kent 256, 5th ed.) In this form of settlement, the tenant for life has a legal estate, a remainder of the same character and for the same period being vested in the trustees. The contingent limitations are thus made to depend, in the first instance, upon the estate of the tenant for life, and secondly upon that of the trustees; for if his estate should determine otherwise than by his death, the estate of the trustees would *eo instanti* take effect, and as a particular estate in possession would support such remainders as still depended in contingency. The contingent estates are thus placed beyond the power of the tenant for life, for although he may at any time destroy his own estate, he will not thereby defeat the contingent limitations; for instead of depending, as primarily, upon the particular estate of the tenant for life, they thus come to depend upon the legal freehold which at once takes effect, for the same period, in the trustees.

"But this is not the only form in which these settlements are made, for sometimes the estate is conveyed directly to the trustees and their heirs, in trust for the person who is to have its beneficial use and enjoyment for his life, and upon a further trust to preserve the contingent limitations, and with remainders over. These different forms are thus stated and illustrated by Lord Chancellor Eldon, in the case of Moody *v.* Walters, 16 Ves. 294.

"About the period of 1693, when this settlement was made, the practice of limiting an estate to trustees to preserve contingent remainders was well known. It had prevailed long before; and in the mode of that provision the estate was limited to them in various ways. If the father was tenant for life, then the mode was a limitation from and after the determination of that estate, by forfeiture or otherwise to trustees and their heirs during his life, upon trust to preserve contingent remainders, but nevertheless to permit him to receive the rents and profits; making them trustees during his life of the freehold, if by forfeiture or other determination his estate ceased to exist: that arrangement making him first tenant for life, then the trustees tenants for his life, with a legal remainder to the first and other sons. Another mode is by limiting the legal estate to trustees for the life of the father, in trust for him; with a legal remainder to his first and other sons; and then, as the legal and equitable estates could not unite, he and his son could not suffer a recovery.' In the mode last mentioned by Lord Eldon, the beneficial owner for life has but an equitable interest, the legal estate for his life being vested in the trustees." Beardsley, J., in Vandenheyden *v.* Crandall, 2 Den. (N. Y.) 9, 16, 17.

Cases in Which the First Estate Consists of a Term of Years.—"When the idea of limiting an estate of this kind to trustees to preserve contingent remainders had become an established device of conveyancees, a further development, or modification, of the same idea was introduced. In lieu of an estate for life to the person who was intended to take the first beneficial estate, a term of years was limited to him determinable upon the dropping of his own life, followed by an estate to the trustees in the usual form to preserve contingent remainders. This was the form of the limitations of the settlement in the above-cited case of Dormer *v.* Parkhurst, 3 Atk. 135; 6 Bro. P. C. 351. In such cases the estate of the trustees, being *pur autre vie*, was of freehold; and since it was a vested estate, the actual seisin, during the continuance of the term of years, was in the trustees. The object of the limitation to the trustees was not, strictly speaking, to prevent the tenant of the precedent estate from destroying the contingent remainders, which he could not effectually have done, since he had only a term of years; but its object was, having first deprived the tenant of the precedent

the trustees is to take effect in the first event, and is not to take effect in the second, and may well seem to depend upon the contingent determination of the preceding estate. It has, however, been definitely settled that under such a limitation the remainder to the trustees is vested.[1]

estate of all power of destruction, to provide a sufficient estate of freehold to support the contingent remainders. In other words, the supporting estate having been taken away from the tenant for life, by turning him into a tenant for years, it became necessary to vest the supporting estate in somebody else; which was effected by vesting it in the trustees. The only method by which the tenant of a precedent estate for years could have attempted to effect the contingent remainders, was by making a tortious feoffment; but by this means he would have gained nothing, for the right of entry of the trustees would have preserved the contingent remainders until the trustees could revest their freehold by making an actual entry upon the feoffee, so that the tenant of the precedent estate would have incurred a forfeiture to no purpose." Challis' Real Prop., 117, 118.

1. Smith J. Dormer *v.* Packhurst or Parkhurst, commonly *cited* as Dormer *v.* Parkhurst, or Dormer *v.* Fortescue, 3 Atk. 135; 6 Bro. P. C. 351; Willes 327; 18 Vin. Abr. 413, pl. 8.

This decision was approved by Fearne, Cont. Rem. 221; disapproved by Smith, see Smith's Ex. Int., § 258; while Butler expresses no opinion upon its merits. Fearne's Cont. Rem. p. 5, note (d).

Mr. Challis reviews the controversy in these words: "It is conceived that, in this controversy, each side is partly in the right and partly in the wrong. The truth seems to be, that the definition of the first class of contingent remainders, as given by Fearne, is somewhat incomplete; and that by reason of this incompleteness, it contains within its terms the estate of trustees to preserve contingent remainders; and that in this sense and to this extent, those who have contended that the estate in question is a contingent remainder, are right, but that the definition admits of being rectified so as to exclude this estate, without at the same time excluding any other estate which it was designed to include, and that when examined by the proper tests for distinguishing vested estates in general from contingent estates in general, the estate of the trustee seems much more properly to come within the conception of a vested estate than of a contingent estate. This is equivalent to saying that the decision in Dormer *v.* Parkhurst (3 Atk. 135), seems to be substantially right in principle.

The estate of the trustees does seem to come within the words (of Fearne's definition as stated in the text) if they are taken strictly. It is the fact that in this case 'the remainder depends entirely upon a contingent determination of the preceding estate itself;' and that while the precedent estate is capable of being determined in several ways, the estate of the trustees is so limited as to take effect only in case the determination shall take place in some of those ways. But the examples given by Fearne show his meaning. In those examples the contingent remainder is capable of being destroyed, if the precedent estate should determine in what may be called the wrong way; and this quality of contingent remainders supplied the principle motive which induced him to write his treatise. This distinguishing characteristic is not possessed by the estate of the trustees, because if the precedent estate should determine in the wrong way, that is by the death of the tenant for life, the estate of the trustee will not be destroyed, but will simultaneously determine by its own natural expiration. Nothing is more evident than that Fearne's treatise was not written to illustrate the nature of estates of this description; and if by inadvertence he has included any of them in his definition, the most reasonable course seems to be, to amend the definition so as to exclude these extraneous specimens, and not to take advantage of the words of the definition in order to include within it something to which it was not meant to apply.

The estate of the trustees is such that it either must actually take effect in possession or else must determine by natural expiration *eo instanti* with the determination of the precedent estate.

(b) **Devise to Widow for Life, and, in Case She Marry, to A.**—Under a devise to testator's "wife for her life, if she shall so long continue his widow, and, in case she marry, to A in fee," A takes a vested remainder which takes effect in possession on the widow's death or second marriage, although the words of the limitation, strictly construed, would seem to create a contingent remainder of the first class.[1]

But no words could be more appropriate to describe a vested estate. Every vested estate which is capable of a natural expiration, may, by possibility, fail to become an estate in possession, by reason of its determination during the continuance of, or *eo instanti* with the precedent estate. The peculiar feature of contingent remainders, and the only feature which makes it necessary to bestow upon them special consideration, is their liability to fail to become estates in possession by reason of something else than their own natural expiration.

It accordingly seems to be expedient that the following proviso should be added to the definition above given of the first class of contingent remainders: Provided always that the precedent estate is capable of determination in at least one way, which will neither vest the remainder nor cause it to determine by its own natural expiration." Challis' Real Prop. 116, 117.

1. Smith on Ex. Int., § 260; Luxford *v.* Cheeke, 3 Lev. 125; Raym. 427; Gordon *v.* Adolphus, 3 P. C. (Toml. ed.) 306. See Farmer's Bank *v.* Hoof, 4 Cranch (C. C.) 323; Bates *v.* Webb, 8 Mass. 458; Gibson *v.* Land, 27 Ala. 117.

"Apparently, in this case, there is ground to contend that A's remainder is contingent, as the estate of the wife may end in one of two ways, her death or her marriage, and the remainder to A is expressed to take effect only on her marriage; but the courts have determined that it is merely an inaccuracy of expression, and that the intention of the testator is that A shall take in either event. They have therefore decided that A shall take equally on the second marriage of the wife, and on her death without being married a second time."

Fearne's Cont. Rem. 7, note by Butler. "And this interpretation is clearly just. In wills the intention, so far as it is consistent with the rules of law, ought to be carried into effect; and the testator certainly intended that A should take in either event, because it is impossible to discover any reason why A should be the object of the testator's bounty, in case the particular estate should determine by the marriage of the tenant for life, if he were to have nothing, in case it determined by her decease; since her marriage could be a ground neither for the testator's disliking and disinheriting the heir at law, nor for his desiring to benefit A; and, therefore, no reason can be drawn from the difference in the events themselves why A should take in one event more than in another." Smith's Ex. Int., § 260.

Analogous Cases.—"But a remainder which is expressly to take effect on a contingent determination of the preceding estate, will not be allowed to take effect on the certain expiration of the preceding estate, unless it is morally certain that such was the intention of the testator." Smith Ex. Int., § 261.

Thus where the devise was to A for life, remainder to his first and other sons in tail, on condition that he and his issue male should assume a particular name; and in case he or they refused, then that devise to be void; and, in such case, the testator devised the lands over. A survived the testator, complied with the condition, and then died without issue; and it was held in K. B., on a case from chancery, and ultimately in the House of Lords that the limitation over did not arise. In this case the contingent determination of the estate—namely, by the non-assumption of the name—was so improbable that the existence of an express limitation over in that event could afford but a slight ground for supposing that the person to whom it was made was also intended to take on the certain expiration of the estate by failure of issue. Amhurst *v.* Donnelly, 8 Vin. Ab. 221, pl. 21, *affirmed* in Dom. Proc., 5 B. P. C. (Toml. ed.) 254.

(c) **Limitation to A for Ninety-nine Years, if He Shall so Long Live, and After His Decease to B in Fee.**—A limitation to A for a term of years, if he shall so long live, and, after his decease, to B in fee, gives B, if *in esse*, a vested remainder, if the term be so long as to make it morally certain that A will die before it expires. In such case the limitation to B, while in form a contingent remainder of the third class, dependent upon A's dying within the term, is regarded as creating an estate to A for life, with a vested remainder to B. If, on the other hand, the term be only for twenty-one years, or any period so short as to make it uncertain whether A will not survive it, the remainder is contingent and void, because the particular estate is only a term of years.[1]

(d) **Limitation to the Heirs as Personæ Designatæ.**—Where it appears from the context that in the limitation of a remainder to the heir of a living person, the testator uses the word heir to denote the individual who at the time of making the will is the heir apparent or heir presumptive of a particular person,[2] or where the same persons who are designated as "heirs" are in another sentence referred to as sons, daughters, or children, the testator having sons, daughters or children at the time, or other expressions are added which show that the testator used the word heirs, not in its technical sense, but as a synonym for the first and other sons, to take successive remainders in tail, or for the children to take as joint tenants or tenants in common, the maxim *nemo est*

1. Fearne's Cont. Rem. 20–22; 2 Washb. Real Prop. (5th ed.) 615; 1 Prest. Est. 80; 2 Cruise's Dig. 206; 4 Kent's Com. *209; Challis' Real Prop., §§ 101, 102; Countess of Carlie's Case, *cited* in Littleton's Rep. 370; Hale, C. J., in Weale *v.* Lower Pollexf. 67; Napper *v.* Sanders, Hutt. 118. "We have seen that the third class of contingent remainders mentioned by Mr. Fearne, comprises those which are contingent, from their depending on an event certain of happening at some time, but uncertain of happening before the determination of the preceding estate. See *supra*, this title, § I, 3, *a* (1).

"Every case in which land is limited to a person for a term of years if he shall so long live, with a remainder over on his decease, is evidently of this description, for the event on which the remainder depends is the decease of the party; and that event, though certain of happening at some time, may not happen till after the determination of the preceding estate, as the term which constitutes the preceding estate may expire by the effluxion of its period in the life of the party. Literally speaking, therefore, all such remainders apparently fall within those of the third class. But in the common course of things, a term of years may be of such long duration as to make it beyond calculation that the party should outlive it; in all such cases limiting a remainder to commence after the decease of the party, is virtually limiting it to commence after the determination of the term; this being admitted, the only circumstance supposed to make the contingency is put beyond calculation, and the remainder must necessarily be considered to be vested." Fearne's Cont. Rem., p. 20, note (i), per Butler. No exact rule as to the length of the term can be given; the question is simply whether, on the scale of chances of human life, the termor can be calculated to outlive the term.

2. Smith's Ex. Int., § 388; Fearne's Cont. Rem. 209; Challis' Real Prop. *104; Burchett *v.* Dudant, 2 Vent. 311; Carth. 154; *sub nomine* James *v.* Richardson, 2 Lev. 232; Darbson *v.* Beaumont, 1 P. Wms. 229; Goodright *v.* White, 2 W. Bl. 1010. *Compare* Bennett *v.* Morris, 5 Rawle (Pa.) 9.

hæres viventis is inapplicable, and the interests so limited, instead of being contingent remainders of the fourth class, vest in the persons designated.[1]

(e) **Limitation to Right Heir of Grantor.**—At common law, under an ultimate limitation to the right heirs of the grantor, the heirs took by descent under the original reversion, and not by purchase as remainder-men under the limitation.[2]

(f) **Remainder to the Heirs or Heirs of the Body of Tenant for Life.**—See SHELLY'S CASE (RULE IN).

(g) **Devise to A and His Issue, in Cases in Which the Word Issue Is Construed as a Word of Limitation.**—See ISSUE, vol. 11, p. 868;[3] SHELLY'S CASE (RULE IN).

(h) **Remainders Under the Cy Pres Doctrine Where Real Estate Is Devised to Children of an Unborn Child**—(See also WILLS).—"Where a testator devises an estate tail to a grandchild, by a child not yet born at the testator's death, to take by purchase, and he appears to have intended that all the issue of such unborn child should take so far at least as the rules of descent will permit, the courts, though obliged to sacrifice his minor intent that the grandchild by such unborn child should take by purchase, because it is contrary to the Rule against Perpetuities, will nevertheless, under the doctrine of approximation, or, as it is commonly called, the *cy pres* doctrine, give effect to his paramount intent, that all the issue of the unborn child should take, by giving an estate tail to such unborn child, so as to enable the grandchild to take derivatively through

1. Smith Ex. Int., § 387.

"The word heir in its strict technical sense, denotes the person on whom, at the ancestor's decease, the law casts the inheritance. As, during the life of the ancestor, the heir must be considered as a person, either not in being or not ascertained, it should seem to follow that a limitation to the heirs of a person in existence, if it have the other qualities of a remainder, must be a contingent remainder of that description which Mr. Fearne includes in his fourth class. But sometimes a testator who devises to the heirs of a person in existence shows, by other expressions in the will, that he uses the word 'heirs' in a popular sense to denote the individual who, at the time of his will, is the apparent or presumptive heir of a particular person. When such an intention is disclosed, the law will construe it in the sense intended by the testator; and the words being thus referred to a person both in being and ascertained, the limitation must necessarily be taken from the class of contingent remainders, and confer a vested remainder on the individual designated." Fearne on Cont. Rem. 209, note (a), by Butler.

Thus a remainder "to the heirs male of the body of B now living," vests in B's son C living at the death of the testator, since the words now living make the limitation a sufficient designation of the person to take as remainder-man. Burchett *v.* Durdant, 2 Vent. 311. See Bowers *v.* Porter, 4 Pick. (Mass.) 208; Putnam *v.* Story, 132 Mass. 205; Haverstick's Appeal, 103 Pa. St. 394; Hinton *v.* Milburn, 23 W. Va. 166.

2. Smith's Ex. Int., § 390; 2 Wash. Real Prop. *242.

But now by Stat. 3 & 4 Wm. IV, ch. 106, § 3, it is expressly enacted that "when any law shall have been limited by any assurance executed after the 31st day of December, 1833, to the person or to the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate or part thereof." Smith's Ex. Int., § 391.

3. Vol. 11, p. 876.

such unborn child, though it cannot be allowed to take in the particular mode pointed out by the testator."[1]

(i) **Remainders, Under the Cy Pres Doctrine in Case of an Intended Perpetual Succession of Life Estates**—(See also WILLS).—"When a testator attempts to create a perpetual succession of life estates, by way of executory trust in favor of unborn children, and more remote descendants, the children when born will take estates tail under the *cy pres* doctrine or doctrine of approximation, in order that the descendants of such unborn children may take derivatively through such children, as they cannot take independently by purchase, on account of the rule against perpetuities."[2] "Where a testator attempts to create a perpetual succession of life estates in favor of children *in esse* and more remote descendants, the children will take estates tail under the *cy pres* doctrine, in order to effectuate the apparent primary or paramount intent of admitting all the more remote descendants to take derivatively through the children, as those among them who were unborn children of persons not *in esse*, could not take independently by purchase, on account of the Rule against Perpetuities."[3] "But, where there is a single intent to create a limited number only of life estates in succession, not warranted by the rule against perpetuities, an estate tail will not be given to any of the persons intended to take such life estates."[4]

(j) **Remainders, Under the Cy Pres Doctrine, Where the Word Son or Child, in a Devise of an Estate in Remainder, Is Construed as a Word of Limitation.**—"Where a testator devises in remainder to the unborn child of a prior taker, even though it be by the designation of eldest son, but he appears to have intended that all the issue of the prior taker should inherit, so far as the rules of descent will permit, in such case, to give effect to the paramount intent of admitting all the issue, the prior taker will have an estate tail, and the description eldest son, child, etc., will not be regarded as a *designatio personæ*, as pointing out a particular individual who is to take by way of contingent remainder, but as a *nomen collectivum*, and a word of limitation."[5]

(3) *Effect of Legislation.*—In many States, statutes exist which

1. Smith's Ex. Int., § 534, *citing* Butler's note, Co. Litt. 271*b*, (1) 7, 2; Fearne's Cont. Rem. 201, note (g), per Butler; Nichol *v.* Nichol, 2 W. Bl. 1159. See Pitt *v.* Jackson, 2 B. C. C. 51; Parfilt *v.* Hembee, L. R., 4 Eq. 443; Forsbrook *v.* Forsbrook, L. R., 3 Ch. D. 93; Morse *v.* Merriman, 8 Cush. (Mass.) 11; Allyn *v.* Mather, 9 Conn. 114; Daebler's Appeal, 64 Pa. St. 15. The result of this construction is that in States in which estates tail have been converted into fees-simple, the first unborn person will take a fee, although the estate was expressly given him only for life. Jackson *v.* Brown, 13 Wend. (N. Y.) 437. *Compare infra*, this title, § I, 3, *d*, and note on *cy pres* doctrine.

2. Smith Ex. Int., § 536, *citing* Humberston *v.* Humberston, P. W. 332; stated in Fearne's Cont. Rem. 503.

3. Smith Ex. Int., § 536*a*, *citing* Wollen *v.* Andrewes, 2 Bing. 126; Brook *v.* Turner, 2 Bing. N. Cas. 422.

4. Smith Ex. Int., § 536*b*, *citing* Seaward *v.* Willock, 5 East 598.

5. Smith Ex. Int., § 537, *citing* Doe d. Garrod *v.* Garrod, 2 B & A. 87; Doe d. Jones *v.* Davies, 4 B. & A. 43.

in effect protect the remainder from being defeated by the determination of the particular estate before the contingency happens upon which it depends, and in some expressly provide that it shall take effect at any time after such determination.[1] Under this legislation a remainder falling under Fearne's third class of contingent remainders would seem to be vested, for since in that class the event upon which the remainder is to take effect is sure to happen, and the contingency consists wholly in the chance of its happening after the determination of the particular estate, so that the remainder may fail for want of support, the very ground of the contingency is removed by the statute. Thus, at common law a limitation to J S for life, and after the death of J D to B in fee, gave B a remainder contingent on the death of J D before J S, because if J S died before J D, B would not be qualified to take, and the remainder would fail for want of support. But under the above legislation it seems that B would take equally in either case. This legislation, however, would not affect the contingent character of remainders of the first class, as if land be limited to use of B till C returns from Rome, and after such return of C to D in fee, for while such remainder is said to depend "entirely on a contingent determination of the preceding estate itself,"[2] it really, as already pointed out,[3] depends upon two contingencies, (1) the return of C, and (2) his return in the lifetime of B, and inasmuch as the first is an event which may never happen, and is entirely independent of the duration of the particular estate, the remainder is still affected with a contingency irrespective of its own duration.[4]

b. CROSS-REMAINDERS.—Cross-remainders may be defined as remainders limited after particular estates to two or more persons, in several farms or parcels of land, or in several undivided shares in the same farm or parcel of land in such way that upon the determination of the particular estates in any of several those farms, parcels of land or undivided shares, they remain over to the other grantees, and the reversioner or ulterior remainder-man is not let in till the determination of all the particular estates.[5]

1. See *infra*, this title, § I, 3, *g*, (2).
2. Fearne's Cont. Rem. 4.
3. See *supra*, this title, § I, 3, *a*, (1), note.
4. See *supra*, this title, § I, 2, *a*.
5. "Remainders of this sort have this denomination when several farms or parcels of land, or several parts of the same farm or parcel of land, are conveyed to several persons, and these several persons are, by the form of the limitation, to have the farm, parcel or part of each other when their respective estates in their respective farms, or parts shall determine." 1 Prest. Est. *94.

The definition given by most of the text writers is as follows: "When lands are given in undivided shares to two or more, for particular estates, so as that upon the determination of the particular estate in any of those shares they remain over to the other grantees, and the reversioner or remainder-man is not let in till the determination of all the particular estates, the grantees take their original shares as tenants in common, and the remainders limited among them on the failure of the particular estates are known by the appellation of cross-remainders." Co. Litt. 195 *f*, note (1) per Butler; 4 Cruise Dig. Real

Prop. (4th ed.), 298. See 2 Wash. Real Prop. (5th ed.), 604; Watk. Conv. 189; Coventry's note; 1 Wms. Saund 172 note to Cook *v.* Gerrard.

This definition seems defective in that it implies that the tenants of the particular estates must hold in common. See text.

"Cross-remainders must be defined, first, as between two persons, and, secondly, as between three or more persons; for no definition of cross-remainders, as between two persons, would be sufficiently extensive to show the nature of these remainders as between three or more persons.

Cross-remainders, between two persons, are a remainder limited to each of two persons, in lands, or the parts of lands, previously limited to the other of them.

Cross-remainders, as between three or more persons, are several remainder's limited to each of three or more persons, in lands, or the parts of lands, previously limited to each of them, and operating by way of successive accumulated remainders on the several aliquot parts, which each takes in the shares of the others, so that, in the first place, or by way of immediate estate, each person is to have a parcel of land, or a part of a parcel of land; and the others, as tenants in common, are to have an estate in remainder in the lands or part, of this person; and the persons taking each part under each successive gift of remainders, are to have remainders, in like manner, in the part limited to each other, till every subdivided part is divisible between two persons only; and then each of these persons is to have a remainder in the share of the other; so that, ultimately, by small undivided parts, the entirety of the lands may center in one person. These remainders place the parties in the like situation as coparceners, inheritable to each other; observe this difference, however; as many parties as there are according to the number of the persons taking under cross-remainders, so many successive interests, either vested or contingent, there will be in every part. The consequence is, that if A and B are tenants in common, with cross-remainders, each of them has an estate in the part of the other; and in each part there are two estates; one limited to the person taking originally, the other to the person taking by way of remainder.

So if three persons are tenants in common, with cross-remainders between them, there will be three distinct and successive estates, in different degrees, in each part; and the second estate, being the first remainder in that part, will limit that part between those two persons who do not take any interest in the original share of that part; and these two persons will take as tenants in common, and a remainder be limited to each of them, in the share of the other. When more than three persons are tenants in common, with cross remainders between them, there will be an increased number of remainders; adding one remote or successive remainder, in every part, and in every degree, for each distinct person; and every remainder, in each part, will exclude the person who takes under the limitation, or gift of of any prior estate in that part; or in the original share of which this particular part is a subdivided portion.

The subdivision is originally by parts, so that each person taking under cross-remainders has an estate in each part; and the owner of every other part takes a remainder in the share or respective shares of the other or others of the donees.

The right of possession under cross-remainders, may be assimilated to the order of succession between coparceners. In the mode in which they become entitled to the possession, and the proportions in which they take, there is a very near and striking analogy. In point of estate and interest there is not any resemblance whatever. Every person whose title is to commence by descent, has a mere expectancy, right or chance of succession, depending on the death of his ancestor and subject to the power of alienation by that ancestor. Under cross-remainders, each person takes an estate in his own right, so that he has an estate in in every part of the land at the same time by parts. In some parts he may have an estate in possession; in other parts, one estate, or several estates, by way of more remote remainder, and ultimately, he may become entitled to the entirety in possession. But then his right will be by different degrees of possession, and under different estates in every part.

Generally speaking, the entirety is in the first place, divided into equal shares, corresponding to the number of persons who are to take these shares,

The particular estates upon which the cross-remainders depend may be limited to take effect in possession immediately or to await the determination of a prior estate, but in either case the term cross-remainder applies only to the estates which are to take place in the share or parcel of land of each person on the determination of his estate in that share or parcel, and not to the estates which the parties take in the original shares under the first limitation to them.[1] Though usual, it is not necessary, in order to create cross-remainders, that the estates should originally have been granted to the several persons in common. The term seems equally applicable where the particular estates are held in severalty as where one lot is granted to A and another to B with remainder over of A's lot to B on failure of issue of A, and B's lot to A on failure of issue of B.[2] In a deed, whether operating as a conveyance at common law or under the Statute

and on the determination of the estate of each person the others are to take the part of that person between them as tenants in common, by way of remainder. Thus the lands are, as between these remainder-men, divided into one share less than the original shares of all the parties.

On the determination of the estate of each remainder-man, the part of that person is to be divided between the other donees, by way of remainder, so that the shares in that part under this remainder will be reduced in number; and so on, as to the parts of each person, under each successive remainder, till the entirety of each original share shall, by parts, have been limited to each person, and consequently, by parts, the entirety may vest in possession in one individual.

Cross-remainders, as between four persons, do, with a view to each part, become, in the first line of remainders, as cross-remainders between three persons, and in the next line, as cross-remainders between two persons.

When the remainders are limited as between more than four persons, then on each successive limitation of remainders in each part, the remainder in that part will experience a similar reduction; and on every more remote and successive line, the remainders in each part must be considered as crossed between one person less than the number of persons in the former line of remainders in that part.

The reason of this reduction is, that each successive remainder is introduced in place of the estate of another person; and is a provision for the determination of that estate, and making it necessary that the estate of that person should be determined before the next remainder in that part should, as far as respects the possession, come into its place." 1 Prest. Est. *95–*100.

As between two persons, one of them has at first but a half, and eventually he may have the whole: as between three, one of them has at first one third part only, on the death of one of the other grantees he will have a moiety or half, and on the death of the other the whole: as between four, one of them has at first but a fourth; on the falling in of the first life, he may have a third; of the second, a half; of the third, the whole. 1 Prest. Est. *108.

"The obvious design and intention of such a limitation is, that upon the share of one the takers failing for want of issue, instead of its reverting to the original owner, or going at once to the final remainder-man, it shall go to the tenant or tenants of the other parts of the estate, who will hold it in connection with the parts already in their possession as they before had holden their own parts. And as this is a reciprocal right, operating crosswise, and only depending upon whose part first fails by a failure of issue, the rights to take such part upon such a failure is regarded as a remainder, and is treated accordingly." 2 Wash. Real Prop. *234.

1. 1 Prest. Est. 95.

2. 2 Wash. Real Prop. *234; 1 Prest. Est. 94–96; 4 Kent Com. 201.

of Uses, cross-remainders can only be created by words of express limitation;[1] in a will,[2] or under directions for a settlement creating in equity an executory trust, they may be raised by implication,[3] and it seems that in the case of an executory trust, whether arising under marriage articles or created by devise, it requires rather less to raise such remainders by implication than in the case of a will.[4] In framing limitations of cross-remainders two things should

1. Note to Cook *v.* Gerrard, 1 Wms. Saunders (5th ed.) 186; 4 Cruise Dig. (4th ed.) 298; Cole *v.* Levin, 1 Vent. 224; Doe *v.* Dorvell, 5 T. R. 578; Edwards *v.* Alliston, 4 Russ. 78; Meyrick *v.* Whishaw, 2 B. & A. 810; Levin *v.* Wealtherall, 1 B. & B. 401; Doe *v.* Worsley, 1 East 416; Bohon *v.* Bohon, 78 Ky. 408.

Segt. Williams says that the reason of the rule is to be found in 1 Rol. Ab. 837 (R.) pl. 2, where it is said that if a man makes a feoffment in fee to the use of J S and J D and the heirs male of their bodies and for default of such issue of either of them to the use of the survivor of them having issue male and to the issue male of such issue male, and for default of issue male of their bodies, the remainder to another, by this gift J S and J D have several inheritances, and no cross-remainder in tail is raised by the words after, for want of the word heirs; for though it be by way of use an estate tail cannot be raised without the word heirs. Therefore, if the limitation be "to the use of A and B and the heirs of their bodies, and if they die without issue of their bodies, or either of them, that then it shall remain," etc. or "that each shall be heir to the other," or in default of all such issue as aforesaid, "then over," or if it be mentioned in express terms, "that there shall be cross-remainders between them" and the like which would clearly raise cross-remainders by implication in a will, yet they cannot be implied in a deed. 1 Wms. Saunds. (5th ed.) 186*b.*, 186*c.*, note to Cook *v.* Gerrard. To the same effect is the observation of Justice Lawrence in Doe *v.* Worsley, 1 East. 416, that in order to raise cross-remainders in a deed between the issue of the first takers, there must be a limitation to the heirs of the body, which is not necessary in a will.

2. Co Litl. 195*a.*, n. (1) per Butler; 4 Kent. Com. *201, *202; 2 Wash. Real Prop. (5th ed.) 605; Atherton *v.* Page, 4 T. R. 710; Doe *v.* Cooper, 1 East 229; Watson *v.* Foxon, 2 East 36; 1 Wms. Saunds. (4th ed.) 185*c*, note to Cook *v.* Gerrard.

As to what words will create cross-remainders by implication in wills see WILLS.

Whether Cross-Remainders Can be Created Between More than Two.—"In the case of Gilbert *v.* Witty, Cro. Jac. 655, it was said by Justice Doddereage, that cross-remainders should never be raised, even in wills, by implication, between more than two persons. This doctrine received some countenance from what was said by the courts in the cases of Cole *v.* Levingston, 1 Ventres 224; Holme *v.* Meynell, Raym. 452, and some other cases. But this notion seems entirely exploded by the cases of Burden *v.* Burville, B. R. East. Term. 13 Geo. 3; Duke of Richmond *v.* Earl of Codogan, determined in the court of chancery in May, 1773, Wright *v.* Holford, and others, B. R. Easter Term, 1774, Cowp. 31, and some other subsequent cases. It seems, however, to be admitted in these cases, that to raise cross-remainder between more than two, stronger implication is required, than to raise them between two only." Co. Litt. 195*a*, note (1) per Butler. See 1 Wms. Saund. (5th ed.) 185*c.*, note to Cook *v.* Gerrard, 1 Prest. Est. *95; De Peyster *v.* Clendining, 8 Paige (N. Y.) 295.

In Hall *v.* Priest, 6 Gray (Mass.) 18, cross-remainders were sustained between eight persons.

3. Co. Litt. 195 a, note (1) per Butler *citing* Green *v.* Stephens, 17 Ves. Jr. 64, 76 by Lord Eldon; 4 Cruise Dig Real. Prop. 312, *citing* Twisden *v.* Lock, Amb. 663, 666 by Lord Camden, also Duke of Richmond's Case, Collect Jur., vol. 2, 347. *Compare* West *v.* Errissey, 2 P. Wms. 349, *cited* by Lord Camden in Twisden *v.* Lock, Amb. 663, 666.

4. "The case of Papillon *v.* Voice, (2 P.Wms. 471), has gone this length at least; that, whatever distinctions have been taken between marriage articles

be particularly attended to: (1) that the clauses by which they are created should not be so expressed as to make it necessary that the parties taking under them should be alive at the time of the decease and failure of issue of the others; (2) that they should be so expressed as to pass not only the original share of the first taker, but the shares surviving or accruing to him or his issue, on the decease and failure of issue of any of them. For the surviving or accruing shares may be considered as a distinct limitation, and may consequently be thought not to remain over, unless this is signified.[1] In all these cases the test of the existence of cross-remainders is, whether or not there is, in the case of a deed, an express limitation, in case of a will an express or implied one, that the whole estate shall go over, together, in entirety to its final limitation, upon the failure of issue, or in parts as the issue

and a will, upon the object of articles, and the general course of dealing in the execution of that object, the court looks at such instrument, and the nature of it, collecting the intention perhaps under different circumstances; but in the instance of a legal devise by a will, containing also an executory trust to settle lands to be purchased to the same uses in substance, the court in the execution of that trust regards the actual intention, if it is to be collected, in a much greater degree than in the construction of the legal devise. In Austen *v.* Taylor (Amb. 376), Lord Worthington did not mean to shake that case, and admits the principle of the court." Lord Eldon in Green *v.* Stephens, 17 Ves. Jr. 64, 76.

1. Co. Litt. 195*b*, note (1), per Butler.

Cross-remainders are not created as to accruing shares by a limitation of the entire estate to an only surviving child and his issue, or by a gift over of the entire estate in remainder after the failure of all the issue, or by an express creation of cross-remainders as to the original shares. Edwards *v.* Alliston, 4 Russ. 78. See Fenby *v.* Johnson, 21 Md. 117.

The same principles apply to trusts of personalty. Co. Litt. 195*b*, note (1); Perkins *v.* Micklethwaite, 1 P. Wms. 274, and note by Cox.

Apt Expressions—Usual Form.—The usual form is, "and in case there shall be a failure of issue of the body or bodies of any of the said daughters, then as to the part or parts, as well accruing and surviving as original, of such of them whose issue shall so fail, to the use of the survivors or survivor, and other or others of them, equally to be divided between them, if more than one, share and share alike, as tenants in common, and of the several and respective heirs of the body and bodies of such surviving and other daughter or daughters; and if all such daughters but one shall die without issue, or there shall be but one such daughter, then to the use of such daughter, and of the heirs of her body." 1 Wms. Saunds. 186*a*, note to Cook *v.* Gerrard.

But it is not necessary, though certainly prudent, to use this technical form. For where the words in a deed were, "and in case any such child or children should die without issue of his, her, or their body or bodies issuing, then the part or parts of him, her, or them so dying without issue should be and remain to the use of the surviving child or children of the said M A and the heirs of his, her, or their respective bodies issuing, and so *toties quoties* as any of the said children should die without issue, till there should be only one child left; and in case all the said children should die without issue, or if the said M A should have no issue of her body, then to R A and his heirs;" the court was of opinion that the deed contained express limitations by way of cross-remainders, which, though not in the formal language used by conveyancers, were yet in terms sufficient to denote that it was the intention of the parties to the deed that there should be cross-remainders. 5 T. R. 427; Doe *v.* Wainwright, 5 T. R. 427. See also 1 Wms. Saunds., 186, 186*a*, note to Cook *v.* Gerrard.

The case of Doe *v.* Wainwright, 5

of one or the other of the first takers shall fail; in the former case cross-remainders exist, in the latter they do not.[1]

T. R. 427, however, cannot be relied on as authorizing any very wide departure from the usual form, since the court, in deciding that case, relied greatly upon the fact that they could not give effect to the word "all" in the sentence, "And in case all the said children should die without issue," in the above limitation, without holding that there were cross-remainders not only as long as the individual children but as long as the several lines of those children existed. The case therefore stands somewhat upon its own peculiar facts and can only be relied on as sustaining the position that the usual form is not absolutely indispensable. *Compare* the remarks of Sir J. Leech upon this case in Edwards *v.* Alliston, 4 Russ. 78.

1. 2 Washb. Real Prop. *234; Doe d. Gorges *v.* Webb, 10 Taunt. 234. See Pilot *v.* Armistead, 2 Ired. Eq. (N. Car.) 226; Seabrook *v.* Mikell, 1 Cheeves (S. Car.) 80.

"If a devise be of one lot of land to A, and of another lot to B in fee, and if either dies without issue, the survivor to take, and if both die without issue, then to C in fee, A and B have cross-remainders over by express terms; and on the failure of either, the other, or his issue, takes, and the remainder to C is postponed; but if the devise had been to A and B of lots to each, and remainder over on the death of both of them, the cross-remainders to them would be implied." 4 Kent's Com. 201, 202.

In Hungerford *v.* Anderson, 4 Day (Conn.) 368, the court by Reeve, J., said: "In order to constitute a cross-remainder by necessary implication, there must appear in the will an intention that no person shall inherit any part of the estate, or take it by way of remainder, as long as any of the devisees, or any of their issue, to whom it is given, are alive. On this ground it has been determined in Dyer 303*b*, where an estate was given to divers persons, and the heirs of their bodies, and if they all die without issue of them, remainder to A. Now, it is apparent that A cannot take, unless they all die without issue; who, then, is to take the estate of one of them who should die without heirs of his body? By necessary implication it must be the other devisees. So a devise to two daughters and their heirs, and if they die without issue, then to B. That is, if both die without issue, B takes the land; but not until that time. If one of them had died without issue, the other devisee must take it by necessary implication; for B could not." "Hence, it was held in the above case that when A devised lands to his four sons, B, C, D and E, and to their male heirs of their own bodies begotten, forever; and in case either or any of them should die before the age of twenty-one his or their lands to be equally divided between the surviving brethren, or their male heirs, and B died during infancy, and before the distribution of the lands, without issue, and C and D died successively afterwards leaving issue male, and lastly E died leaving issue female only, the devise created no cross-remainders between the devisees, and that the entailment being spent on the death of E without issue male, the estate reverted to the heirs general of the devisor, except the share of B which, on his death, went to the surviving brethren, and on their deaths to their respective heirs general.

So where in a devise to two, their several shares are limited over to third persons, on the failure of issue of either of them, cross-remainders will not be implied. Baldrick *v.* White, 2 Bailey (S. Car.) 442. *Compare* Seabrook *v.* Mikell, 1 Cheeves (S. Car.) 80.

On the other hand, where a testator devised real estate to his wife during life or widowhood, and then to two granddaughters and their issue in two equal shares, with a devise over, in case the granddaughters died without issue—it was held, that the latter took vested remainders in tail, with contingent cross-remainders depending on survivorship. Pierce *v.* Hakes, 23 Pa. St. 231. *Compare* Simpson *v.* Coon, 4 S. & R. (Pa.) 368.

So under a devise to four children, "each to have an equal share of that property, but is never to be sold; is to remain in the family forever, and when either of them dies, then for his or her share to be divided equally among the rest," the devisees take as tenants in common, with cross-remainders be-

c. ALTERNATIVE OR SUBSTITUTIONAL FEES—CONTINGENCIES WITH DOUBLE ASPECT.—Although at common law a fee cannot be limited after a fee,[1] yet two or more several contingent fees may be limited as substitutes or alternatives the one for the other in such way that every subsequent limitation will constitute a disposition in place of the former, if the former should not vest in interest, and only one will take effect.[2] Thus where land is devised to A for life without impeachment of waste, and if he have issue male, then to such issue male and his heirs forever;

tween them, and the ultimate limitation to the last survivor; and on the death of one of the devisees his heirs take nothing. Reber *v.* Dowling, 65 Miss. 259; *sub nomine*, Dowling *v.* Reber, 3 So. Rep. 654.

A testator directed the residue of his estate, real and personal, to be divided into nine equal shares, and gave eight of his children "one of the said shares each, to have and to hold the same to their own use and behoof forever, and that of their several and respective heirs and assigns forever; it being my express will and intention in case of the decease of either of my said children without issue, the share of such deceased child or children shall be equally divided to and among his or her surviving brothers and sisters;" and gave the other ninth to a trustee for the use of his remaining child for life, and in case of her decease without issue to divide and distribute the said share equally among my other children, as provided in the last item, but, in case my said son die leaving issue, then to divide and distribute said share to and among said issue. *Held*, that each of the eight children first named took an estate-tail in the real estate with cross-remainders over to the other brothers and sisters. Hall *v.* Priest, 6 Gray (Mass.) 18.

1. See *supra*, this title, § I, 1, *a*.

2. Prest. Est. 83; Fearne's Cont. Rem. 371, 372, note (a); Tiedeman Real Prop., §§ 537, 540; Stump *v.* Findlay, 2 Rawle (Pa.) 168.

A testator devised certain real estate to his son in trust, for the use and benefit of his grandson during the term of his natural life, and from and immediately after the decease of said grandson, then in trust to the child or children of such grandson if he should have any. But in case such grandson should depart this life without leaving a child or descendant thereof living at the time of his death, or in case he should have a child, children or descendants of the same living at the time of his death, and such child, children, descendant and descendants should subsequently depart this life under lawful age, and without issue living at the time of his, her or their decease, then to the "children" of the testator's son in fee. *Held*, that the will created a contingent remainder with a double aspect, and not an executory devise. Demill *v.* Reed, 71 Md. 175. In the above case the court by Miller, J., said: "It is a clearly established general rule in the construction of wills that a limitation which may operate as a remainder shall not be construed an executory devise. Here there is first a life estate given to the grandson, B, and upon his death alternative contingent remainders in fee are limited, first, to the child or children of B, if he leaves any, which shall attain lawful age, or die before that time leaving issue, and, failing this, then to the children of the testator's son H. If B had left a child who attained the age of twenty-one, or died before that time leaving issue, the fee would have vested in such child or issue, and such vesting would forever have excluded any possible future interest in the children of H J W. Their interest took effect only upon the failure of the preceding contingency. There are, therefore, here two contingent fees not limited to take effect the one upon or after the other, but the one to take effect to the entire exclusion of the other, and the falling out of the contingencies is to decide which of the two is to take effect. It is a case illustrating the statement made by Fearne 373: 'However, we are to remember, that although a fee cannot, in conveyances at common law, be mounted on a fee, yet two or more several contingent fees may be limited merely as substitutes or alternatives one for the other, and not to interfere; but so that one only take effect, and every subsequent limitation

and if he die without issue male, then to B and his heirs forever;[1] the first remainder is a contingent remainder in fee to the issue of A, and the remainder to B is also a contingent fee not contrary to, nor in any way derogatory from, the effect of the former but by way of substitution for it. If A have issue male, the remainder vests in that issue in fee; but if A have no issue male, then it vests in B in fee.[2] Hence these limitations or the interests created by them, taken in connection with those for which they are substituted, are sometimes called contingencies with a double aspect, or gifts upon a double contingency, or gifts or devises upon two alternative contingencies.[3] Any number of alternative interests may be limited in succession, so that each more remote limitation may be simply a substitute for the one next preceding it.[4] The characteristic of such limitations is that if any prior limitation in the series takes effect, all the ulterior limitations entirely fail.[5]

d. OF THE CONTINGENCY UPON WHICH A REMAINDER MAY DEPEND—(See also LIMITATIONS IN INSTRUMENT, vol. 13, p. 773;[6] WILLS).—At common law a limitation will fail to take effect as a contingent remainder:

1. If the condition or contingency upon which it depends requires the performance of an act morally wrong or civilly unlawful,[7] as a remainder to a bastard not *in esse*.[8]

2. If the contingency is too remote[9] as where the remainder is

be a disposition substituted in the room of the former, if the former should fail of effect.'"

Legislation.—In several States, a contingent remainder in fee limited on a prior remainder in fee, to take effect if the first remainder-man die under twenty-one, or otherwise lose his estate before arriving at full age, is expressly authorized by statute. Stimson's Am. Stat. Law, § 1440; *New York*, Rev. Stat., pt. 2, ch. 1, tit. 2, § 16; *Indiana*, Rev. Stat. 1881, § 2962; *Michigan*, Ann. Stat., § 5532; *Wisconsin*, Rev. Stat. 1878, § 2040; *Minnesota*, Gen. Stat. 1878, ch. 45, § 16; *California*, Civ. Code, § 5772; *Dakota*, Civ. Code, § 229; *Idaho*, Rev. Stat. 1887, § 2832.

1. Loddington *v.* Kime, 1 Salk. 224; Fearne's Cont. Rem. 225; Doe d. Brown *v.* Holme, 3 Wils. 237; Goodright *v.* Dunham, Doug. (3d ed.) 254. *Compare* Smith *v.* Horlock, 7 Taunt. 129.

2. Fearne's Cont. Rem. 373.

3. Smith's Ex. Int., § 129.

For further discussion of the nature of alternative limitations, see *infra*, this title, § II, 5, *e*.

4. Smith Ex. Int., § 136*a*. See Laffer *v.* Edwards, 3 Mad. 210.

5. Smith Ex. Int., § 236*a*. Laffer *v.* Edwards, 3 Mad. 210. *Compare infra*, this title, § II, 5, *c*; § II, 5, *e*.

By express words the second fee might be vested while the first remained in contingency; but then the first must operate by executory devise or shifting use, and not as a strict and proper remainder. 1 Prest. Est. 84.

6. Vol. 13, p. 773.

7. Fearne's Cont. Rem. 249; Smith Ex. Int., § 696.

8. Fearne's Cont. Rem. 249; Blodwell *v.* Edwards, Cro. Eliz. 509; Lomas *v.* Wright, 2 My. & K. 769.

On the doctrine that a bastard cannot take by the description of issue of a particular person until he has acquired the reputation of being his child. See 1 Coke's Inst. 3*b*, I.

9. Fearne's Cont. Rem. 248, 249; Smith Ex. Int., § 697; 2 Wash. Real Prop., *253; 2 Bl. Com. 169; Cholmley's Case, 2 Rep. 51*b*; Zeisweiss *v.* James, 63 Pa. St. 465.

Statutory Changes.—In several States it is provided that no future estate shall be invalid on account of the improbability of the contingency on which it is to take effect.

New York, Rev. Stat. pt. 2, ch. 1, tit. 2, § 26; *Michigan*, Ann. Stat., § 5542; *Wisconsin*, Rev. Stat. 1878, § 2050; *Minnesota*, Gen. Stat. 1878, ch. 45, § 26; *California*, Civ. Code, § 5697; *Dakota*, Civ. Code, § 189; *Indiana*, Rev. Stat., ch. 28, § 162.

What Is Remoteness—Possibility Upon Possibility.—Upon this question two distinct and contrary theories exist; one that a limitation is too remote, if it offends against the rule that there cannot be a possibility upon a possibility, or so much of the rule as is still in force; the other if it offends against the Rule against Perpetuities. The rule against double possibilities or a possibility on a possibility is thus explained by Fearne: "If there be a lease for life, remainder to the heirs of J S, though this remainder be good, because by common possibility, J S may die during the particular estate; yet if there be no such person as J S at the time of the limitation, notwithstanding such a person should afterwards be born and die during the life of the tenant for life, his heir shall not take by virtue of such limitation; because the possibility on which it is to take effect is too remote; for it amounts to the concurrence of two several contingencies, not independent and collateral, but the one requiring the previous existence of the other, and yet not necessarily arising out of it, viz.: First, that such a person as J S should be born, which is very uncertain; and, secondly, that he should die during the particular estate, which is another uncertainty grafted upon the former. This is called a possibility upon a possibility, which Lord Coke tells us is never admitted by intendment of law.

"Upon the same ground ariseth the distinction between a remainder limited by a general description and one limited by a particular name to a person not *in esse*. In the first case the remainder is good, as a limitation to the right heirs of J D who is alive, or *primogenito filio* of B who has no son then born; but in the other case the remainder is void; as if a remainder be limited to G, son of D; in that case if D hath not a son named G at the time of the limitation, the law will not expect he should afterwards have a son so named, because it amounts to a possibility upon a possibility, viz.: First, that he should have a son; and, secondly, that such son should be named G." Fearne's Cont. Rem. 250, 252. The notion that there could not be a possibility upon a possibility was introduced by a remark of Popham, C. J., in 1598, in the Rector of Chidington's Case, 1 Co. 153*a*, 156*b*, was rejected by Lord Nottingham in the Duke of Norfolk's Case in 1681, 3 Ch. Cas. 29, and while deeply imbedded in the literature of the profession seems to be without adequate support from adjudged cases. Gray on Perpetuities, § 288; Wms. Real Prop. 272. The doctrine was, however, recognized in Zeisweiss *v.* James, 63 Pa. St. 265. The eminently unsatisfactory character of the distinction appears from Lord Coke's statement that the chance that a man and a woman, both married to different persons, shall themselves marry one another is but a common possibility, but the chance that a married man shall have a son named Geoffrey is a double or remote possibility. 10 Rep. 50*b*; 2 Rep. 51*b*. Whereas if the son were to get an estate, if called Geoffrey, it is evident that the latter event is much the more probable. In commenting upon the above passage from Fearne, Butler says: "The expression of a possibility upon a possibility, which, in the language of Lord Coke cited in this place, is never admitted by intendment of law, must not be understood in too large a sense. A remainder to the son of A who first or alone shall attain twenty-one, is so far a possibility on a possibility, as it depends for its effect on the happening of two possible events, that A shall have an eldest or only son, and that such son may attain twenty-one; but the validity of such a remainder is unquestionable. In Routledge *v.* Dorril, 2 Ves. Jr. 357, a moneyed fund was vested in trustees, in trust for the intended husband and wife for their lives successively, and, after the decease of the survivor of them, in trust for all and every the children and grandchildren or issue of the said intended marriage, in such shares and at such times as the parents or the survivor of them should appoint, and for want of such appointment, in trust for all and every the children and grandchildren, or issue of the marriage, if more than one, who should be living at the decease of the surviving parent, in equal shares payable to the sons at twenty-one, and to the daughters at twenty-one or marriage. The Master of the Rolls

held, that it was competent to the parties to have appointed among all the issue living at the death of either the husband or the wife, whether in the first, second, or third degree; and that so far as the power was not well executed, the fund was to be divided as if no appointment had been made. Now it is evident, that to entitle a grandchild to take under the latter trust, four events must happen—that the husband and wife should have a child; that such child should have a child, and such last-mentioned child should be alive at the decease of the survivor of his grandfather and grandmother, and that if such child were a grandson he should attain twenty-one, and if a granddaughter, attain that age or marry." Fearne's Cont. Rem. 250–252, note (c).

Smith succinctly states the principles to be deducted from the authorities cited by Fearne and Butler thus: "A limitation may be made to depend on any number of contingencies, even though they may be engrafted on each other, so long as each amounts to a common probability, and so long as they may, according to common probability, grow out of or be connected with each other in the manner specified by the instrument containing the limitation. But a limitation is invalid, when made to depend on a single contingency, if it is made to depend on a remote possibility or when made to depend on two contingencies, if, according to common probability, they do not grow out of and are not connected with each other in the manner specified." Smith Ex. Int., § 697, 698.

Sergt. Williams (Wms. Real Prop. 274), is of opinion that the rule against double possibilities is obsolete, and that the only remaining principle traceable to it is embodied in the rule that an estate cannot be given to an unborn person for life followed by any estate to any child of such unborn person; and in this he is sustained by the opinions of Lord St. Leonards in Cole *v.* Sewell, 4 Drury & War. 27, and of Lord Brougham in the same case on appeal, 2 Cl. & F., N. S. 230, who were clearly of opinion that the doctrine of remoteness otherwise than as embodied in this rule had no application to contingent remainders. This view is adopted by Tiedeman, Real. Prop., § 417. Challis thinks that the three instances in the text are the only cases in which the rule against double possibilities is still in force. Challis, Real. Prop, 90, 91. All agree that the Rule against Perpetuities has no bearing upon the question, Lord St. Leonards observing in Cole *v.* Sewell, 4 Drury & War. 27, that the above-quoted passage from Fearne showed "there was then a difficulty about remote possibilities which does not exist at this moment" (1843), and Lord Brougham observing in the same case on appeal, 2 Cl. & F., N. S. 230: "On looking at the learned and able arguments in the court below, as reported, which I have read carefully, I was a good deal surprised to find that there was a question raised about the remoteness of the limitations. Now, whatever doubt may have arisen in the earlier periods of the learning of the law of contingent uses, whatever confusion of expression, perhaps rather than of substance, may be found in the reports, giving rise to an impression that there is in such a case a rule similar to the rule with respect to perpetuities in the case of springing uses and executory devises, which on account of the law respecting perpetuities may be too remote—whatever difficulty, confusion, or doubt may have arisen in earlier cases as to this, I am quite confident that for upwards of a hundred years the rule has been settled, as will be clearly seen if you search through the authorities. I have been led to do so from the curiosity of the case, and from seeing that the learned gentlemen, particularly Mr. Sergeant Warren, who argued this case below, raised the point, and therefore we would suppose that there must be some foundation for it. I wished, therefore, to trace what that foundation was, because it opened to my mind a new and a strange view of the law, applying that to contingent remainders, which I had always understood must be, from the very nature of the thing, confined to springing uses and executory devises; and why? In the case of a contingent remainder if the limitation is to operate by way of remainder, it must be supported by a preceding particular estate of freehold, an estate for life, or an estate tail, and it is absolutely useless unless it is to take effect *eo instanti*, that the preceding estate determines; that is the very nature of it, the bond of the existence, if I may so speak, of a contingent remainder. But then, if I have an estate limited upon a fee [simple], that is to say, an estate to A and his heirs, and

limited to a corporation not *in esse*[1] or to the right heirs of a person not *in esse* as purchasers,[2] or to the child of an unborn

upon the determination of that estate in fee, that is, when the heirs shall cease, then over, that cannot operate by way of remainder, it is quite clear that that is void as a remainder, and it is quite clear that if that is to take effect by way of executory devise or springing use (the only way in which it can take effect), there is no end of it. It may be a perpetuity to all intents and purposes, because if the fee is first limited to A and his heirs, then as long as there are the heirs, the contingent use, the springing use, or, in the case of a will, the executory devise, cannot come into possession, cannot exist, and cannot be available, consequently, there might be a perpetuity created from the condition of a former use not coming *in esse*, that condition being the general failure of heirs. What is the consequence, then? That the law has said, 'to prevent the possibility of this perpetuity, we will fix certain bounds, beyond which the limitation shall not take effect.' Therefore there may be an estate given to A and his heirs; that is a fee; but you cannot limit a remainder upon that. If you give an estate to A and his heirs, and for want of such issue, or if A shall die without heirs during the life of B, then over, that will do, that will operate by way of springing use or executory devise, because the life of B limits the period during which that shall be held *in suspenso*, and that is the origin of the rule.

"In the same way, I will take the ordinary case of a fee limited upon a fee, that is, a fee to come into use, to come into possession upon the determination of the estate of A and his heirs, living B.; that prevents the perpetuity, because it limits the period to dying during the life of B . . . But this is not the case of an executory devise in which any argument against perpetuity on the ground of remoteness can be raised, and the doctrine of remoteness has been, therefore, I think, most erroneously imported into this case, with which it can have nothing whatever to do, because it cannot be an executory devise, if it can operate by way of contingent remainder; and there cannot be remoteness created here, because the preceding estates tail are all barrable; at all events, you have the most perfect security against perpetuity ever creeping into it, because if it is a contingent remainder, it must take effect on being barrable, and it is gone forever *eo instanti* that the particular estate arises."

Mr. Gray contends, on the other hand, that the rule against double possibilities is absolutely obsolete; that the rule against an indefinite succession of life estates suggested by Williams is identical with the first form of the Rule against Perpetuities; that that rule is equally applicable to contingent remainders and executory interests, and that the test of remoteness is whether the remainder offends against it. Gray's Perpetuities, §§ 284–298, where the authorities upon both sides of the controversy are collated. See also Lovering *v.* Lovering, 129 Mass. 97; Hill *v.* Simons, 125 Mass. 339; Heald *v.* Heald, 56 Md. 300; Allender *v.* Susan, 33 Md. 11; Brattleboro *v.* Mead, 43 Vt. 556.

Perpetuities.—In conclusion, it should be observed, however, that where the legal estate is in trustees or mortgagees, the equitable remainder, being indestructible, is subject to the Rule against Perpetuities (Abbiss *v.* Binney, L. R., 17 Ch. D. 211); and that, if this position be correct, State statutes by which the remainder is made indestructible should, by parity of reasoning, be subject to the rule also. See *infra*, this title, § I, 3, *g*, (2).

The validity of a contingent estate is to be determined by considering the terms of the will alone, and not by what might have happened or what did actually happen. Bailey *v.* Sanger (Ind.), 6 West. Rep. 558.

See Nightingale *v.* Burrell, 15 Pick. (Mass.) 104; Gray Perp., § 201.

1. Challis' Real Prop. 91, *citing* Cholmley's Case, 2 Rep. 50 at 51*b*; 2 Bl. Com. 170; Zeisweiss *v.* James, 63 Pa. St. 265.

Challis is of opinion that a remainder to a corporation not *in esse* or to the right heirs of a person not *in esse* as purchasers, would still be bad, although the objection to such remainders was originally based upon the obsolete rule against double possibilities. Challis' Real Prop. 92. But see preceding note.

2. Challis' Real Prop. 91; 2 Wash. Real Prop. § 154; Cholmley's Case, 2

person after a life estate to its parent.[1] But a remainder to an unborn person, either for life, in tail or in fee will be good, unless it is preceded by a gift for life or in tail to the unborn parent of that person.[2]

3. If it is repugnant to a rule of law.[3]

4. If it is contrariant in itself, as in the case of a proviso for determining an estate tail as if tenant in tail were dead; for the

Rep. 50 at 51*b*; 2 Bl. Com. 170; Connden *v.* Clerk, Hob. 33*a*; Dennett *v.* Dennett, 40 N. H. 503.

1. 2 Wash. Real. Prop., *254; Tiedeman' Real. Prop. § 417; 2 Prest. Abst. 115; Wms. Real. Prop. *274; Challis' Real. Prop. 90; Watk. Conv. 196, Coventry's note; Fearne's Cont. Rem. 502, and Posthumous Works 215; Leake Land Law, 334; Hay *v.* Coventry, 3 T. R. 86; Brudenall *v.* Elwes, 1 East 452; Moneypenny *v.* Dering, 2 D. M. & G. 145; 16 M. & W. 428; Cole *v.* Sewell, 4 Drury & War. 27; 2 H. L. Cas. 186; Jackson *v.* Brown, 13 Wend. (N. Y.) 442.

Sergt. Williams states the rule thus: "An estate cannot be given to an unborn person for life, followed by any estate to any child of such unborn person." Wms. Real Prop. *274.

Mr. Tiedeman, Real Prop., § 417, says that in abolishing the rule against double possibilities, the courts extracted therefrom its essence, and formulated it in the above rule. But this seems extremely doubtful. See preceding note on Remoteness, and Mr. Gray's observations in next note.

Cy Pres Doctrine.—"If in a deed there are two limitations, one to an unborn person and the other (by purchase) to any issue of such unborn person, the second limitation is void. And all limitations subsequent to such void limitation, are also void. (2 Prest. Abst. 114, 115, Fearne's Cont. Rem. 502; and Posth. Works, 215; Brudenall *v.* Elwes, East 453; Monypenny *v.* Dering, 2 De G. M. & G. 170; Hay *v.* Earl of Coventry, 3 T. R. 86). If in a will there are two such limitations, the prior limitation (whether it be executed or executory) may be construed as a limitation in tail provided that such a limitation would, if not barred, carry the estate by descent to the issue specified in the second limitation. 2 Prest. Abst. 166; Butl. note on Fearne's Cont. Rem. 204; Parfitt *v.* Hember, L. R. 4 Eq. 443; Forsbrook *v.* Forsbrook, L. R. 3 Ch. 93;" Challis' Real Prop. 90, 91.

In the case of a will this is done with a view to carrying out the general intent to benefit the issue of the unborn child, so far as the rules of law will permit. Challis' Real Prop. 91. See Morse *v.* Merriman, 8 Cush. (Mass.) 11; Allyn *v.* Mather, 9 Conn. 114; Jackson *v.* Brown, 13 Wend. (N. Y.) 437; Doebler's Appeal, 64 Pa. St. 15. *Compare supra*, this title, § I, 3, *a*, (2) (*h*).

2. 2 Wash. Real Prop. § 254, *255, *citing* 2 Bl. Com. 170; 2 Prest. Abst. 115; Brudenall *v.* Elwes, 1 Earl 453, per Lord Kenyon; Smith Ex. Int., §§ 711, 713; Walk. Conv. 195, Coventry's note; Jackson *v.* Brown, 13 Wend. (N.Y.) 437.

But Mr. Gray suggests that if an estate be given to A, a bachelor, for life, remainder to A's eldest son for life, remainder to the eldest son of the eldest son of B, another bachelor, in fee, the last remainder is bad. Yet this does not come within the rule laid down by Sergt. Williams, since although the eldest son of the eldest son of B is the child of an unborn person, the remainder to him does not follow an estate to that unborn person. So if an estate be given to A, a bachelor, for life, remainder to his eldest son for life, remainder to such of the other children of A as survive his eldest son, the last remainder is bad. Gray's Perp., §§ 292, 293.

3. Fearne's Cont. Rem. 252; Smith's Ex. Int., § 696.

Fearne illustrates the principle by a condition so framed as to defeat the prior estate in part only, on the assumption that "a condition or limitation must determine the whole of an estate to which it is annexed, and not determine it in part only and leave it good for the residue." Hence a proviso to make the estate of a tenant in tail cease during his life is void. Fearne's Cont. Rem., 252.

But the better opinion is that such an interest after an estate tail would now be sustained as a conditional limitation. See *infra*, this title, § II, 4, *a*; § II, 4, *c*.

estate tail is only determined on a general failure of issue of the tenant in tail.[1]

5. If repugnant to the nature of the preceding estate, as where the remainder is limited to take effect on tenant in tail suffering a common recovery.[2]

6. If it operates in derogation or defeasance of the preceding estate.[3]

If a remainder fails to take effect because the condition upon which it depends is illegal, *contra bonos mores*, repugnant to law, contrariant in itself, or repugnant to the nature of the estate, the limitation over is absolutely void. If it fail, because the condition operates in defeasance of the preceding estate, the limitation over may yet be sustained in a devise or conveyance under the Statute of Uses, as an executory devise or shifting use. Hence in a devise or conveyance by way of use, it is important to determine whether the limitation is merely bad as a remainder because dependent upon a condition which inures to defeat the preceding estate, or fails entirely by reason of the fact that the condition, in addition to defeating the preceding estate is itself void, because repugnant to law, or to the nature of the preceding estate, contrariant in itself, morally wrong or civilly unlawful.

1. Fearne's Cont. Rem., 252, 253.

The expression therefore should provide that in the happening of the contingency, the estate tail should cease in the same manner as though the tenant in tail were dead and there were a general failure of issue inheritable under the entail. Fearne's Cont. Rem. 254 note (e.) per Butler.

2. Fearne's Cont. Rem., 257; Smith Ex. Int., § 696.

3. Fearne's Cont. Rem., 260, 261; 2 Wash. Real. Prop. *255–*257. See *supra*, this title, § I, 1, *a*; *infra*, this title, § II, 4, *c*.

Thus, if the particular estate be limited to two with remainder over upon the death of one of them, to a stranger in fee, the remainder is void, because as the survivor must have the estate for life by reason of his having been joint tenant with the deceased, the limitation over upon the death of one can only take place by defeating the estate of survivor. Had the limitation been to the the survivor instead of a stranger, it would have been good. 2 Cruise Dig. Real Prop. 235, 237.

Principle of Construction.—"The contingency will never be construed as operating in defeasance of the preceding estate, if that construction can possibly be avoided. Thus, if land be leased to one for life, etc., and if such a thing happens, then to remain to B, etc., this shall not be understood as intended to vest in possession, immediately upon the happening of the condition, and in abridgment of the preceding estate; because under that construction the remainder would be void for the reasons already given; but it shall be construed to vest in interest upon the happening of the condition, and to remain as a remainder ought to do; that is, so as to await the determination of the preceding estate, before it comes into possession.

As if a gift in tail be made to one, upon condition that if he do such an act, then the land shall remain in his right heirs; the word then is not so to be understood, as to avoid the estate tail, and execute the fee simple in possession, immediately on performance of the act, but must be taken in this manner, viz., that upon the performance of the act, the remainder in fee shall vest in him, not to be executed in possession till the expiration of the estate tail." Fearne's Cont. Rem. 262–263.

This is merely a particular instance of the well-settled rule that a limitation will never be construed an executory devise or shifting use, if it can be construed a remainder. See *infra*, this title, § II, 3.

e. OF THE TIME WITHIN WHICH A CONTINGENT REMAINDER SHOULD VEST.—1. Every contingent remainder must vest during the continuance of the particular estate or at the very instant of its determination.[1] Hence, whenever the preceding estate is

Enlarging Conditions.—A remainder limited to take effect to the tenant of the particular estate, is not within the principle although the particular estate is thereby destroyed by merger. 2 Wash. Real Prop. *257. "And though the limitation should not so far pursue the particular estate in quality, as to come within the doctrine of estates to be enlarged on condition, yet if it be such as cannot defeat, exclude, or abridge the particular estate, nor have any other operation than if the words expressive of its time of commencement had been omitted, or it had been in express words postponed till after the determination of the preceding estates, the objection to its effect as a remainder does not hold, as it then in effect gives no more, than the remnant or residue expectant on the particular estate, and could not have entitled the grantor or his heir to enter at common law in defeasance of the particular estate, nor operates at all to the prejudice of strangers, which are the reasons assigned against the validity of conditional limitations at common law. Thus, suppose in the case of a lease to two as above cited, the limitation over after the death of the first of them had been to the survivor instead of another, as the case puts it; this would not have avoided, defeated, or abridged the estate of the survivor, but actually have embraced it in the afflux of a greater, into which it would have run under the technical term of merging, instead of being rescinded or nullified. The grantor or his heir could have no title to enter and defeat the particular estate; because there was no condition or proviso to make it cease, or carry the estate either expressly or implicatively to anybody, from the devisee of the particular estate. Nor should the limitation operate to the prejudice of another, viz.: the person otherwise entitled to the particular estate, because it was to that very person himself, and the effect would have been precisely the same if the limitation had been, and from and after the determination of the estate aforesaid, then to the survivor in fee." Fearne's Cont. Rem., 265, 266.

Statutory Changes. — In several States a remainder may be limited on a contingency which would abridge or determine the precedent estate; and if valid as a conditional limitation, it will be equally good as a contingent remainder. *New York*, Rev. Stat. pt. 2, ch. 1, tit. 2, § 27; *Indiana*, Rev. Stat., 1881, § 2960; *Michigan*, Ann. Stat. § 5543; *Wisconsin*, Rev. Stat., 1878, § 2051; *Minnesota*, Gen. Stat., 1878, ch. 45. § 27; *California*, Civ. Code, § 5778; *Dakota*, Civ. Code, § 235.

In others, statutes providing that any estate which would be good by executory devise is equally good if created by deed, and that a freehold may be limited to commence *in futuro*, would seem to abrogate the rule that the contingency must not operate in defeasance of the precedent estate. See *supra*, this title, § I, 1, *b*; *infra*, this title. § I, 3, *g*, (2).

1. Fearne's Cont. Rem. 305; 2 Bl. Com. 168.

"So that if a lease be made to A for life and after the death of A and one day after, the land shall remain to B for life, this remainder to B is void, because it cannot take effect immediately upon the determination of the preceding estate. This rule was originally founded on feudal principles, and was intended to avoid the inconvenience which might arise by admitting an interval, when there should be no tenant of the freehold to do the services to the lord or answer to strangers' præcipes, as well as to preserve an uninterrupted connection between the particular estate and the remainder, which, in the consideration of law, are but several parts of one whole estate." Fearne's Cont. Rem. 307, 308.

Posthumous Children.—By Stat. 10 & 11 Wm. III, ch. 16, it is enacted that where any estate is settled in remainder to children with the remainder over, any posthumous child may take in the same manner as if born in the father's lifetime. Fearne's Cont. Rem. 308.

For similar legislation see *New York* Rev. Stat., pt. 2, ch. 1, tit. 2, § 30; *Illinois* Rev. St. 1883, ch. 30, § 14; *Michigan* Ann. Stat., §§ 5546, 5547; *Wisconsin* Rev. Stat 1878, §§ 2054, 2055; *Minnesota* Gen. Stat. 1878, ch. 45, § 30;

in several persons, in common or in severalty, the remainder may fail as to one part and take effect as to another; for the particular tenant of one part may die before the contingency, and the particular tenant of another part may survive it.[1] So, likewise, a contingent remainder may take effect in some and not in all the persons to whom it is limited, according as some may come *in esse* before the determination of the preceding estate and others not.[2]

II. An estate cannot be given to an unborn person for life, followed by an estate to any child of such unborn person; for in such cases the estate given to the child of the unborn person is void.[3]

f. OF THE ESTATE NECESSARY TO SUPPORT A CONTINGENT REMAINDER—(1) *At Common Law.*—At common law every contingent remainder of freehold requires a particular estate of freehold to support it, not only in its inception, but throughout the pending of the contingency; because if any interval were permitted to exist between the determination of the particular estate and the vesting of the remainder, the immediate freehold would be in abeyance during such interval.[4]

Virginia Code, 1873, ch. 112, § 10; *West Virginia* Rev. Stat. 1878, ch. 82, § 10; *North Carolina* Code, 1883, § 1327; *Kentucky* Gen. Stat. 1873, ch. 63, art. 1, § 15; *Missouri* Rev. Stat. 1879, § 3945; *California* Civ. Code, § 5698; *Nevada* Comp. Laws, 1873, § 273; *Colorado* Gen. Stat. 1883, § 205; *Dakota* Civ. Code, § 190; *Idaho* Gen. Stat. 1874-5, p. 604, § 47; *Montana* Gen. Stat. 1882, § 223; *South Carolina* Gen. Stat. 1882, § 1846; *Alabama* Code, 1876, § 2182; *Mississippi* Code, 1880, § 1202; *New Mexico* Comp. Laws, 1884, § 1427.

In States in which no express provisions on the subject exist, the better opinion is that a posthumous child may take as though born in his father's lifetime, and such was the opinion of the House of Lords before the passage of the above act. Co. Litt. 298*a*, note (B), per Butler. See Doe *v.* Long, 1 Salk. 227.

Consequently a future estate depending on the death of any person without heirs, issue, etc., is defeated by the birth of a posthumous child, capable of inheriting from such person. This would seem to be the necessary result of the common-law principle and above legislation. In some States express provision to that effect is made. *New York* Rev. Stat., pt. 2, ch. 1, tit. 2, § 31; *Illinois* Rev. Stat. 1883, ch. 30, § 14; *Michigan* Ann. Stat., §§ 2054, 2055; *Wisconsin* Rev. Stat. 1878, ch. 45, § 31; *Minnesota* Gen. Stat. 1878, ch. 45, § 31; *Virginia* Code, 1873, ch. 112, § 10; *West Virginia* Rev. Stat. 1878, ch. 82, § 10; *North Carolina* Code, 1883, § 1327; *Tennessee* Code, 1879, § 2009; *Missouri* Rev. Stat. 1879, § 3946; *California* Civ. Code, § 5739; *Nevada* Comp. Laws, 1873, § 272; *Dakota* Civ. Code, § 211; *Idaho* Gen. Stat. 1874-5, p. 604, § 147; *Montana* Gen. Laws, § 222; *Alabama* Code, 1876, § 2182; *New Mexico* Comp. Laws, 1884, § 1428.

In some States the child must be born within ten months of its father's death. *Virginia* Code, 1873, ch. 42, § 10; *West Virginia* Rev. Stat. 1878, ch. 82, § 10; *North Carolina* Code, 1883, § 1327; *Kentucky* Gen. Stat. 1873, ch. 63, art. 1, § 15; *Tennessee* Code, 1879, § 2815; *Mississippi* Code, 1880, § 1203.

1. Fearne's Cont. Rem. 309, 310.

2. Fearne's Cont. Rem. 312.

As to the application of this to gifts to a class see *supra*, this title, § I, 2, *b*.

3. Wms. Real Prop. 274. See *supra*, this title, § I, 3, *d*.

4. Challis' Real Prop. 93; Fearne's Cont. Rem. 281; Smith Ex. Int., § 758; 2 Wash. Real Prop. *258; Harris *v* McElroy, 45 Pa. St. 220. *Compare infra*, this title, § I, 3, *g*, (1).

A term of years is sufficient to support a vested remainder of freehold, for such remainder is, so far as respects the property or seisin, an estate in possession subject to the term (see *supra*, this title, § I, 1, *a*); but a contingent

Therefore a contingent remainder preceded only by a term of years,[1] or by a particular estate, which, by the very words of its original limitation, cannot endure until the remainder vests, is void *ab initio*.[2] A contingent remainder, preceded by a vested remainder, is not affected by the destruction of the particular estate preceding the vested remainder, for the latter estate thereupon immediately takes effect in possession, and is itself sufficient to support it. Thus, where the limitation was to J S for life, remainder to his wife for life, remainder to his first and other sons in tail, and J S was attainted of treason before he had a son, it was held that the wife's estate was sufficient to support the contingent remainder.[3] A vested remainder preceded by a contingent remainder, which is itself without sufficient support, is accelerated.[4]

The foregoing principles apply equally to remainders limited by way of use, more accurately termed contingent uses, for, although before the Statute of Uses, the freehold vested in the feoffees to uses, and there was no need of a particular estate of freehold to support contingent limitations, yet since the statute, by executing the use in the tenant of the first particular estate, deprives the feoffees of the freehold, the necessity for a particular estate to support contingent remainders limited by way of use is as great as in the case of those limited by conveyance at common law.[5]

remainder preceded by a term of years, and followed by a vested remainder, is bad; for the freehold must pass out of the grantor at the same time the remainder is created, and in this case it cannot pass to the contingent remainder-man, because such remainder, at the time of its creation, vests in no one, and if it be held to pass to the succeeding vested remainder-man the contingent remainder is precluded from ever taking effect in possession, for the freehold which it was limited to precede thereby becomes itself vested in possession. Fearne's Cont. Rem. 281.

1. Smith Ex. Int., §§ 761, 762.

For as the freehold could not be in abeyance, and as the ulterior freehold interest was intended to be a future interest, the present freehold must reside in some person entitled to the ulterior freehold interest, and, of course, in some other person than the contingent remainder-man; and, hence, in the grantor of his heir at law, and the ulterior interest necessarily fails, because it could only take effect in defeasance of the estate so residing in the grantor or his heir at law, which was a mode foreign to the simplicity of the common law. Smith Ex. Int., § 762. Such a limitation, however, may be good as an executory devise or springing use. See *infra*, this title, § II, 4, *b*.

2. Smith Ex. Int., § 764.

3. Corbet *v.* Tichborn, 2 Salk. 576, which differs from the illustration in the text only in the fact that there seems to have been some question as to whether the son was not born after the treason and before attainder; the K. B., however, held the point immaterial, as, in either case, the contingent remainder was sustained by the wife's estate. The principle in the text, deduced from this case, appears to be sustained by Fearne and Smith: "If the remainder is all along preceded by such a preceding estate (*i. e.*, a freehold) it is sufficient, though the first preceding estate may have become forfeited or determined before the vesting of the remainder." Smith Ex. Int., § 765*a*, *citing* Corbet *v.* Tichborn, 2 Salk. 576; Fearne's Cont. Rem. 283.

But see Sir Thomas Palmer's Case, Moor 815, as stated in Fearne's Cont. Rem. 282.

4. Goodright *v.* Cornish, 1 Salk. 226; Challis' Real Prop. 94. See *infra*, this title, § I, 5, *b*.

5. Fearne's Cont. Rem. 284, *citing* Adams *v.* Terretenants of Savage, 2

When the legal estate is devised to and vested in trustees in trust, there is no necessity for any preceding particular estate of freehold to support contingent limitations, for the legal estate in the general trustees will be sufficient for the purpose; nor in such case is it necessary that the contingent remainder should vest by the time the preceding trust limitation expires.[1]

For the same reason contingent remainders limited out of an equity of redemption, need no particular estate to support them and are unaffected by the failure or destruction of the preceding limitations, since the outstanding legal estate in the mortgagee is sufficient to sustain them.[2]

A contingent remainder for years does not require a preceding freehold to support it; for though it is a remainder in a lax sense as regards the possession, it is not a remainder, strictly so called as regards the seisin, property or ownership.[3]

Although every contingent remainder must be supported by a preceding freehold, yet it is not necessary that such preceding estate continue in the actual possession of its rightful tenant; it is sufficient, if he have at the time the remainder vests, such an interest as would give him at common law a present right of entry as distinguished from a mere right of action.[4]

Salk. 679; Davies *v.* Speed, 2 Salk. 675.

1. Fearne's Cont. Rem. 303, 304, *citing* Chapman *v.* Blisset, Cas. temp. Talb. 145; Hopkins *v.* Hopkins, Cas. temp. Talb. 44. See Smith Ex. Int. § 765*c*, 783; Challis' Real Prop. 95; Wash. Real Prop. (5th. ed.) 637; Wms. Real Prop. 239; 2 Cruise Dig. Real Prop. 247; 1 Prest. Est. 241; Berry *v.* Berry, L. R. 7 Ch. D. 657; Abbiss *v.* Burney, L. R. 27 Ch. D. 229; Marshall *v.* Gingell, L. R. 21 Ch. D. 790.

It is to be observed that in the cases cited by Fearne both the legal fee and the trusts are created by the same instrument; "but it frequently happens that contingent remainders are created by deed or will, after the legal freehold (said to be misprint for legal fee by Malins V. C. in Astley *v.* Micklethwait, L. R. 15 Ch. D. 65) has been vested in some other person by a previous deed or will. No case has been decided to show that such an outstanding estate will preserve the contingent remainders created by the subsequent deed; the general opinion is, that it will; but, if the deed vesting the legal fee in the trustee is of a very ancient date, cases may arise, in which it may be doubtful whether the long possession by the *cestui que trust* without an acknowledgement of the outstanding legal estate, has not, in the presumption of law, devested it from the trustees, so as to make it incapable of supporting the contingent remainders, by virtually depriving it of its legal existence."

Fearne's Cont. Rem. 304, note (m) per Butler.

This passage was quoted with approval by Malins V. C. in Astley *v.* Micklethwait, L. R. 15 Ch. D. 65, and applied to contingent remainders created by will out of an equity of redemption in lands which the testator had previously mortgaged. This is in accord with Mr. Butler's suggestion, Fearne's Cont. Rem. 320 n. (e), as to what the decision should be on principle, although when he wrote the point had not arisen.

2. Astley *v.* Micklethwait, L. R. 15 Ch. D. 59; Fearne's Cont. Rem. 320, n. (e) per Butler.

3. Smith Ex. Int., § 765*a*; Fearne's Cont. Rem. 284.

4. Fearne's Cont. Rem. 286–301; Smith's Ex. Int., § 765*b*.

"It is sufficient, if there subsists a right to such preceding estate, at the time the remainder should vest; provided such right be a right of entry, and not a right of action only; for whilst a right of entry remains, there can be no doubt but the same estate continues, since the right of entry can exist only

in consequence of the subsistence of the estate; but where the right of entry is gone, and nothing but a right of action remains, it then becomes a question in law whether the same estate continues or not; for the action is nothing more than the means of deciding this question. Another estate is in the meantime acknowledged and protected by the law, till such question be solemnly determined in a court of justice, upon the action brought." Fearne's Cont. Rem. 285.

Distinction Between Right of Entry and Right of Action. — To understand Fearne's language, "it is necessary to distinguish between a right of entry and a right of action. If A is disseised by B, then, while the possession continues in B, is a mere possession unsupported by any presumption of right; and A may restore his possession by an entry on the land, without any previous action. If A enters and B defends his possession, and the question is tried on a possessory action, the gist of it must be, who has the best title to the possession, and A must necessarily recover. Thus far the party disseised, even during the disseisin, is considered in law to be the rightful tenant. But if B continues in the possession of the estate till his decease, the law, at his decease, casts the possession upon his heir; thus upon B's decease, his heir acquires the possession by act of law; and his title, though immediately derived from a person who himself acquired it by wrong, is so far respected in law, that A cannot restore his possession by entry, and can only recover it by action. This removes A's title one degree farther than while he could restore his possession by entry, and is therefore said to reduce him to a right of action, and it is called a right of action in contra distinction from a right of entry. It follows, 1st, that, where there is an estate for life, remainder in contingency, if the tenant for life be disseised, then until the death of the disseisor, or until by some other means the right of entry is lost, a right of entry is in the disseisee; and this right of entry supports the contingent remainder; and 2dly, that, when, by the death of the disseisor, or by any other means, the right of entry under a previous estate is lost, there is no longer a rightful estate capable of supporting the contingent remainder." Fearne's Cont. Rem. 285; note (e), per Butler.

Statutory Changes.—But in some States the right of entry is not tolled, impaired or affected by descent cast in consequence of death of the disseisor or person in possession. Stimson's Am. Stat. Law, § 1404; *Massachusetts* Pub. Stat. 1882, ch. 126, § 16; *Maine* Rev. Stat. 1883, ch. 104, § 5; *Vermont* Rev. Stat. 1880, § 953; *New York* Civ. Code, § 374; *New Jersey* Addenda, 3; *Wisconsin* Rev. Stat. 1878 § 4217; *Virginia* Code, 1873, ch. 129, § 4; *West Virginia* Rev. Stat. 1878, ch. 8, § 4; *Kentucky* Gen. Stat. 1879, § 3221; *Arkansas* Dig. 1884, § 4473; *California* Civ. Code, § 10327; *Nevada* Comp. Laws 1873, § 1028; *Dakota* Civ. Code, § 50; *Utah* C. C. P., § 187; *South Carolina* Gen. Stat. 1882, § 2282; *Missouri* Rev. Stat. 1879 § 3221; *Mississippi* Code, 1870, § 1200; *Montana* C. C. P. § 38; *Alabama* Code, 1876, § 3233.

In *New Jersey*, *Kentucky* and *South Carolina*, the right of entry is lost if the disseisor be allowed to retain possession for the number of years prescribed by the Statute of Limitations. *New Jersey* Addenda, 3; *Kentucky* Gen. Stat. 1873, ch. 63, art. 1, § 5; *South Carolina* Gen. Stat. 1882, § 2282.

Estates Limited by Way of Use.—"But where the estates are limited by way of use, and are afterwards devested and turned to a right, it has been held requisite to the execution of the subsequent contingent uses, that either the *cestui que use* under some preceding vested use, or else that the feoffees or their heirs, should enter, in order to to revest the estates; for although contingent uses are not destroyed by such a devesting of the preceding estate as turns it to a right of entry, as they would be if such estate was determined, or turned to a right of action only; yet, it has been said, there must, at or after the time when uses come *in esse*, exist a seisin in the feoffees, out of which those uses may arise, before they can be executed by the statute. It appears to have been the opinion of the court in Chudleigh's case, that upon a conveyance to uses, there is no actual seisin left in the feoffees, but that as to all the uses *in esse*, and which vest immediately, the seisin is presently transferred into the *cestuis que use*; and that as to the uses not *in esse*, there is no present seisin existing anywhere; but only a possibility of a seisin in the feoffees, to serve those uses when they come *in esse*; which takes effect as the contingencies on which the uses depend, arise, so as

The better opinion would seem to be that under the common law, as it existed unaffected by legislation, the particular estate and the remainder need not be created by one and the same deed or instrument, provided both estates pass out of the grantor at the same time and were created by the same transaction.[1]

(2) *Under American Statutes.*—See *supra*, this title, § I, 1, *b*; *infra*, § I, 3, *g*, (2).

g. DESTRUCTION OF CONTINGENT REMAINDERS—(1) *At Common Law.*—At common law, contingent remainders, except where the legal estate is vested in trustees or mortgagees, may fail or be destroyed in any one of the following ways:[2]

1. Where the particular estate upon which the remainder

then to give the feoffees, &c., a sufficient seisin to serve such uses, that they may be executed by the statute, if the estates limited in the conveyance to uses be not in the meantime devested; but that if the estates happen to be first devested, then that possibility of a seisin in the feoffees is devested, as well as the other estates; and must be reduced and revested before the contingent uses can be executed. Now if this devesting or disturbance of the estates limited in the conveyance to use, has operated so far as not to leave a right of entry in any preceding vested estate, then is the contingent use entirely destroyed and gone, as we have already seen, for want of a preceding estate to support it; but if a right of entry is left in any preceding vested estate, then the *cestui que use* having such right of entry may, by his entry, revest (as it has been said) the estates which were devested, and amongst the rest, the possibility of seisin in the feoffees to serve the contingent uses; but if no such entry should be made, then, it has been said, the feoffees or their heirs must enter, to revest their seisin, for that otherwise there would exist no seisin to serve the contingent uses; and consequently, that if the feoffees should bar their own right of entry upon such an occasion, by feoffment, release or otherwise, the contingent use can never be executed for want of a seisin in the feoffees out of which it may arise; and that the *cestui que use* will then have no other remedy than against the feoffees in a court of equity for breach of trust." Fearne's Cont. Rem. 288, 299. For discussion of this subject as well as the Statute of Uses, see Chudleigh's Case, 1 Rep. 70; *nom* Dillon *v.* Franie, 1 Ander. 309, under names of Dillam or Dilion *v.* Franie; Fearne's Cont. Rem. 290, n. (h.) per Butler. See also TRUSTS; USES.

Adverse Possession—Statute of Limitations.—In the absence of express statutory provision to the contrary the Statute of Limitations does not begin to run against the remainder-man until after the death of the particular tenant. Chandler *v.* Phillips, 1 Root (Conn.) 546; Jackson *v.* Schoenmaker, 4 Johns. (N. Y.) 390. See Hall *v.* Vandergrift, 3 Binn. (Pa.) 374.

Nor will a release by the life tenant of his interest to the remainder-man or reversioner after the statutory period has run, enable the latter to maintain ejectment until the life tenant's decease. Adverse possession for the statutory period gives a perfect title until the life tenant's decease. Moore *v.* Luce, 29 Pa. St. 260. But see Mangum *v.* Peester, 6 S. Car. 313.

1. See *supra*, this title, § I, 1, *a*.

Both Fearne and Smith expressly state that both estates must be created by the same instrument. Smith Ex. Int., § 159; Fearne's Cont. Rem. 301.

But when they wrote the question depended largely on legislation. Moreover in the cases relied on by Fearne as sustaining his position, Moore *v.* Parker, Skinner 558, 1 Ld. Raym. 37, 4 Mod. 316; 1 Eq. Abr. 182; Srowe d. Cutler *v.* Tucker, 1 Lev. 135; Raym. 162; Weal *v.* Lower, Pollex 63; Doe d. Fonnereau *v.* Fonnereau, Dougl. 470, the creation of the particular estate and the remainder did not form part of the same transaction, nor did they pass out of the grantor at the same time.

2. The statements in this section apply only to contingent remainders of freehold. *Compare supra*, this title, § I, 3, *f*, (1).

depends expires by the terms of its original limitation before the contingency happens upon which it is to vest.[1]

2. Where the tenant for life is disseised and his right of entry tolled.[2]

3. Where the tenant for life incurs a forfeiture by making an alienation which divests remainders and reversions dependent upon his estate, or does anything in any matter of record which amounts to an assertion of a right in himself to the inheritance, or to an admission of a like right in a stranger, the next vested remainder-man becomes entitled to enter immediately, and thereby destroy all intermediate contingent remainders. But since an estate of freehold cannot be defeated without an entry by the person entitled to take advantage of the forfeiture, the particular estate, until entry, continues to subsist and support intermediate contingent remainders.[3] So, if the reversioner enters for condition broken, contingent remainders dependent upon the estate of the tenant in possession are destroyed,[4] but remain unaffected by breach without entry.[5]

4. Where the preceding legal estate is destroyed and a new estate created, by the tenant of such preceding estate, by the operation of a tortious assurance, as a feoffment, fine or common recovery, the contingent remainders dependent upon the legal estate, are destroyed.[6] Conveyances which operate under the Statute of Uses as a bargain and sale, or a lease and release,

1. Smith Ex. Int., § 768.

Support.—B died, leaving a will by which his estate was to go to his wife, M, for life, remainder over to the heirs of C. The latter was then living, and at the time of his death was still surviving with nine children. *Held*, that there being no heirs of C, she being alive at the death of M when the particular estate terminated, the remainder failed for want of persons to take it under the will. Irvine *v.* Newlin, 63 Miss. 192. See for other examples, *supra*, this title, § I, 3, *a*, (1).

Where Remainder-man Is a Child En Ventre Sa Mere—See *supra*, this title, § I, 3, *e*, note.

2. Smith Ex. Int., § 769. See *supra*, this title, § I, 3, *f*, (1) note.

3. Smith Ex. Int., § 776; Challis' Real Prop. 107; Fearne's Cont. Rem. 322, 323; 2 Wash. Real Prop. (5th ed.) 638.

As to various ways by which a forfeiture might be incurred at common law, see Co. Litt. 251*a*, 252*a*. *Compare* FORFEITURE, vol. 8, p. 446.

So the failure of a life tenant to pay annuities charged on his devise by the testatrix, though constituting breach of condition, does not defeat contingent remainders without entry. Williams *v.* Angell, 7 R. I. 145, 152.

4. Fearne's Cont. Rem. 349.

5. Williams *v.* Angell, 7 R. I. 152.

6. Smith Ex. Int., § 770; Fearne's Cont. Rem. 315, 316, 340; Wash. Real Prop. (5th ed.) 638; Abbott *v.* Jenkins, 10 S. & R. (Pa.) 296; Lyle *v.* Richards, 9 S. & R. (Pa.) 322; Waddell *v.* Rattew, 5 Rawle (Pa.) 231; Harris *v.* McElroy, 45 Pa. St. 216; Redfern *v.* Middleton, 1 Rice (S. Car.) 459; McElwee *v.* Wheeler, 10 S. Car. 392; Dennett *v.* Dennett, 43 N. H. 498.

These assurances had a tortious operation by which they could convey to the feoffee, conusee, or recoveror, a greater estate than was rightfully possessed by the feoffor, conusor or recoveree. The estate so conveyed was not, either wholly or in part, the estate of the person making the assurance, but a totally new estate, and the old estate of the person making the assurance was absolutely destroyed. If the precedent estate upon which any contingent remainder depended was destroyed by this means, the contingent remainder was destroyed likewise. Challis' Real

pass only what the bargainor or releasor can lawfully pass, and do not affect the estate for life in any other way than by transferring it to another person.[1]

Prop. 110; Fearne's Cont. Rem. 317; Archer's Case, 1 Rep. 66.

The better opinion appears to be that the power of the tenant for life to destroy contingent remainders is *strictissimi juris* and can never expect favor or anything beyond mere support, and titles depending on such an act can never be recommended. Co. Litt. 290*b*, note (1), per Butler; Harris *v.* McElroy, 45 Pa. St. 221; Fearne's Cont. Rem. 329.

"Although equity does not interpose in case of the destruction of contingent remainders, by tenant for life, where there is no trust, in the case to bring it within the cognizance of a court of equity, yet it views such destruction of contingent remainders in the light of a wrong or tort, which it is anxious to prevent; and consequently seizes every occasion, and makes every possible stretch for extending its protection against it. Thus a trust declared in a will to support contingent remainders, though annexed to an improper misplaced estate, has been rectified and transposed to effectuate the end. As in a case where one devised lands to his eldest son L, for life only, remainder to the first, second, third and fourth sons of the said L in tail, remainder to two trustees for their lives, in trust for the better securing the several remainders limited unto the several sons of the said L with remainders over; L afterwards suffered a recovery, before any son born. And upon a suit, by a daughter claiming a portion under the uses of that recovery, against a son born after it, it was insisted that the trustees for preserving the contingent remainders being living, the contingent estates were not barred by the recovery. To which it was answered, that the estate to the trustees was after and not before the estates to be supported; but the Chancellor held that the law would manage and marshal the will, according to the intent, which there was, to support the contingent remainders, notwithstanding the estates' being inserted after the contingent remainders; for if it was to stand so in construction of law, it would not preserve them; and therefore it should be construed before them, and accordingly dismissed the bill." Fearne's Cont. Rem. 337, 338, *citing* Green *v.* Hayman, 2 Cas. Ch. 10.

Whether a court of equity would compel a purchaser to accept a title depending on the destruction of contingent remainders was doubted by Lord Eldon, in Roake *v.* Kid, 5 Fra. Ves. 647, 648.

But in Redfern *v.* Middleton, 1 Rice (S. Car.) 459, a feoffment with livery of seisin by the tenant for life with a release of right of entry and action by the person entitled next in remainder or reversion, was held to be a title which one is bound to accept, although the contingent remainder-man whose interest was destroyed was an infant.

1. Smith Ex. Int. §§ 774, 775; Dennett *v.* Dennett, 43 N. H. 498; McKee *v.* Pfout, 3 Dall. (Pa.) 489. But while doubtless true that conveyances under the Statute of Uses in themselves have no tortious operation, it should be remembered that if the conveyance is made to the immediate vested remainder-man or reversioner, or if the tenant for life and the immediate vested remainder-man or reversioner join in the conveyance, or the tenant for life who makes the conveyance has the immediate vested remainder or reversion, and the remainder or reversion is of an estate which at least equals in quantity the estate of the life tenant, the conveyance causes a merger of the two estates, thereby destroying the particular estate and the intervening contingent remainders dependent upon it. Fearne's Cont. Rem. 320, 321, note (f), per Butler; Smith Ex. Int., § 778; Challis' Real Prop. *108. See MERGER, vol. 15, p. 313; Bennett *v.* Morris, 5 Rawle (Pa.) 9, 14.

"Thus, if A be tenant for life, remainder to his sons successively in tail male, remainder to B in fee, and before the birth of a son, A conveys to B in fee, or A and B join in a conveyance to C in fee, by bargain and sale or lease and release, the contingent remainders to the sons are destroyed. In the same manner, if the estate were limited to A for life either in possession or remainder, with remainder to his sons in tail, with the remainder or reversion to A in fee, if, before the birth of a son, A executes a convey-

5. If the tenant of the precedent estate surrenders his estate to the next vested remainder-man, provided the remainder at least equal in quantity the precedent estate, the precedent estate and all intervening contingent remainders dependent upon it are thereby destroyed.[1]

6. If the particular estate merges in the inheritance either by the act of the particular tenant or by the descent or conveyance of the inheritance to the particular tenant after the particular estate has taken effect in possession, all intervening contingent remainders dependent upon the particular estate are thereby destroyed.[2]

ance by lease and release, or bargain and sale enrolled, his estate for life, and remainder or reversion in fee become consolidated, and the contingent remainder is destroyed. But these observations apply to those cases only where the estates are legal." Fearne's Cont. Rem. 320, 321, note (f), by Butler.

1. Challis' Real Prop. 107, 108, *citing* Fearne's Cont. Rem. 318, 321, note (f) per Butler.

A surrender, whereby the life estate is merged, can exist only by mutual agreement. Where not only is there no mutual agreement shown, but its existence is negatived by the facts, and if it were implied it would be against the interest of him whom it is sought to bind by it, there can be no surrender. Fisher *v.* Edington, 12 Lea (Tenn.) 189.

Unless the subsequent estate was an estate of inheritance, little would be gained by the destruction of the intervening contingent remainders. But if the subsequent estate was of inheritance, the destruction of the intervening contingent estates would liberate the inheritance from all liability to be postponed to them in case they should ever become vested; and thus the tenant for life and next vested remainder-man could, by collusion, absolutely dispose of the inheritance pending the contingency. Challis' Real Prop. 108.

Merger and Surrender Distinguished. —"It is the general rule, that two estates will merge when they meet in the same person, without the intervention of any intermediate estate, and are such that the prior estate might have been surrendered to the tenant of the posterior estate (3 Prest. Conv. 152). In this sense it may be said that the scope of merger is identical with the scope of surrender. But this resemblance holds good only for the purpose of ascertaining the relative *quantum* of the relevant estates. Merger is not due to the same cause as surrender; for it arises by operation of law, and as the mere result of the situation of the estates *inter se* at the time of the merger, without regard to the intention of the parties by or through whom they are placed in that situation. But surrender is due to the intention, and is the effect of the act of surrender, and not merely of the situation in which the surrender places the two estates (Prest. Shep. T. 301). Under special circumstances, the operation of merger and of surrender may be very different. Thus, if there be an estate for life in one person, with the reversion in two other persons as joint tenants, then if the tenant for life should surrender his estate to one of the joint tenants, it will be destroyed, since one joint tenant can accept a surrender as fully as if he were solely seised; whereby the estate of each joint tenant is accelerated. But if the tenant for life should grant his estate to one of the joint tenants, one moiety only would be merged in his moiety of the reversion, and the other moiety would remain on foot, and vested in the same joint tenant, as an estate *pur autre vie*, with reversion to the other joint tenant (3 Prest. Conv. 24). The merger would effect a severance of the joint tenancy in the reversion. (Co. Litt. 183*a*)." Challis' Real Prop. 67.

2. Smith Ex. Int. § 777; Challis' Real Prop. 108; Craig *v.* Warner, 5 Mackey (D. C.) 460; Manguin *v.* Peester, 6 S. Car. 316; Redfern *v.* Middleton, 1 Rice (S. Car.) 459.

"This merger may be occasioned by the act of the particular tenant in various ways:

(1) If the tenant for life accepts the reversion in fee before the vesting of the contingent remainders. Purefoy

But where a testator limits a particular estate to the heir with a contingent remainder over without any ulterior vested remainder carrying the fee, so that the inheritance descends to the heir until the contingency happens, at the very time that the particular estate first takes effect, the particular estate is merged only *sub modo*, so as to open for the interposition of the remainder when the contingency happens.[1] So where a limitation either by devise or settlement *inter vivos* is to one for life, with contingent remainder to another, followed by a remainder to the heirs or heirs of the body of the first taker, the fee or fee tail taken by the first taker, under the Rule in Shelly's Case, is subject to open and let in the contingent remainder, provided it vest during what would have been the subsistence of the particular estate if it had not been merged.[2] For, as in these cases, the particular estate and the inheritance both take effect at the same time—*i. e.*, when the testator dies or the settlement becomes operative—if merger were to take place, the particular estate would arise and be destroyed in one and the same instant, by a descent permitted or limitation created by the very instrument by which it was itself created.[3]

7. The better opinion is that, to destroy contingent remainders, the particular estate upon which they depend must be altered in quantity, not merely in quality.[4]

v. Rogers, 2 Saund. 380, as stated, Fearne's Cont. Rem. 317.

(2) If the tenant for life surrenders (Thompson *v.* Leach, 2 Vent. 198, as stated, Fearne's Cont. Rem. 318), bargains and sells, or leased and released (Fearne, 321, note [f]) to the immediate vested remainder-man in tail or in fee, or to the reversioner.

(3) If the tenant for life and the immediate remainder-man or reversioner join in a conveyance. (Fearne's Cont. Rem. 321, note [f], and 340.)

(4) If a tenant for life, having also the immediate vested remainder or reversion, bargains and sells, or leased and released. (Fearne's Cont. Rem. 321, note [f].)

The merger of the particular estate, and the destruction of contingent remainders thereby, may be occasioned by the descent of the inheritance on the particular tenant subsequently to the taking effect of the particular estate."

Smith Ex. Int., §§ 778, 779.

As to effect of merger upon the running of the Statute of Limitations, see Mangum *v.* Prester, 6 S. Car. 316; Luce *v.* Moore, 29 Pa. St. 260.

1. Smith Ex. Int., § 780, *citing* Fearne's Cont. Rem. 343–345; Challis' Real Prop. 108, 109; Archer's Case, 1 Rep. 66; Plunket *v.* Holmes, 1 Lev. 11; Boothby *v.* Vernon, 9 Mod. 147. *Compare* Craig *v.* Warner, 5 Mackey (D. C.) 460.

But it seems that the merger becomes complete in the alienee on conveyance being made by life tenant, and the intermediate remainder is destroyed. Bennett *v.* Morris, 5 Rawle (Pa.) 15; Fearne's Cont. Rem. 320, 321, note (f), per Butler; Smith's Ex. Int., § 778.

2. Challis' Real Prop. *108, *109; Smith Ex. Int., § 780*a*.

3. Smith Ex. Int., §§ 780, 781; Challis' Real Prop. 108, 109.

4. Fearne's Cont. Rem. 338, 339, *citing* Lane *v.* Pannel, 1 Roll. Rep. 238, 314, 438; Harrison *v.* Belsey, Raym. 413.

"It is true, that if a lease be made to two with a condition to have fee, if they make a partition of the term, the condition is destroyed; but that turns upon a reason which does not at all affect a contingent remainder, viz: the requisite agreement in quality between the first estate and the enlargement to accrue thereupon. The enlargement must accrue in the same quality in which the estate was first

8. If the particular estate be once destroyed, so that no present right of entry exists when the contingency happens, the remainder will not take effect although the particular estate be afterwards restored.[1]

9. The liability of contingent remainders limited by way of use or devise to destruction is unquestioned.[2]

10. Contingent remainders limited out of an equitable fee or an equity of redemption, where the legal estate is vested in trustees or mortgagees, are not subject to destruction by reason of the determination of the equitable estate preceding the contingent remainder.[3]

granted; for that was the quality of the estate conditioned to be enlarged; and it must differ in quality at the time of enlargement from the estate enlarged; otherwise, instead of being an enlargement or extension of the estate then in being it would, in truth, be the accession of another estate of different quality, which would not be agreeable to the terms of the condition. But no such necessary condition seems to exist between a remainder and the quality of the preceding estate. Whilst the particular estate continues the same in quantity, it continues to be the same estate as far as respects its relation to a remainder. If a release or severance between joint tenants determine the old estate, then a vested remainderman would be entitled to enter immediately upon such release or severance; but if, notwithstanding such release or severance, it continues to be the same particular estate as to a vested remainder, why does it not as to a contingent one? No legal modification or alteration in the circumstances only of a particular estate, can be said to determine that estate; but the determination of the particular estate is the only point of connection between such estate and the remainder; therefore, until that point is passed, there still remains the same place for a contingent remainder to take effect." Fearne's Cont. Rem., 338, 339.

1. Fearne's Cont. Rem., 349. "If a tenant for life with contingent remainder over makes a feoffment in fee on condition, and the contingency happens before the condition is broken, the remainder is destroyed, notwithstanding the tenant for life afterwards enters for the condition broken. If the tenant for life enters for the condition broken, before the contingency happens, the contingency, it seems, may vest; but, in that case, if the reversioner enter for the forfeiture before the contingency happens, the contingent remainder is destroyed."

Fearne's Cont. Rem., 349 note (t), per Butler.

2. Challis' Real Prop. *95; Fearne's Cont. Rem. 284, 324; Mansell *v.* Mansell, 2 P. Wms. 678, 682; Cunliffe *v.* Brancker, L. R., 3 Ch. D. 393. *Compare supra*, this title, § I, 3, *f*, (1).

Under the Statute of Uses a feoffment to the use of the feoffees and their heirs during the life of B, remainder over gives the feoffee the legal estate for the life of B only; hence, if they make a tortious conveyance, their alienee being in of the new estate by disseisin, holds discharged from the use.

"It appears, that before the Statute of Uses, if the feoffees had aliened, without consideration, or with notice, the lands would have been subject to the old uses; but that was because the feoffees themselves, before that statute, stood seised of the legal fee simple; and of course their alienee came in, either of the same estate, or of an estate derived out of that. But since the statute it is otherwise; for now the feoffees are seised of no greater estate than what is actually limited in use to them, the seisin being executed to the uses by the statute; from whence it follows, that when such feoffees do not take the use in fee, if they make a feoffment, their feoffees come in neither of nor under the estate which they were seised of, but of a new estate acquired by disseisin. But though this appears to be the strict legal doctrine, 'in the case of' feoffees or grantees to uses, yet the interposition of a court of equity will make a material difference, where there are estates limited in trust to support contingent remainders, according to the modern practice." Fearne's Cont. Rem. 325.

3. See *supra*, this title, § I, 3, *f*, (1). Such remainders are in consequence

To protect contingent remainders limited by conveyances under the common law or under the Statute of Uses from destruction, the estate may be limited to trustees for the purpose in the mode heretofore pointed out.[1] Trustees appointed for this purpose, who concur in destroying the remainders, are held liable in equity as for breach of trust.[2]

(2) *Under American Statutes.*—In *Maine, Massachusetts, New York, Michigan, Wisconsin, Minnesota, Virginia, West Virginia, Kentucky, Texas, California, Dakota, South Carolina* and *Mississippi*, no expectant estate can be defeated or barred by any alienation or other act of the tenant of the precedent estate, nor by the destruction of the precedent estate by disseisin, forfeiture, surrender or merger.[3] In most of the

subject to the Rule against Perpetuities. Abliss *v.* Burney, L. R., 17 Ch. D. 211.

1. See *supra*, this title, § I, 3, *a*, (2), (*a*).

2. Fearne's Cont. Rem. 326–338. See Mc Elroy *v.* Harris, 45 Pa. St. 216.

"If the purchaser under such conveyance comes in for valuable consideration, and without notice, then will the remedy of the person claiming under the contingent remainders be against the trustees, who shall be decreed to purchase lands with their own money, equal in value to the lands sold by them, and to hold them upon the same trusts and limitations as they held the other. But if the conveyance be with notice of the uses, whether with or without consideration, in that case the purchaser shall hold the lands subject to the former trusts. Thus we observe the court of chancery, for the protection of trusts, considers a purchaser from trustees with notice, as coming in privity of the same estate which the trustees themselves held; and then pursuant to the doctrine of uses when in their fiduciary state, such purchaser holds the lands subject to the same trusts as the trustees themselves did. . . . But if tenant for life, with contingent remainders to his first and other sons, etc. depending on his estate, destroy the contingent remainders at law, though it be a plain wrong, yet, as he is no trustee, it is no breach of trust; and therefore equity will not interfere; for in such case *æquitas sequitur legem.* There are, indeed, cases wherein a court of equity has refused to punish the trustees for their concurring in a conveyance to destroy contingent remainders. As where upon a subsequent remainder to the right heirs, a collateral relation only has been affected by it, there having been no issue of the marriage; for next after the parties to the marriage, the court considers the issue to be the only objects of the settlement and trusts, and pay less regard to the remainder over to the right heirs, as no immediate objects of consideration in the settlement. As also where the application to the court for relief has been made by one who was not at the time, nor possibly ever might be, entitled to the remainder, under the words of the limitation." Fearne's Cont. Rem. 326–329.

There are also instances of a court of equity exercising a discretionary power of directing trustees for preserving contingent remainders, even to join with the tenant for life, or his first son, in barring the subsequent contingent limitations; but this has only happened under peculiar circumstances. Fearne's Cont. Rem. 330, note (n), per Butler.

3. Stimson's Am. Stat. Law. § 1403; *Maine*, Rev. Stat. 1883, ch. 73, § 5; *Massachusetts*, Pub. Stat. 1882, ch. 126, §§ 8–9; *New York*, Rev. Stat. pt. 2, ch. 1, Tit. 2, § 32; *Michigan*, Ann. Stat. § 5548; *Wisconsin*, Rev. Stat. 1878, § 2056; *Minnesota*, Gen. Stat. 1778, ch. 45, § 32, 33; *Virginia* Code, 1873, ch. 112, § 13; ch. 129, § 3; *West Virginia*, Rev. Stat. 1878, ch. 82, § 13; ch. 80, § 3; *Kentucky*, Stat. 1873, ch. 63, art. 1, § 12; *Texas*, Rev. Stat. 1879, § 550; *California*, Civ. Code, § 5741; *Dakota*, Civ. Code, § 213; *Mississippi* Code, 1880, § 1199; *South Carolina*, Ann. Laws, 1883, 280.

It seems however that this provision does not prevent the destruction of the remainder by natural expiration of the particular estate. Irvine *v.* Newlin, 63 Miss. 192.

above States, as well as in *New Hampshire*, *Vermont*, *Indiana*, *Georgia*, *Oregon* and *Wyoming*, conveyances by tenant for life, have ceased to have any tortious operation, and pass only such interest as the grantor or feoffor can lawfully convey.[1] In *New York*, *Michigan*, *Wisconsin*, *Minnesota*, *California*, *Dakota and Idaho*, it is expressly enacted that "no remainder, valid in its creation, shall be defeated by the determination of the precedent estate before the happening of the contingency on which the remainder is limited to take effect, but should such contingency afterwards happen, the remainder shall take effect in the same manner and to the same extent as if the precedent estate had continued to the same period."[2] In *Virginia*, *West Virginia* and *Kentucky*, it is expressly enacted that a contingent remainder shall in no case fail for want of a particular estate to support it,[3] and in *Georgia* that the fee may be in abeyance without detriment to subsequent remainders.[4] In States in which the

In *Alabama*, contingent remainders have been abolished, and every future estate created in land by way of contingent remainder or executory devise has the same properties as the latter estate. *Alabama* Code, 1876, § 2180.

Under *Massachusetts* Gen. Stat. ch. 89, § 4, 8; ch. 90, § 36, a tenant in tail in remainder cannot by a warranty deed pass any estate, by way either of grant or of estoppel. Allen *v.* Ashley School, 102 Mass. 262.

In several of the above States it is expressly provided however that such expectant estate may be defeated in any manner or by any means which the party creating the estate shall in the creation thereof have provided or authorized and is not on that account to be adjudged void in its creation.

Massachusetts, Pub. Stat. 1882, ch. 126, § 8, 9; *New York*, Rev. Stat. pt. 2, ch. 1, tit. 2, § 33; *Michigan*, Ann. Stat., § 5549; *Wisconsin*, Rev. Stat. 1878, § 2057; *Minnesota*, Gen. Stat. 1878, ch. 45, § 32, 33; *California*, Civ. Code., § 5740; *Dakota*, Civ. Code. § 212.

As to construction of the *New York* provision, see Greystone *v.* Clark, 4 Hun (N. Y.) 125; Simpson *v.* French, 6 Dem. (N. Y.) 108.

In *Georgia*, the remainder is not destroyed by the destruction of the precedent estate by disseisin, forfeiture, surrender, merger or otherwise, nor will any conveyance by tenant for life work a forfeiture. *Georgia* Code, 1882, § 2160, 2264.

In this State there is also a general provision that if two estates in the same property unite in the same person in his individual capacity the less estate is secure in the greater. *Georgia* Code, 1882, § 2271.

1. Stimson's Am. Stat. Law, § 1402; *Maine* Rev. Stat. 1883, ch. 73, § 5; *Massachusetts* Pub. Stat. 1882, ch. 126, § 7; *New Hampshire* Gen. Laws, 1878, ch. 135, § 18; *Vermont* Rev. Laws, 1880, § 1918; *New York* Rev. Stat., pt. 1, ch. 2, tit. 1, § 143, 145; *Wisconsin* Rev. Stat. 1878, § 2202; *Michigan* Ann. Stat., § 5654; *Minnesota* Gen. Stat. 1878, ch. 40, § 5; *Indiana* Rev. Stat. 1881, § 2961; *Virginia* Code, 1873, ch. 112, § 7; *West Virginia* Rev. Stat. 1878, ch. 82, § 7; *Kentucky* Gen. Stat. 1873, ch. 63, art. 1, § 17; ch. 66, art. 1, § 1; *Texas* Rev. Stat. 1879, § 550; *California* Civ. Code, § 6108; *Dakota* Civ. Code, § 630; *Mississippi* Code, 1880, § 1199; *Alabama* Code, 1876, § 2196; *Oregon* Gen. Law, 1872, ch. 6, § 5; *Georgia* Code, 1882, § 2260; *Wyoming* Biennial Laws, 1882, ch. 1, § 4.

2. *New York* Rev. Stat., pt. 2, ch. 1, tit. 2, 334.

The provisions of the other States above mentioned are substantially the same. Stimson's Am. Stat. Law, § 1426, (B); see *Michigan* Ann. Stat., § 5550; *Wisconsin* Rev. Stat. 1878, § 2058; *Minnesota* Gen. Stat. 1878, ch. 45, § 34; *California* Civ. Code, § 5742; *Dakota* Civ. Code, § 214; *Idaho* Rev. Stat. 1887, § 2839.

3. *Virginia* Code 1873, ch. 112, § 12; *West Virginia*, Rev. Stat. 1878, ch. 82, § 12; *Kentucky*, Gen. Stat. 1873, ch. 63, Art. 1, § 11.

4. *Georgia* Code 1882, § 2247.

freehold may be in abeyance,[1] without detriment to subsequent remainders, even though there be no express provision in regard to the effect of the failure or destruction of the particular estate upon the remainder, it would seem on principle that the remainder is indestructible. In States in which there is no express provision in regard to the abeyance of the freehold, and in which the only provision in regard to the effect of the failure or destruction of the remainder is that any limitation by deed or will is valid which would be valid as a conditional limitation it would seem on principle, that the remainder to be protected, must conform to the rules regulating the creation of executory interests.[2] It would seem that legislation, which either directly or indirectly has the effect of making a contingent remainder indestructible, would almost necessarily have the further effect of subjecting it to the Rule against Perpetuities, since it was originally exempted from its operation solely by reason of its destructible character.[3]

4. Quasi Remainders or Remainders of Personalty.—In personal

This provision was apparently intended to cover the case of the freehold being in abeyance. At common law the fact that the fee was in abeyance pending the vesting of a remainder did not affect its validity: *e. g.*, limitation to A for life, remainder to the heirs of J S a person living at the time of the limitation. Here the fee according to the ordinary construction is in abeyance till J S dies, when his heirs may be determined; yet the remainder is good, and can only be defeated by the death of the life tenant before J S. Wms. Real Prop. 266.

This section however, by providing that an "absolute estate may be created to commence in future" necessarily implies that the common law doctrine, that the freehold cannot be in abeyance, is abrogated.

1. See *supra*, this title, § I, 1, *b*.

2. This seems to be the recognized rule in *England* under the 40 & 41 Vict. C. 33, which enacts, that every contingent remainder created by any instrument executed after 2nd August, 1877, or by any will or codicil, revived or republished by any will or codicil executed after that date, in tenements or hereditaments of any tenure, which would have been valid as a springing or shifting use, or executory devise, or other limitation, had it not had a sufficient estate to support it as a contingent remainder, shall, in the event of the particular estate determining before the contingent remainder vests, be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use, or executory devise, or other executory limitation.

This act is generally believed to have been passed in consequence of the observations made by the judges in the case of Cunliffe *v.* Brancker, 3 Ch. D. 393, upon the practical injustice caused by the common law principle forbidding the abeyance of the freehold.

It will be seen from the act that the common law doctrine of the destruction of contingent remainders by the natural expiration of the precedent estate pending the contingency, is by no means obsolete; since it still applies (1) to all contingent remainders created by any deed executed on or before 2nd August, 1877, or by any will executed before that date and not subsequently revived or republished; and (2) to all contingent remainders, whenever created, which do not conform to the rules regulating the creation of executory interests.

Legal contingent remainders which are protected from destruction by 40 & 41 Vict. C. 33, must therefore conform to the Rule against Perpetuities. Challis' Real Prop. 112, 113.

3. See *supra*, this title, § I, 3, note on Remoteness.

property under which both chattels real and personal are included, there cannot be a remainder in the strict sense of that word; if the future interest be preceded by, and is to take effect in defeasance of a prior interest, it is a conditional limitation or shifting interest whether created by deed or will; if not preceded by such prior interest, or if so preceded, but limited in such way as not to effect the prior interest, it is a springing interest. Therefore, whether preceded or not by a prior interest, all future interests of personalty are strictly speaking executory, and fall under the rules by which that mode of limitation is regulated.[1] For purposes of convenience, however, a springing interest in personalty, limited to take effect after the determination of a prior life interest created by the same instrument out of the same subject of property, is frequently designated as a remainder or *quasi* remainder to distinguish it from a conditional limitation or springing interest not so preceded. Such an interest is analogous to a remainder in real estate in that it is limited to await the natural determination of the prior interest, and like it is distinguished by that fact from a conditional limitation; it cannot however be said to be supported by the prior interest in the sense in which a remainder in real estate is supported by the particular estate, for the dependence of the remainder upon the particular estate resulted from the feudal doctrine that the freehold could not be in abeyance and such an interest is not subject to the common law doctrines derived from the principles of feudal tenure.[2]

5. Acceleration of Remainders and Quasi Remainders—*a.* WHEN PRECEDED BY VESTED INTERESTS.—A gift of real or personal property to one for life, and from and after his decease to another, means from and after the determination of the preceding estate, and the gift over, if vested when the preceding estate determines, whether by the life tenant's death, his incapacity to take, renunciation, or any other circumstance, is thereby accelerated, and takes effect in possession immediately, having only been postponed for his sake.[3] If the gift over be contingent, the following distinctions seem to be sustained by principle: (1) In

1. Fearne's Cont. Rem., 401, note (*e*) per Butler; Smith Ex. Int., § 159*a*; Gray's Perpetuities, § 117. *Compare infra*, this title, § II, 4 *d*.

2. Smith Ex. Int., § 168.

3. 1 Jarm. on Wills (5th ed.) *574; Perkins' Treatise Conv. §§ 567, 569; Shep. Touch. 435, 451; Theobald on Wills (2nd ed.) 609; Malins, V. C., in Jull *v.* Jacobs, L. R., 3 Ch. Div. 712; Blatchford *v.* Newberry, 99 Ill. 48.

The principle is equally applicable to both real and personal property as well as residuary bequests of mixed funds. Everstaff *v.* Austin, 19 Beav. 591; Fox *v.* Rumery, 68 Me. 121; Verrill *v.* Weymouth, 68 Me. 318; Yeaton *v.* Roberts, 28 N. H. 462; Sauter *v.* Muller, 4 Dem. (N. Y.) 389; Crozier *v.* Bray, 39 Hun (N. Y.) 121; Taylor *v.* Wendall, 4 Bradf. (N. Y.) 324, 331; Sarles *v.* Sarles, 19 Abb. N. Cas. (N. Y.) 322; Blatchford *v.* Newberry, 99 Ill. 46; Marvin *v.* Ledwith, 111 Ill. 144; Dean *v.* Hart, 62 Ala. 358; Holderly *v.* Walker, 3 Jones Eq. (N. Car.) 46; Huber *v.* Mohn, 37 N. J. Eq. 432; *In re* Rawlins' Estate (Iowa), 47 N. W. Rep. 992; Bell *v.* Towell, 18 S. Car. 94; Gordon *v.* Shewsbury, 11 S. Car. 2;

Waddle v. Terry, 4 Coldw. (Tenn.) 51, 59; Darcus v. Crump, 6 B. Mon. (Ky.) 363, 365. For other authorities see LEGACIES AND DEVISES, vol. 13, p. 32, note (1).

The principle upon which the court proceeds in such cases is well explained by Malins, V. C., in Jull v. Jacobs, L. R., 3 Ch. Div. 709, where, under a devise of real and personal property to testator's daughter "during her lifetime, and after her decease the property to be equally divided between her children on their becoming of age," it was held that in respect to the real estate, the gift to the children was strictly a vested remainder; that the construction as to the personalty followed the rule as to the realty, and the gift to the daughter being void on account of her having attested the will, the gift to the children was accelerated and took effect immediately: "The first question is, What would have been the effect of this devise and bequest if the daughter could have taken under it? Property is given to her for life, and after her decease to be equally divided between her children; and notwithstanding what has been urged by Mr. Glasse, I take that to be as clear a remainder to the children as the law could possibly create. He says: 'I give the property to A for life, and after the decease of A to B,' or 'after the decease of A to A's children.' It is a remainder vested if there are children, or contingent if there are no children. Whenever the life estate expires, those in remainder take. Therefore, under the old law, when life estates were forfeitable by any of those acts which formerly would have caused a forfeiture, where property was limited to A for life, and after the decease of A to A's children, if A had forfeited the life estate, his children would have immediately a right (of entry), because 'from and after the decease' means from and after the determination of the life estate, and however it is terminated, whether by the death of the tenant for life or by forfeiture, it is equally gone. If it was given to A for life, and after the decease of A to B, and A forfeited, B would have immediately had a right of entry, having the next remainder. And it is not contingent on account of taking effect only after the death of A. Therefore, in my opinion, it is perfectly clear that the daughter is by this will as to the real estate made tenant for life with remainder to her children, to be equally divided on their coming of age. A remainder is, in my opinion, unquestionably created. But then comes the question whether the Wills Act, by taking away the life estate of the daughter, causes an intestacy during her life, so as to carry the property to the heir-at-law, or accelerates the remainder. It is perfectly clear, in the first place, that the children are postponed to the mother simply because the mother is to have the property for her life, but if the mother cannot have the property for her life, why are the children to be postponed? The reason of their postponement altogether ceases; they are not to have it until after her death, because the testator assumed that she would have it during her life. But he was ignorant of the law that if he called in his daughter to be an attesting witness the very gift he made to her would absolutely fail. Now, he has postponed his grandchildren, that is, his daughter's children, to the daughter, solely because the daughter was to take for life, and if he had known that she could not take for life he would not have postponed the children until after her death; he would not have left her and her family totally destitute in the meantime. It is a mere accident that the daughter cannot take the life estate, and I am of opinion that the children are postponed to the daughter simply that she may have the property for life, and if she could not have it for life, the children would have had it immediately. That would be the conclusion I should come to from the reason of the thing without the decisions. But the decisions are all the same way."

"The testator by his will gave his real and personal estate to trustees, and directed them, subject to certain payments thereout, to pay the rents to his son John Lainson for life, and from and after the decease of his son, he gave the estate to his first and other sons in tail male. By a third codicil, the testator revoked the bequest in favor of his son, and in lieu of it he gave him an annuity, but he did not, by that or any other codicil, dispose of the rents of the estate during the life of John Lainson his son. The question is, whether this creates an intestacy or an acceleration of the estate to the son of John Lainson, and I am of opinion that it is an acceleration of the estate to the son, and not an intestacy. I have

looked carefully at the authorities, and I am unable to distinguish the case where a person gives an estate to another, and that fails, from the case where the testator himself directs that it shall fail; and although the expression used is, that the estate to the son of John Lainson is only to take effect 'from and after John Lainson's decease,' I am of opinion that the meaning is, 'from and after the determination of his estate by death or otherwise.'" Romilly, M. R., in Lainson *v.* Lainson, 18 Beav. 6. Affirmed by the Lords Justices Knight, Bruce and Turner, 5th N. Y. 754.

The principle applies whether the life estate is revoked by the testator or determined by a forfeiture clause. *In re* Love; Green *v.* Tribe, 47 L. J., Ch. 783; L. R., 4 Ch. D. 296. In Eaton *v.* Roberts, 28 N. H. 462, the court by Wood, J., said: So "when a devise to two in succession fails as to the first for causes which would, but for the gift over, create a lapse, the next in succession or remainder shall take it."

As when the life tenant died in lifetime of testator. Bell *v.* Towell, 18 S. Car. 94. See LEGACIES AND DEVISES, vol. 13, p. 32.

Compare Thompson *v.* Hoop, 6 Ohio St. 481; Goddard *v.* Goddard, 10 Pa. St. 87; or was incapable of taking because a slave. Darcus *v.* Crump, 8 B. Mon. (Ky.) 365.

Widow's Renunciation and Election Against Will.—Where the widow, who has been given a life interest under the will renounces and elects to take her dower, or the statutory allowance instead, her renunciation works an extinguishment of her life estate, and acceleration of the rights of the second taker. Fox *v.* Rumery, 68 Me. 121; Verril *v.* Weymouth, 68 Me. 318; Wood *v.* Wood, 1 Metc. (Ky.) 512; Eaton *v.* Roberts, 28 N. H. 459-462; Timberlake *v* Parish, 5 Dana (Ky.) 345; Ezell *v.* Ezell, 1 South. L. Rev. 369; Brown *v.* Hunt, 12 Heisk. (Tenn.) 404; Holderly *v.* Walker, 3 Jones Eq. (N. Car.) 46; Adams *v.* Gillespie, 2 Jones (N. Car.) 444; Milliken *v.* Welliver, 37 Ohio St. 460. But in such case the better opinion is that the remainder, though accelerated, is subject to an equity in favor of legatees and devisees who have been disappointed by the widow's election to take against the will. Sarles *v.* Sarles, 19 Abb. N. Cas. (N. Y.) 322; Jennings *v.* Jennings, 21 Ohio St. 56; Timberlake *v.* Parish, 5 Dana (Ky.) 352. In Dean *v.* Hart. 62 Ala. 310, the court by Brickell, J., said: "The effect of her dissent is simply to annul the provisions of the will in her favor—to blot them out and leave them as if, from death or other cause, she had become incapable of taking. The statute does not contemplate that it shall in any other respect disappoint and nullify the arrangements of the will, destroy the rights it confers, or that it shall create new and distinct rights in those who are strangers to the will. The whole purpose of the Statute is accomplished when she obtains that which the law would have given her if her husband had died intestate. Whatever she renounces of necessity results to the indemnity of those who are injured by her renunciation. (2 Lomax on Ex'rs 349; McReynolds *v.* Couts, 9 Gratt. (Va.) 242.)" In Sandoe's Appeal, 65 Pa. St. 316, the court by Read, J., said: "The rule in equity treats the substituted devises and bequests to the wife, as a trust in her for the benefit of the disappointed claimants, to the amount of their interest therein; and the court will assume jurisdiction to sequester the benefit intended for the refusing wife, in order to secure compensation to those whom her election disappoints." See Gallagher's Appeal, 87 Pa. St. 200; Staig *v.* Atkinson, 144 Mass. 564.

Civil Death.—Conviction and sentence to imprisonment for life for murder of the second degree, does not divest the estate of the life tenant, under 2 *New York* Rev. Stat. 701, § 20, providing that one sentenced to imprisonment for life shall be thereafter deemed civilly dead, and hence remainders dependent on the dropping of the life are not thereby accelerated. It seems also that civil death did not divest property rights at common law, and hence the same result would have followed irrespective of the statute. Avery *v.* Everett, 110 N. Y. 317; 36 Hun (N. Y.) 6.

Cases Contra.—Knepley's Appeal, 17 Pa. St. 19. In this case a testator devised to his wife his dwelling house and furniture, and directed the sum of $3,000 to be left or put at interest by his executor and the interest thereof to be paid to his widow annually during her widowhood; and as to the said three thousand dollars he further directed, that at the marriage or decease of his widow, the same to be put to interest by his executor for his son John during his life-

the case of a devise of realty to two in succession, if the tenant of the precedent estate die in the lifetime of the testator, the limitation over will be construed an executory devise, and the land, until the contingency happens, will descend to the heir at law; if, however, the particular estate has once vested in the life tenant, and afterwards fails for any cause, it seems the limitation over will be construed a contingent remainder and will fail for want of support.[1] (2) In States in which the freehold may be in abeyance without detriment to subsequent contingent remainders, it is immaterial whether the precedent estate ever vested in the life tenant or not, and in either case the remainder will pass to the heirs at law until the contingency happens upon which it is to vest.[2] (3) In regard to personalty

time, and at his decease, the principal to be paid to his sons Charles and Henry; and if one of them should die before his father, the survivor to take the whole. The widow refused to take under the will. *Held*, that as the said sum of three thousand dollars was to be invested for the use of John only on the marriage or decease of the widow, that John was not entitled to have that amount invested for his use on the refusal of the widow to take under the will; but it was decided that the balance in the hands of the administrator, which was less than $3,000, be invested and allowed to accumulate until the marriage or decease of the widow, when the sum of $3,000 might be required to be invested for the benefit of John if living, and if not, then to be paid by his sons as directed by the will.

This case is contrary to the current of authority and does not seem to have been cited in later cases in the State. Dale *v.* Bartley, 58 Ind. 101, and Blatchford *v.* Newbury, 99 Ill. 11, do not militate against the principle in the text, since they were both decided on the ground that only those beneficiaries were to take who survived the life tenant. See note 2 *infra*.

1. Fearne's Cont. Rem. 525, 526; But *compare* Thompson *v.* Hoop, 6 Ohio St. 480. See Marvin *v.* Ledwith, 111 Ill. 145. See also *infra*, this title, § II, 3; § II, 4, *b*.

2. Dale *v.* Bartley, 58 Ind. 101; Augustus *v.* Seabold, 3 Metc. (Ky.) 155. See *supra*, this title, § I, 1, *b*; § I, 3, *g*, (2).

A testator after devising certain real and personal property to his wife provided that in case she "shall marry, she is only to hold that part of the tract of land and farm which lies eastwardly of the lane and road leading through the plantation," and by a subsequent clause provide that after her death the property so bequeathed should be divided between the children of his brothers or such of them as should be living at the time of her death. *Held*, that the heirs at law were entitled by descent to the land lying "westwardly of the lane" as designated in the will from the period of the marriage of the widow until her death, when the devisees in remainder were to be ascertained and would be entitled under the devise. Augustus *v.* Seabolt, 3 Metc. (Ky.) 155. In the above case the court by Stites, J., said: "It is manifest that the testator, to a certain extent, overlooked the event of his wife's marrying again, and that he did not provide to whom the land 'lying westwardly of the lane,' should go on the happening of such an event. It is true that he directs that all the real estate devised to his wife shall, after her death, go to such of the children of his brothers' — naming the brothers— as may be then living; but they take nothing until after the death of his wife, and then only those children will take who shall be then living. Now in the absence of any residuary clause in the will, can it be said, from anything in the will that the testator made, or intended to make, any provision with regard to the contingent estate in the land west of the lane, which would exist upon the marriage of his widow, and continue until her death? We think not. His intention that her estate in that part of the land should cease on her marrying again is expressed in so many words; and as clearly expressed is his inten-

tion that the children of his brothers shall not take until the death of his widow. To say that he intended the devisees in remainder to take on the marriage of the widow, would not only violate the plain language of the testator, but it might also defeat his will in another respect by letting in as devisees, persons not intended to be the recipients of his bounty, for it is not to the children alive at the marriage of the widow that he devises his estate, but to those alive at her death. It is therefore obvious that the estate of the devisees in remainder in the land in dispute cannot, by any construction of the will, consistent with the language, be made to begin before the death of the widow; and equally plain that the widow's estate therein ceased upon her marriage, thus leaving the land, between the periods designated, undisposed of by the will, and to descend to and vest in the heirs at law until the death of the widow. That the testator failed to provide for the happening of the contingency upon which his wife's estate in the land was to cease before her death, and omitted to dispose of the estate that might thereby accrue, may have resulted from a belief upon his part that she would not marry, or from sheer negligence, or even ignorance that an estate might thus be created. Be this as it may, the omission cannot be supplied by the court, for, as we may have seen, that would be making a will for him rather than construing that which he made. Nor can any mere inference that he really designed to dispose of his entire estate be allowed to prevail here for such inferences as we have seen would be inconsistent with other parts of the will, and is neither necessary nor indubitable. Neither will it do to say, as is suggested in the opinion of the court below, that it is evident that the testator did not intend to provide for his heirs at law. The heir at law never takes by the act or intention of the testator. His right is paramount to and independent of the will, and no intention upon the part of the testator is necessary to its enjoyment. On the contrary, such right can only be displaced or precluded by direct words or plain intention, evidencing a desire upon the part of the testator that he shall not take. He needs no argument or construction showing intention in his favor, to support his claim. They belong to the party claiming under the will and in opposition to him, and it is therefore unnecessary here that there should be any inference of intent on the part of the testator in favor of the heirs at law to entitle them to the land." *Compare* Wager *v.* Wager, 96 N. Y. 164, in regard to the evidence of intent necessary to exclude the heir-at-law or next of kin. See WILLS.

A testator, leaving no parent or child, died, bequeathing to his widow, absolutely, all of his personalty, and also certain real estate during her life. His will provided that after her death, his executor should sell such realty, and divide the proceeds thereof, in specified portions among certain legatees named. "And if any of the legatees should not survive him or should not be living at the time provided for the payment of the legacies and that the amount bequeathed to any who did not survive him be equally divided between his brothers and sisters now living." The widow having elected to take under the law instead of under the will, during her lifetime petitioned the proper court for an order to sell such realty for the payment of such legacies, alleging the personalty to be insufficient to realize the required amount. *Held*, on demurrer to the petition that, at least as far as relates to the realty the widow must be held to have rejected the will entirely. *Held*, also, that she took one-third of the land in fee. *Held*, also, that as to the title to the remaining two-thirds during her life, the testator died intestate, leaving it undisposed of and that, under section 26th of the Statute of Descents, she is entitled to such two-thirds during her life. *Held*, also, that during her lifetime, no part of such realty could be sold by the executor for the payment of such legacies. Dale *v.* Bartley, 58 Ind. 101. In the case just cited the court by Worden, J., said: "The terms of the third clause of the will are very explicit, as to the event, the death of the testator's wife, upon the happening of which the executors were authorized to take charge and dispose of the property. Then the time fixed for the payment of the several legacies was clearly not until after the death of the widow, for they were not to be paid until the property was disposed of. But, if any of the legatees were to die before the time fixed for payment, his or her legacy was to go to the brothers

it seems that the next of kin are beneficially entitled to the income undisposed of until vesting.[1] (4) If the gift over is limited to take effect on a particular event and the very opposite or alternative of that event actually happens, the subsequent gift fails altogether, although the prior gift be out of the way.[2] (5) So if the performance of a condition upon which the remainder depends in the case of realty, is impossible or in the case of personalty, besides being impossible constitutes the sole motive of the gift.[3]

and sisters of the testator. There could be no distribution under the fourth clause of the will until the time specified arrived; for, until that time, it could not be told what legatees would survive, and therefore, be entitled to the legacy. Finally, it might be detrimental to the interests of the brothers and sisters of the testator, who were to have the overplus, to have the sale made before the time fixed by the testator."

A testator devised his estate to trustees, to be held by them until its distribution to those ultimately entitled. The will contained minute directions as to the administration of the estate during this period. It made provision for the widow in lieu of dower, and for testator's daughters, and gave the estate to the issue of the daughters after the widow and daughters should have died. It further provided that "in case of the death of both of my said daughters, without leaving lawful issue then immediately after the decease of my wife if she survive my said daughters, but if not, then immediately after the decease of the last surviving daughter," the estate should be divided and distributed among "the surviving descendants" of testator's brothers and sisters, such descendants taking *per stirpes*. Both daughters died without issue, and the widow renounced her rights under the will, taking under the statute one-third of the personalty and her dower in the realty. *Held*, that the distribution could not take place until the death of the widow notwithstanding the renunciation. Blatchford *v.* Newberry, 99 Ill. 13. In the case just cited, the court by Sheldon, J., said: "Who are the donees in this devise to whom one-half of this estate is to be distributed? They are a class of 'surviving descendants' of the testator's brothers and sisters. The members of this class are to be determined by the event or time to which the word 'surviving' relates. There are three periods here to which it may be claimed to relate, the death of the testator; the death of the last daughter, Julia Newberry, without issue; or the time appointed for the distribution upon the death of Mrs. Newberry. However, it may have been at some former time, we understand the rule now prevailing to be, that where a gift to survivors is preceded by a life or other prior interest, it takes effect in favor of those who survive the period of distribution, and those only." For a vigorous dissenting opinion by Dickey, J., see p. 65. This case contains a very complete discussion of the subject and will repay careful study. As to the period to which words of survivorship refer, see WILLS.

1. Theobald on Wills (2d ed.) 610; Blatchford *v.* Newberry, 99 Ill. 13.

2. Jarman on Wills (5th ed.), *577; Lomas *v.* Wright, 2 My. & K. 775. LEGACIES AND DEVISES, vol. 13, p. 31, and cases cited.

Thus if the gift over is to take effect in case the prior donee die before twenty one, and the prior donee attain that age, the gift over fails, although the prior donee is an after born illegitimate child and therefore cannot take. Lomas *v.* Wright, 2 My. & K. 775.

3. Wms. Exrs. 1263, 1264; Humberstone *v.* Stanton, 1 V. & B. 385.

A testatrix gives and devises her whole estate for the support of her mother during her life. She further provides that "if L W will stay on my land and rent as much as he can well manage, and pay the customary rent for mother's support so long as she lives, then at her death I give and devise to him, the said L W, my Bird place," etc. . . . She further disposes of all that may be left at her mother's death. Her mother died before the testatrix. *Held*, that the devise was for the benefit of the mother, and intended to be a remuneration for

In the same way powers of sale will be accelerated but not powers to charge.[1] No distinction exists as regards acceleration between appointments and devises, though if the object of an appointment which is void is to benefit the persons who would take in default of appointment, and a remainder is well appointed, the remainder will not be accelerated.[2] The doctrine of acceleration, however, is merely a rule of construction founded upon the presumed intention of the testator, and when it is the evident intention of the testator that the remainder should not take effect till the expiration of the life of the prior donee, the remainder will not be accelerated.[3]

b. WHEN THE REMAINDER IS PRECEDED BY A CONTINGENT INTEREST.—If a remainder or *quasi* remainder is preceded by a contingent interest, the first thing to determine, is whether the contingency affects the subsequent limitations; if so, the failure of one involves all;[4] if not, the failure or destruction of a contingent remainder of freehold from any cause at common law accelerates the next vested estate.[5] In States in which the freehold may be in abeyance without detriment to subsequent remain-

what the devisee might do for her, and the devise failed with the object for which it was made. Burleyson *v.* Whitley, 97 N. Car. 295. See LEGACIES AND DEVISES, vol. 13, p. 99. As regards personalty, if the impossibility of the condition were unknown to the testator, as where a legacy is given on condition the legatee marry the testator's daughter, who happens to be then dead, on the condition subsequently becomes impossible, the impracticability of performance will bar the legatee's claim. Wms. Exrs. 1264.

1. Theobald on Wills (2d ed.) 610, *citing* Truell *v.* Tysson, 21 Beav. 437.

2. Theobald on Wills (2d ed.) 610, *citing* Craven *v.* Brady, L. R., 4 Eq. 209; L. R., 4 Ch. App. 296; Crozier *v.* Crozier, 3 D. & War. 353. Jarman, however, says that the doctrine of acceleration does not extend to estates limited under powers of appointment. 1 Jarman on Wills (5th ed.) 580. *Compare* Reid *v.* Reid, 25 Beav. 469.

3. Blatchford *v.* Newberry, 99 Ill. 48; Dale *v.* Bartley, 58 Ind. 105. See Estate of Mathew Delaney, 49 Cal. 76; Holt *v.* Lamb, 17 Ohio St. 374; Huber *v.* Mohn, 37 N. J. Eq. 432.

4. 2 Jarman on Wills (5th ed.) *830; Theobald on Wills (2d ed.) 477. As to realty, see Davis *v.* Norton, 2 P. W. 390; Moody *v.* Walters, 16 Ves. 283; Doe *v.* Shippard, Doug., stated Fearne's Cont. Rem. 236; Folderoy *v.* Colt, 1 M. & W. 250. As to personalty, Gray *v.* Golding, 6 Jur. N. S. 474; Lett *v.* Randall, 10 Sim. 112; Cattley *v.* Vincent, 15 Beav. 198; Fitzthenry *v.* Bonner, 2 Drew 36.

As to when the contingency affects the whole series, see above references. Also WILLS. *Compare* Robison *v.* Female Orphan Asylum, 123 U. S. 709; Wager *v.* Wager, 96 N. Y. 164.

5. Challis' Real Prop. 94, *citing* Goodright *v.* Cornish, 1 Salk. 226.

It would seem to be quite immaterial whether the contingent remainder was void in creation, afterwards became void through the event upon which it depended becoming impossible, or failed by the determination of the particular estate before the contingency happened. In any case the next vested remainder would be accelerated, as appears from the fact that the next vested remainder-man was entitled to enter on cause of forfeiture being committed by life tenant, thereby destroying intermediate contingent remainders. Challis' Real Prop. 107.

The leading case on the subject is Goodright *v.* Cornish, 1 Salk. 226, where testator devised lands to John for fifty years, if he should so long live, "and as for my inheritance after the said term I devise the same to the heirs male of the body of John, and for default of such issue then to Richard." *Held*, that the remainder to the heirs male of the body of John was void for

ders,[1] or where the freehold is in trustees, and the interests are carved out of the equitable fee,[2] or the limitations concern personal property, it would seem on principle that if the contingent interest is void in its creation from any cause, or the contingency upon which it depends afterwards becomes impossible, or the donee dies before the testator, the next vested interest would be accelerated;[3] but that if the contingent interest were valid in its creation, and the event upon which it depends undetermined, the limitation over would not take effect until it was ascertained whether the contingent interest would vest, and, in the meantime, the property would devolve upon the heirs or next of kin of the testator or settlor.[4]

want of sufficient estate to support it and the ultimate remainder to Richard took effect immediately.

1. See *infra*, note (4); § I, 1, *b*; § I, 3, *g*, (2).

2. See *supra*, this title, § I, 3, *f*, (1).

3. Willing *v.* Baine, 3 P. W. 113; Robison *v.* Female Orphan Asylum, 123 U. S. 702; Miller *v.* Fleming, 6 Mackey (D. C.) 397; Wager *v.* Wager, 96 N. Y. 164.

Real estate was conveyed to C for life, and after her death to her children by E, during the life of each of the children, and after their death to E and to his heirs, *habendum* to C during life, and after her death to "the said surviving children," and after the death of each of them, to E and his heirs. *Held*, that the provision for the children was contingent upon their surviving their mother, and only such of the children as survived her took the estate, and that E took a vested remainder in fee subject to the intervening contingent estate to the children. Smith *v.* Bloc, 29 Ohio St. 496.

In the case just cited the court by White, J., said: "The children are provided for as a class, and it is only such of the class as survive the mother for whom provision is made. If none of the children should survive the mother the intervening estate would be destroyed and the remainder-man in fee would be let into the possession immediately on the determination of the life estate of C. But if any of the class survive the mother, the survivors take the intervening estate, and thus postpone the remainder-man in fee until the intervening estate is determined."

So where the testator bequeathed the income from his estate to his wife, and after her decease, to his sisters, if living, and on their death be divided among three charitable institutions. *Held*, that the death of the sisters before the testator did not defeat the remainder to the charities, but it vested in them upon the death of the widow. Robison *v.* Female Orphan Asylum, 123 U. S. 709.

4. Acceleration is a question of intention, and depends upon the assumption that the subsequent interest was intended to be delayed solely for the benefit of the prior interest. Whenever, therefore, the prior interest determines, the subsequent interest takes effect. Therefore, inasmuch as at common law, an intermediate contingent remainder of freehold is annihilated by the destruction of the particular estate before it is ready to vest, the next vested remainder takes effect at once. But in States in which the freehold may be in abeyance without detriment to subsequent contingent remainders, or where the freehold is vested in trustees, or the limitations concern personal property, the intermediate contingent interest, being incapable of destruction, can only be removed from the way of the subsequent interest by the fact that it was originally void in creation, or afterwards becomes void because the event upon which it was limited to take effect becomes impossible. Therefore, until the possibility or impossibility of the event upon which the intermediate interest depends is established, the ulterior interest cannot take effect, and in the interim rents and profits pass to the settlor or testator's legal representatives.

In Carrick *v.* Errington, as stated by Lord Hardwicke in Hopkins *v.* Hopkins, 1 Atk. 597, it was held that where the interests were created by settlement to trustees, the heir at law of the settlor was entitled to the rents, till some per-

son came *in esse* capable of taking under the contingent remainders. This case is expressly placed by the English writers of 4th Eng. ed. of Jarman on Wills, on the ground that the freehold was outstanding in trustees. 2 Jarman on Wills (5th Am. ed.) *575.

In Wade-Gery *v.* Handley, L. R. 1 Ch. D. 653. 3 Ch. D. 374, a testator devised estates to trustees and their heirs upon trust to accumulate the rents until the expiration of a term of twenty-one years, and after the expiration thereof to stand possessed of the estates in trust for the second and every other younger son successively of his nephew W in tail male, and failing such issue, in trust for the first and every other son of his nephew H in tail male, with divers limitations over; and he gave a fund of personal estate to be held on similar trusts. At the expiration of the term, W and H were both living, and each had an only son. *Held*, on petition of a son of H claiming the estates as tenant in tail in possession indefeasibly, or as tenant in tail in possession subject to defeasance in the event of a second son of W being born (affirming the decision of Bacon, V. C.), that until it should be ascertained whether there would be a second son of W, the rents of the real estates and the income of the personal estate were undisposed of and belonged, respectively, to the heir-at-law and the next of kin. "The testator has provided for the manner in which his testamentary dispositions are to be made effectual, and the court has very often exercised a large discretion in construing a will by supplying more than is said by the testator for the purpose of giving effect to what the court is satisfied was the true intention. But upon this will I cannot find any expressed intention by the testator to dispose of the property, after the expiration of the period of accumulation which he mentions, in favor of any but persons whose rights are merely contingent. No doubt, he did not consider that there might be an interval between the expiration of the twenty-one years he mentions and the period at which the rights could be ascertained. The contingency of that interval occurring has happened, and as to what is to be done in that event he is silent. What authority have I, in construing this will, to hold that he does by his will say (for this is what I am asked to do) that when the twenty-one years has expired, if it is then doubtful which of the persons entitled under the several limitations, executory as they are, will become ultimately entitled, the one who presents himself first shall have in the interval. I can find no authority for saying that. I am dealing with it now only as a question of construction. If I were to adopt the suggestion of the plaintiff's petition, and declare that the plaintiff is entitled to the possession of the real estate and the enjoyment of the income of the personalty and years afterwards a person with a better title, namely, a second son of William Wade-Gery, should be born, what account would the court be able to render to the person who would then be clearly entitled to the enjoyment of the estate during the interval. If the plaintiff were to die after the court had made that declaration, his heir-at-law, or legal personal representative, would be entitled, however long the interval might be, to the enjoyment of this property. Is there anything like what I can impute to the testator as his intention? The testator had a right to dispose of the property, and if he has failed to dispose of it entirely, the law has pointed out what the consequence is. The petitioner is entitled to all the testator has given him. Can I say that he has given him anything, if the event shall happen that a second son should be born? It is impossible for one to do so. I confess, keeping in mind that rule of which I have been reminded, that the court leans as strongly as it can against intestacy, there is a strong temptation to adopt the construction which Sir Henry Jackson puts upon the will, because such a construction would be more useful and rational. But that does not justify me in putting words into this will which I do not find in it. I find no gift to the plaintiff at the time when the twenty-one years shall have expired; and if I were to make the declaration he asks for, I must make it on the assumption that the will contains those words. I have no authority to do that. Therefore, upon the question of construction, I am against the plaintiff. But if I am asked, as a matter of authority, to decide in favor of the plaintiff, then I am bound to decide against him. It is impossible for any serious purpose to distinguish this case from that of the Countess Bective *v.* Hodgson (10 H. L.

II. EXECUTORY INTERESTS—1. **History and Origin.**—Before the passage of the Statute of Uses,[1] chancery compelled the feoffee to uses to carry out the confidence reposed in him in the mode pointed out by the feoffor in the instrument, and as the common law recognized the feoffee alone as the legal tenant seised of the premises and responsible for feudal services and ignored the existence of the *cestui que use*, the settlor or feoffor might limit to the *cestui que use* interests which would have been invalid in a conveyance at common law, because framed in violation of its doctrines derived from the principles of feudal tenure. Hence landowners who before the Statute of Wills,[2] were unable to make a valid will of lands, were wont to accomplish the same result indirectly by conveying in their lifetime the land they wished to devise, to a feoffee to such uses as the feoffor should appoint by his last will. The will then operated upon the use and was enforced through chancery.[3] The Statute of Uses which converted the interest of the *cestui que use* into a legal estate, put an end to all devises of lands until the passage of the Statute of Wills which authorized a devise of all lands held in fee in free and common socage and of two-thirds of the land held by any one in fee in knight service. In construing this statute, courts of law adopted the more liberal rules which chancery had formerly applied to devises by way of use, in analogy to which they sanctioned the validity of devises of future estates of freehold and limitations which, though invalid at common law, would have been sustained by chancery in a conveyance to uses.[4] The

C. 656). The same point arose there; the same rule must be applied as was laid down as being the law by the highest authority which we know of—namely, the House of Lords." Bacon V. C. in 1 Ch. D. 661–663.

In Sidney *v.* Wilmer, 25 Beav. 266, Sir J. Romilly, M. R., said, that "there is no case in which the estate of a remainder man has been accelerated for the purpose of giving him a right to rent accrued prior to the time when his estate took effect," and although this case was overruled by Lord Westbury on appeal (4 D. J. & S. 84), the lords justices in Wade-Gery *v.* Handy, L. R., 3 Ch. D. 374, declined to follow Lord Westbury's decision because inconsistent with Countess of Bective *v.* Hodgson, 10 H. L. C. 656, thus reinstating the authority of Sir J. Romilly's original decision.

See further Theobald on Wills (2d ed.) 610; Chambers *v.* Brailsford, 18 Ves. 368; Andrew *v.* Andrew, L. R., 1 Ch. D. 410.

As to implication of shifting clauses with a view to aiding the intent to avoid intestacy, see D'Eyncourt *v.* Gregory, 34 Beav. 36.

1. 27 Hen. VIII, ch. 10, A. D. 1537.

2. 32 Hen. VIII, ch. 1, A. D. 1542.

3. 2 Wash. Real Prop. (5th ed.) 738; Co. Litt. § 169; Wms. Real Prop. *258; Lewis' Perp. *76.

4. Wms. Real Prop. *312, *313; Wash. Real Prop. (5th ed.) 738, 739.

This construction was doubtless aided somewhat by the fact that irregular limitations of various kinds, bearing a close analogy to executory limitations, had been tolerated in devises under local customs—as by the custom of gavelkind and the custom of London. Wms. Real Prop. *312, *citing* Year Book 9 Hen. VI. 24 b.; Litt. 169, 566. See also Gray's Perp., § 124.

The following is the account of the rise of executory interests given by Mr. Challis: "For a long time previously to the Statute of Uses, 27 Hen. VIII, ch. 10, while uses existed in the shape of what are now known as trusts, the court of chancery had been accustomed to give effect to devises of the use of lands; whereby for many prac-

tical purposes, lands may be regarded as having been then devisable, although the common law (except by the special custom of certain localities) permitted no devise of the legal estate. When by the operation of the Statute of Uses, uses had been converted into legal estates, this general privilege of devise was lost; and since the statute was expressly extended to uses in being at the time of its enactment, this deprivation had, in a certain sense, a retrospective operation. The power to practically devise lands, by means of the creation of uses, would subsequently have been recovered through that construction of the statute which afterwards gave rise to the modern system of trusts. But the loss of a privilege to which people had long been accustomed was felt to be so great a hardship, that the government found itself in a manner compelled, without waiting for this indirect remedy which was probably not at all foreseen, to restore by express enactment what it had perhaps only by inadvertence, taken away. Within a few years after the passing of the Statute of Uses, the Statute of Wills permitted the devise of all lands held in socage for a fee simple, and of two equal third parts of lands held by knight service for a fee simple. Thus, within a short space of time, there were introduced into our legal system two separate methods, both unknown to the common law, by which legal estates in lands might be created and conveyed.

The language of the Statute of Wills is exceedingly wide, permitting devises to be made by the owner 'at his free will and pleasure'; and there existed this reason for relaxing, in respect to devises, the severity of the common-law rules relating to abeyance of the seisin, namely, that in case the seisin was not completely disposed of by the devise, there was nothing in the theory of the law to compel the conclusion, that during any unappropriated interval the seisin must be in abeyance. A devise, upon becoming operative, necessarily followed upon the death of the testator, and therefore, the seisin during the unappropriated interval, might be suffered to descend upon his heir-at-law, who would have taken the whole estate in the absence of the devise. This view was ultimately adopted, though not without opposition, and of course not immediately upon the passing of the statutes. Some time was required before such important changes in the theory and practice of conveyancing could be first thought of, then thought out, then generally accepted as plausible, and lastly adopted into common practice.

The remarks in the foregoing paragraph only suffice to explain the emancipation of executory devises from the common-law rules relating to abeyance of the seisin; and this accounts for only a part of the distinction between common-law limitations and executory limitations. The latter are untrammelled, not only by the rules relating to abeyance of the seisin, but also by the rule which makes it impossible at common-law to limit a fee simple upon the determination, or in defeasance, of another fee simple. The introduction of this second element is explained by the operation of the Statute of Uses. Before the Statute, when uses existed only as trusts, the court of chancery, in prescribing rules for the limitation of uses, did not confine them within either of the above mentioned restrictions, which were applied by the common-law courts to the limitation of legal estates. The court of chancery did not insist upon the analogy of the law being followed either (1) as regards the impossibility of limiting a future interest, to take effect after or in the defeasance of a fee; or (2) as regards the necessity for guarding against abeyance of the freehold. Limitations of uses were allowed which, if they had been limitations of legal estates at the common law, would have violated either or both of the above-mentioned rules. When the Statute of Uses converted uses generally into legal estates the question arose whether uses thus limited in contravention of the rules of the common-law should be allowed to take effect as legal estates by virtue of the statute. The ultimate decision of the courts was, after some hesitation, in favor of their validity.

By this means executory limitations were introduced into the law. It is possible that, if executory devises had stood alone, they would never have acquired their freedom from the common-law rule forbidding the creation of a fee upon a fee; and this quality of them seems to be satisfactorily explained only by analogy to executory limitations contained in a deed, and taking effect under the Statute of Uses. But some doubt is thrown upon this

explanation regarded in the light of a positive historical fact, by the circumstance that limitations of a fee upon a fee seem to have been permitted in executory devises, at least as soon as, or even earlier than in executory limitations made by deed. In 1 Eq. Ca. Abr. 186, pl. 3, Lord Nottingham is said to have stated, that the case of Hinde and Lyon, 3 Leon. 64, which was decided in the nineteenth year of Elizabeth, was the first case in which an executory devise over upon the defeasance of a fee was held to be good. It may be doubted whether any earlier example of a similar executory limitation contained in a deed can be found in the books.

Whatever may be the historical connection, in these respects, between executory devises and executory limitations contained in a deed, it is certain that the most marked characteristic of both species is their freedom from both of the common-law restrictions above mentioned; and that it has never been authoritatively suggested that in either respect, so far as regards dealings with the freehold and inheritance of lands, there is any difference between executory devises and executory limitations contained in a deed." Challis' Real Property, 136–138.

The following is Butler's introduction to this part of Fearne's Essay, and as it contains much useful information, not readily accessible, and has become one of the classics of the profession, it is here given *in extenso*.

"To obtain an accurate notion of executory devises and conditional limitations, it may be useful to consider; 1st. What future estates and interests in real property were allowed by the common law, and some of the rules of the common law respecting them; 2ndly, the first admission of conditional limitations as trusts in equity, and in legal devises of land; and 3rdly, their introduction, as legal estates, in consequence of the Statute of Uses.

1. As to the future estates and interests in real property, which were allowed by the common law, it is generally understood, that lands were granted originally for the life only of the grantee, then to him and his lineal heirs, and then to him and his lineal and collateral heirs; and on every such grant, whether it were for life, or in fee, a right remained in the grantor to the services of the grantee, during the continuance of his estate, and to a return of the land, on its expiration. Whether this right of the grantor depended on an estate for life, or in fee, it was of the same nature, and indifferently called his reverter, or escheat; but from the remoter probability of the return, when the fee was granted, it became customary to call it after a grant of the fee, his Possibility of Reverter; by degrees that expression was applied to those cases only, where a limited fee had been granted, and the word escheat was applied to those, where the grant had conferred an absolute estate in fee simple. A grant to a man and the heirs of his body was at common law a limited fee; and therefore, after such a grant, a possibility of reverter was said to remain in the grantor. When the statute *de donis* converted such fees into estates tail the return of the land was secured by it to the donor, and was called his reverter. In all these cases, the words reverter and reversion are synonymous.

After a general power of alienation was allowed, the owner of the fee might either grant the whole fee or a limited fee carved out of it, or an estate for years, for life, or in tail. If he granted a limited fee, the possibility of reverter on the determination of the limited fee continued in him, but, being a mere possibility, it could not be granted; if he granted an estate for life or in tail, the estate so granted was called a particular estate; and, having granted one such estate, he might grant over ulterior particular estates at his pleasure. Those, being carved out of that portion of the first particular estate, were called remainders. From their nature they necessarily waited the expiration of the preceding particular estate or estates for their falling into possession. The only other future interest in real property which was known at the common law was a right to enter on the breach of a condition. According to the law of tenure, the performance of the services was a condition annexed to every grant. If the tenant neglected to perform the services, the grantor might enter and resume the tenement. Whether this condition was expressed or not, it was considered to be inseparably incident to the estate of the grantee. At first, it was the only condition that could be annexed to the grant of land; afterwards, other conditions were occasion-

ally introduced, and by an application, in some respects very much forced, of the original principle of conditions, that, on the non-performance of them, the grantor might resume the land, conditional fees at common law, and some other modifications of landed property were introduced, as estates upon condition. These were often of such a kind as to make it more natural that a stranger should have the land upon the non-performance of the condition, than the grantor; and that the grantor, instead of being confined to his right of resumption should have it in his power to compel the performance of the condition or recover from the grantee a compensation or satisfaction for the breach of it; but as all these estates were considered to be estates upon condition, the law still confined the donor's remedy to the resumption of the estate, and confined that remedy to the donor and his heirs. When the grantor entered for the breach of the condition, he was considered to be in as of the seisin of his former estate; it was the same when the heirs of the grantor entered; they were supposed to be in as of the seisin of the ancestor. The entry defeated the livery by which the grant was made, and by a necessary consequence defeated all the estates which depended upon that livery. Thus, if a feoffment was made to one for life or in tail, upon condition, with remainders over, and the grantor or his heirs entered for a breach of the condition, the first estate and the remainders over were equally destroyed; and the grantor or his heirs were considered to be in as of the former seisin.

Such, before the Statute of Uses, were the legal modifications of real property in respect of future estates, interests, and rights. It is evident, that such modifications of real property as are now produced by executory devises and conditional limitations would not before the passing of that statute have been allowed by the courts of law. If, before that time, land had been conveyed to A and his heirs, with a proviso that, if A should not leave any child of his body living at the time of his decease, the land should go over and belong to B and his heirs, it is obvious that the limitation to B must be legally void. It could not be a grant of the reversion, as the whole fee was previously granted; or a grant of a remainder, as it was preceded by no particular estate; it could not confer a title on B to enter for condition broken, as such a title of entry could only belong to the grantor or his heirs: and escheat was wholly out of question. If the conveyance had been to A for life, with remainders over, with a proviso, that, if B attained twenty-one in the lifetime of A, the land should immediately thereupon devolve to B and his heirs, the consequences would have been the same, and the limitation to B would have been liable to all the objections suggested. At first sight, it might, perhaps, be thought that the limitation to B and his heirs might be supported as a remainder expectant on A's estate for life; but, on further examination, it would appear that the limitation to B and his heirs wanted the distinctive quality of a remainder, that its vesting in possession would depend upon and wait for the regular expiration of the preceding estate; for in the supposed case, the vesting of A's estate in possession would not depend on the decease of A, the natural term for the expiration of the preceding estate, but would vest in possession on B's attaining twenty-one in the lifetime of A. It would not, therefore, wait till the expiration, but would take effect during the continuance, and operate to the destruction of A's life estate. Thus both the limitations proposed were before the Statute of Uses legally void.

2. There appears, however, some reason to suppose, that though conditional limitations were legally void, they were allowed in the modifications of uses, while uses remained in their fiduciary state at the common law. In that state the courts of law could not notice uses; but it was considered that the owner of the land charged with them, was under a moral obligation of disposing of the land and the rents accruing from it in conformity to the use and therefore if the use limited the beneficial interest of the lands, in the manner suggested, the legal owner of the land was bound to dispose of it accordingly. Thus such limitations, though void at law, became good as trusts in equity. It is also probable, that under the custom of devising lands as it prevailed in London and some other places, these modifications of property were sometimes attempted and from the liberality which our courts have always adopted in the

nature and qualities of executory interests were at first only vaguely defined, and it is only within the last century that the principles applicable to the subject have been reduced to anything approaching a scientific basis.[1]

2. Definitions.—An executory limitation may be defined as a limitation of a future interest in lands or in chattels real or

construction of wills, were often allowed.

3. After the passing of the statute of the 27 of Henry VIII which converted uses from their fiduciary state at the common law, into legal estates, it became incumbent on the courts to determine what effect that statute should have in respect to the executory limitations under consideration. When the case was first pressed on the courts, it would seem to have been necessary for them to consider whether the statute executed any modifications of property made through the medium of uses, which the courts of law would have held illegal, if they had been made of the lands themselves in conveyances at common law. So far as respects the modifications of property in question the court held them to be executed by the statute, and thus made them a part of the English law of real property. Comparing them with remainders, and titles of entry for a condition broken, they appear of a mixed nature, partaking, in some measure, of the nature of each. They so far partake of the nature of a remainder that when the event upon which they are to have effect takes place, the estate or interest created by them passes to a stranger, and they so far partake of the nature of a title to enter for the breach of a condition, that, when the event proposed takes place they operate to defeat the preceding estate. When the uses raised by them arise from an event provided for by the deed or will which creates them, they are called conditional limitations, secondary, future, springing or shifting uses, or executory devises, according to the nature of the event on which they are limited, and the instrument which creates them; when they arise from the act of some agent or person whom the instrument authorizes to raise or appoint them, they are said to arise by an execution of a power. Executory devises are the immediate subject of this part of Mr. Fearne's essay; but his positions and illustrations are always either directly or indirectly referrable to the general doctrines of law on all limitations of this description, either in deeds or wills." Fearne's Cont. Rem. 381 n. (a).

1. Wash. Real Prop. (5th ed.) 739.

Executory limitations regarded historically "must have been of gradual introduction and growth as a settled and defined portion of the English law, for though it was stated by Lord Kenyon, in Jones *v.* Roe, 3 T. R. 93, that they took their rise in the time of Elizabeth, it was said by the same judge, in Doe *v.* Morgan, 3 T. R. 765, that being found of general utility, they were established in the time of Charles I. And in the argument of Thellusson's Case (1798), Mr. Hargrave states that 'executory devise was not regularly admitted till about two centuries ago.' But Mr. Lewis refers to cases in which the doctrine was recognized at a period anterior to that. Still, the law upon the subject, especially the indestructibility of executory devises, does not seem to have been settled until the case of Pells *v.* Brown, Cro. Jac. 590, in 1619, though courts had often recognized as valid, devises of estates of freehold to commence *in futuro.* Nor was the law in relation to them fully settled till the Duke of Norfolk's Case in 1695. 1 Wms. Real Prop. 262, and note. And finally, Lord Mansfield, in 1785, declared that he emembered the introduction of the rule which prescribes the time in which executory devises must take effect to be for the period of a life or lives in being and twenty-one years afterwards. Buckworth *v.* Thirkell, 3 B. & P. 652, n.; Cadell *v.* Palmer, 10 Bing. 140; 1 Clark & F. 372." 2 Wash. Real Prop. (5th ed.), 739. See also Gray on Perpetuities, § 142, *et seq.*

In his preface to "the Original View," Mr. Smith says that even then (1845), "a general and most baneful ignorance has prevailed, which the vagueness and endless discrepancies of the books have rendered inevitable to most persons and excusable in all."

personal which would be invalid if made in an assurance at common law, but which so far as regards the freehold and inheritance of lands, is valid in a will or in a conveyance to uses, and so far as regards chattels real or personal, is valid in a will[1] or in any instrument *inter vivos* which will be sustained in equity as a trust.[2] Interests in realty created by such limitations are called executory interests, and may be divided into springing and shifting uses, and executory devises. A springing interest is an interest limited by way of use or devise to take effect at a future time independently of, without being supported by, and without affecting any prior interest of the measure of freehold created by the same instrument.[3] A shifting interest is an interest so limited as to arise in derogation or defeasance of another interest of

1. Challis' Real Prop. 138, 139; Fearne's Cont. Rem. 386; Wilson's Springing Uses, 1, 2; 2 Jarman on Wills (5th ed.) 864.

2. Gray's Perp., §§ 75, 87; Wilson's Springing Uses, 27, 28; Smith Ex. Int., § 127*b*.

The Statute of Uses does not apply to chattels real or personal; hence no future use can be raised out of a term of years or other personal property, and all such limitations can only take effect in equity as trusts. Gray's Perp., §§ 73, 79; Challis' Real Prop. 138.

As to such limitations, see *infra*, this title, § II, 4, *d*.

3. Smith Ex. Int., §§ 117, 156; Challis' Real Prop. 141. "When a use cuts short another granted estate, it is called a shifting use. When it cuts short the estate of the person creating it, it is called a springing use." Gray's Perp., § 54.

"A limitation of a springing interest operates upon the estate remaining in the grantor or his heir, or in the heir of the testator, in the same way as a conditional limitation operates upon the prior estate which is liable to be defeated by it. The limitation of a springing interest operates by devesting the estate from the grantor or his heir, in a particular event, entirely irrespective of the original measure of that estate, and by transferring it to the person who is to take the springing interest. A conditional limitation operates by devesting the estate from the person entitled under the prior estate, in a particular event which is quite unconnected with the original and regular duration of that estate, and by transferring it to the person who is to take under the conditional limitation. The difference is, that the estate devested, is, in the one case, an estate remaining in the grantor or his heir or the heir of the testator; whereas, in the other, it is an estate created by a previous clause of the instrument by which the interest was limited which is to take effect in defeasance of it." Smith Ex. Int., § 156.

Limitations by which such interests are created, are distributed by Smith into seven classes.

1. "The first is a sentence which creates an interest in favor of a person unborn or unascertained, or an interest which is limited to take effect at a future time, without being preceded by any other, or merely preceded by a term for years which is to commence at a future time. (Pay's Case, Cro. Eliz. 878, as stated, Fearne's Cont. Rem. 400, 539.) As in the case of a devise to take effect six months after the testator's death, or a devise to the first son of J S, when he shall have one, or the heir of J S, a person who is living. (See Fearne 395; and Gore *v.* Gore, 2 P. W. 28, as there stated. See also Fearne's Cont. Rem. 400.) An instance of this kind of springing interest, occurred where a testator gave to two persons and their heirs, to sell and dispose, at their discretion, one quarter part of all his right in Moorlinck, if an act should pass for inclosing the said moor within twenty years. And he directed the moneys to arise by such sale to be divided between certain persons whom he named. It was held that this was an executory devise to take effect after an inclosure act. (Gardner *v.* Lyddon, 3 Y. & Jer. 389.)

2. The second is a sentence which creates a freehold interest to take effect on the regular certain expiration of a chattel interest, but such freehold

interest is contingent on account of the person, as where a testator devises to A for twenty-one years, and then to the first unborn son of B in fee.

3. The third is a sentence, which creates a freehold interest which is to take effect after a preceding chattel interest, but only on a contingent determination of such chattel interest by force of a special or collateral limitation. As if land is devised to A for twenty-one years, if B shall so long remain at Rome, and if he quit Rome during the term, to C in fee. Or, where land is devised to A for twenty-one years, if he shall so long live; and on the death of A, then to B in fee.

There is a danger of confounding the kind of springing interest exhibited in the first of these examples, with a contingent remainder of the first class.

Such a limitation might indeed be termed a remainder, as regards the possession, or the enjoyment, or both. But it is not a remainder, in relation to the seisin, property, or ownership, and therefore not a remainder properly so called. And the same danger exists, in fact, of confounding other instances of the second, third, and fourth kinds of limitations of springing interests with contingent remainders.

4. The fourth is a sentence which creates a freehold interest after a preceding term of years, to take effect, in right, on an event or at a time unconnected with the original measure and the regular expiration of the term. As where land is devised to A for twenty-one years; and if A shall die within the term, then on the expiration of the term, to B in fee.

5. The fifth is a sentence which creates a freehold interest after a preceding term for years, to take effect, in possession, or enjoyment, or in both, in defeasance of the term, or of the beneficial interest therein, on an event or at a time which may happen within the term, but is unconnected with the original measure and the regular expiration of the term. As where land is devised to A for twenty-one years; and on the death of A, then immediately to B in fee.

This, though a conditional limitation, specifically so called, as regards the possession, or enjoyment, or both, is a limitation of a springing interest, as regards the seisin, property, or ownership; and therefore most properly classed among those springing interests which do not affect a prior freehold.

From the second, third, fourth, and fifth kinds of springing interests, we must be careful to distinguish limitations of vested interests, subject to a term or other chattel interest, or, in other words, limitations of a freehold interest in favor of a person in being and ascertained, to take effect in possession, or enjoyment, or both, on the regular and certain expiration of an actually subsisting term or other chattel interest, and without requiring the concurrence of any collateral contingency. And from the first kind we must distinguish other limitations of vested interests, subject to a suspension of the possession, or enjoyment, or both.

6. The sixth is a sentence which creates an interest to take effect at a time which could not arrive till a period subsequent to the expiration of a preceding interest. As where a devise is made to A for life, remainder, after the death of A, and one day afterwards, to B for life. (Fearne Cont. Rem. 398.)

7. The seventh is a sentence which creates an interest to take effect on the regular expiration of a qualified fee which must expire, if at all, within the period prescribed by the Rule against Perpetuities. As where land is limited by way of use or devise, to A and his heirs, till B shall, etc.; and then to B and his heirs (2 Bl. Com. 334. See also Fearne's Cont. Rem. 373).

'There is no clearer rule in law,' says Lord Nottingham, 'than this, that there can be no remainder limited upon an estate in fee; yet public reason and the convenience of common assurances have found a way to pass by this rule, as well by way of limitation of use, as by way of devise; and *ergo*, if the father limit a use to himself and his heirs until a marriage happen, and then to the son and his heirs, this is a good fee by common experience.' (Lord Nottingham, in Howard *v.* Duke of Norfolk, 2 Swanston 461.)

This is not a vested interest, subject to a chattel interest, because the marriage might never happen; and it was never intended that the estate of the father and his heirs should cease unless it should happen; and consequently the words of limitation, 'and his heirs,' must carry the entire ownership of which the land was susceptible. This case is distinguishable from that of a limitation to trustees and their heirs, till A shall attain twenty-four with a

the measure of freehold created by a preceding limitation.[1] If created by way of use, these interests are called springing and shifting uses; if by will, springing and shifting devises[2] or more commonly executory devises indiscriminately.[3] Conditional limitation is a common term for shifting uses and shifting executory devises,[4] as well as the limitations by which they are created.[5] A contingent use, strictly speaking, is a remainder

limitation over to A and his heirs when and as he shall attain twenty-four. In this last case, an estate is given to the trustees for a limited purpose only; and it is not intended that their estate should subsist beyond the time when A shall attain twenty-four, or when, by his death under that age, it shall have become impossible for that event ever to happen. And therefore the words 'and their heirs' do not pass the fee, and the trustees only take a chattel interest. These limitations of springing interests can only be by way of use or devise. They would be void if inserted in a deed at common law." Smith Ex. Int., §§ 118–127*a*.

1. Smith Ex. Int., § 149.

The better opinion is that the future interest must be limited by the same instrument, Challis' Real Prop. 141; 2 Wash. Real Prop. (5th ed.) 669.

"'One devises lands to his wife, till his son came to the age of twenty-one years, and then that his said son should have the lands to him and his heirs; and if he dies without issue before his said age, then to his [the testator's] daughter and her heirs. This is a good contingent or executory devise to the daughter.' (1 Eq. Cas. Ab. 188, pl. 8.) With regard to the devise of the fee to the son, it is to be observed, that the case occurred before the Descent act, 3 & 4 Will. 4, C. 106; and that the fee simple to the son (which, by the rule in Boraston's Case, 3 Rep. 19, is a vested estate), therefore passed to him by descent and not by purchase. But now, by § 3 of the last cited act, the heir to whom a devise is made, is deemed to take as devisee, that is, as a purchaser, and not by descent. Therefore, at the time when the case was decided, the executory devise to the daughter came under the class of springing limitations, because it was not subsequent to, or in defeasance of, an estate limited by the same instrument. But as the law now stands, the fee to the son would pass by the will, and not by descent; and therefore the executory devise to the daughter would not come under the class of shifting limitations." Challis' Real Prop. 142. The better opinion is that an interest which arises by virtue of a power of appointment is to be taken as arising from the instrument creating the power. 4 Kent Com. 328; 2 Wash. Real Prop. (5th ed.) 669; Wms. Real Prop. 295.

2. Challis' Real Prop. 141.

3. Gray's Perp., § 54.

"Limitations of springing interests, conditional limitations, *quasi* remainders after a life interest in personal estate, and alternative limitations, when contained in wills, are seldom distinguished or designated by these or any other specific terms, but are usually denoted by the general term of executory devises. . . . And in many cases, indeed, it has been as well to use a general designation as to use a specific term, and, of course, in some instances, where the object is to generalize, and generalization can be accomplished with accuracy, the general designation is the most appropriate. But, in the great majority of cases, the maxim *error latet in generalibus*, was peculiarly applicable; and the use of general designations, instead of specific terms, has been the source of passages in the books which, embracing distinct and dissimilar cases, greatly tend to mislead; of vague, confused, and erroneous conceptions in the student; of perplexity and mistake in the practitioner, and sometimes, even the judges themselves; and of constant litigation upon points which would or might otherwise have been long before set at rest." Smith Ex. Int., § 111, b. 111, c.

4. Gray's Perp., § 54.

5. "The term conditional limitation is sometimes used generically to denote any kind of qualified limitation in the derivative sense; any kind of limitation in the derivative sense which depends upon a condition, in contradistinction to an absolute limitation. (See Holmes *v.* Cradock, 3 Ves. Jun. 319; Tolderoy *v.* Colt, 1 You. & Col. 621; Prest. Shep.

T. 117; Fearne's Cont. Rem. 14, 17, 18); or to denote an indirect special limitation in contradistinction to a direct special limitation. (See Fearne's Cont. Rem. 272.)

This use of the term, though philologically correct enough, is practically productive of a great and mischievous confusion of ideas. In particular, special limitations, in the original sense of limits, are confounded with conditional limitations, in the derivative sense, specifically so called, or, in other words, with that kind of limitations, which, in contradistinction to remainders, operate in defeasance of a preceding estate, and which are accurately distinguished from remainders by Fearne. (See Fearne's Cont. Rem. 15, 16.) The mode of determining an estate by means of a special limitation is not peculiar to conveyances by way of use and devise, as we shall presently see; but the mode of determining a preceding estate by means of a conditional limitation, specifically so called, is peculiar to uses and devises.

A conditional limitation, in the specific sense, is a proviso, by way of use or devise, for the annihilation of an interest of the measure of freehold under a preceding limitation, in a particular event which is unconnected with the original quantity of that interest (See Fearne's Cont. Rem. 10, note (h), and 14–16. And see Lloyd *v.* Carew, Prec. Chan. 72; Show Cases Parl. 137; as stated, Fearne 275; Pells *v.* Brown, Cro. Jac. 590; Hanbury *v.* Cockerell, 1 Roll. Abr. 835, pl. 4; Gulliver *v.* Wickett, 1 Wils. 105; and Marks *v.* Marks, 10 Mod. 420; as stated, Fearne's Cont. Rem. 396, 399), and which may not happen till after such interest has become vested; and for the creation of a new interest in its stead, in favor of another person. Or more fully, it is a distinct clause, by way of use or devise (see Prest. Shep. T. 121, 126, 127), by which an interest is limited to take effect, in possession, or in enjoyment, or in both, on or at a particular time or event, in defeasance and exclusion of and by way of substitution for an interest of the measure of freehold given by a previous sentence, at a period when such prior interest may have become vested even in enjoyment, and before such a prior interest has lasted the full measure of duration assigned to it by such preceding sentence, either in express terms or by construction of law. As where an estate is devised to A for life, or to A indefinitely, provided that when C returns from Rome, it shall then immediately go to B and his heirs; or, where land is granted to A, and his heirs, to the use of B and his heirs; but in case, etc., then immediately to the use of C and his heirs.

So, where a testator gave his son an absolute interest in one-fourth of his personal estate: but, by a codicil, he directed that his son's share should be only for the life of himself and his wife, provided they had no issue, and, at their death, it should become part of the residue. Sir John Leach held, that the son took in the first instance absolutely, with a good limitation over, by way of executory devise, at the death of the survivor of himself and wife, if there be no issue then living; the failure of issue being plainly confined to the death of the survivor, by the direction that the share of the son was to become part of the residue at their death. (Rackstraw *v.* Vile, 1 Sim. & Stu. 604.)

Before we determine that a limitation is a conditional limitation, we must observe whether it is really and in fact and not merely apparently or in terms limited to take effect in defeasance of a prior interest. For, though apparently or in terms it may be limited to take effect in defeasance of a prior interest, yet, if in reality it is to await the regular expiration of such prior interest, it is a remainder, and not a conditional limitation. (See Driver d. Edgar *v.* Edgar, Cowp. Rep. 379; and Fountain *v.* Gooch, as stated and commented on, Fearne's Cont. Rem. 426–428.)

These limitations can only be by way of use or devise. They would be void if inserted in a deed at common law, being foreign to the simplicity of the conveyances employed before uses and devises were introduced. When these limitations are by way of use, they are sometimes called shifting uses, and sometimes springing uses. Those which are by devise are usually designated by the generic name of executory devises.

These limitations partake of the destructive nature of conditions subsequent, and the creative nature of limitations in the derivative sense. And hence they are appropriately termed conditional limitations. (See Butler's note (1), Co. Litt. 203 *b.*)" Smith Ex. Int., §§ 148–151.

limited by way of use,[1] but the term is used loosely to designate all future uses,[2] and sometimes even to distinguish springing and shifting uses from those limited by way of remainder.[3] As regards personalty, executory interests are shifting or springing, as they do or do not defeat an interest previously limited by the same instrument. But, although the distinction exists and sometimes becomes important, interests of this kind, limited by will, are usually designated by the generic term of executory bequests.[4] As between executory interests created by way of use and those created by way of devise it should further be observed, that while the principles governing both are almost identical, there is this distinction, that by an executory devise the freehold itself is transferred to the future devisee substantively without any reference to the Statute of Uses.[5]

3. Of Construing a Limitation to be a Remainder Rather than an Executory Interest.—From the definition of an executory limitation it necessarily follows, as a fundamental rule of construction, that no limitation shall be construed as an executory interest which would have been good in its inception as a remainder; and that if it has once taken effect as a remainder it cannot afterwards be construed as an executory interest in order to preserve it from destruction.[6]

In Stearns *v.* Godfrey, 16 Me. 158, a conditional limitation (so called) was sustained in a common-law conveyance, but this seems to be merely another instance of an irregular special limitation, miscalled a conditional limitation, and carefully distinguished from the latter by Smith in the above extract. Such an irregular special limitation has been defined as a "proviso annexed to an estate capable of supporting a remainder, and beginning with the words 'on condition,' 'provided,' or 'so that,' but followed by a distinct sentence creating a remainder over in favor of another person, and, for that reason, construed as if forming a part of the sentence whereby the preceding estate is created, so as to mark out the original limits thereof. Thus, if a devise be to A for life on condition that he do not marry C, with remainder to B; this is construed as if it were to A until he shall marry C; and then, or upon death, to B. The proviso, 'on condition' that he do not marry C, is construed as if it formed a part of the sentence devising the estate to A for life, and constituted an additional limit to the measure originally given to that estate, instead of being deemed to operate as a proper condition subsequent, so as to defeat such estate in favor of the heir of the testator, or as a conditional limitation, so as to defeat such estate in favor of B before it had filled up the measure of duration given to it by the terms of the clause by which it was created." Smith Ex. Int. §§ 38, 39.

1. 2 Wash. Real Prop. (5th ed.) 659; Gilb. Uses (Sugd. ed) 152*n*; 1 Prest. Abst. 105; 4 Kent Com. 258. Such an interest is subject to the rules applicable to remainders limited by common law conveyances. Gilb. Uses (Sugd. ed.) 297*n*. See *supra*, this title, § I, 3, *f*, (1); § I, 3, *g*, (1).

2. Tiedeman Real Prop., § 482.

3. See Sharswood's definition of a contingent use. 2 Bl. Com. 165 note.

4. Smith Ex. Int., § 117*b*.

5. 2 Wash. Real Prop. (5th ed.) 738; 1 Spence Eq. Jur. 470, 471; Lewis' Perp. 72.

6. Challis' Real Prop. 95, 97; Fearne's Cont. Rem. 386, 395, 526; Smith Ex. Int., § 196; 2 Prest. Abst. 153, 154; Purefoy *v.* Rogers, 2 Saund. 380; Walter *v.* Drew, Com. Rep. 372; Wealthy *v.* Bosville, Rep. K. B. temp. Hardw. 258; Carwardine *v.* Carwardine, 1 Eden 34; Doe d. Mussell *v.* Morgan, 3 Durn. & East 376; Doed. Browne *v.* Holme, 3 Wils. 237; Goodtitle *v.* Billington, Dougl. Rep. 725, or 735, 3d ed.; as cited, Fearne's Cont. Rem. 386–394; Spalding *v.* Spalding, Cro. Car. 185. See Nightingale *v* Burrell, 15 Pick. (Mass.) 111; Hall *v* Priest,

Thus if land be devised to A for life, remainder in tail to the sons of B who has no sons, and A dies in the lifetime of the testator, if the sons of B shall not then have been born, the limitation to them takes effect as an executory devise, just as if there had been no limitation to A in the first place. But had A survived the testator, and his estate for life become vested and had then died before B ever had any sons, as the limitation to the sons of B took effect at the death of the testator as a contingent remainder, it could not afterwards be construed as an executory devise to save it from destruction.[1] A limitation which has taken effect

6 Gray (Mass.) 20; Parker *v.* Parker, 5 Met. (Mass.) 138; Hawley *v.* Northampton, 8 Mass. 3; Burleigh *v.* Clough, 55 N. H. 267; Terry *v.* Briggs, 12 Met. (Mass.) 22; Beekley *v.* Leffingwell, 57 Conn. 163; Wolfe *v.* Van Nostrand, 2 Comst. (N. Y.) 436; Johnson *v.* Valentine, 4 Sandf. (N.Y.) 36; Manderson *v.* Lukens, 23 Pa. St. 31; Stehman *v.* Stehman, 1 Watts (Pa.) 466; Willis *v.* Bucher, 3 Wash. (U. S.) 369; Phillips *v.* Woods (R. I.) 15 Atl. Rep. 88; Bonknight *v.* Brown, 16 S. Car. 171; Randolph *v.* Wendel, 4 Sneed (Tenn.) 646; Shadwell *v.* Hembree (Oregon), 18 Pac. Rep. 572. But see Thompson *v.* Hoop, 6 Ohio St. 480, where the widow renounced, and contingent remainders thereupon were held to take effect as executory interests. Also the observations of Kennedy, J., in Wells *v.* Ritter, 3 Whart (Pa.) 227; also *infra*, this title, § II, 4 *b*; p. 928, n. 4.

"The reason which is usually and justly assigned to this rule, is, that an executory interest, not by way of remainder, unless it is engrafted on an estate tail, cannot be barred; and consequently there is a tendency in such interests, to a perpetuity, which is contrary to the policy of the law.

It may be added, however, that it may perhaps have been originally adopted, partly at least, for another and more general reason, which would seem to affect executory interests engrafted on an estate tail, as well as those engrafted on other estates, though the application of that reason has ceased since the Statute of Uses. Before that statute, executory interests which were not by way of remainder, or by way of argumentative or diminuent limitation, could only be limited by way of use or devise; and they were mere trusts, which could only be enforced in equity; and therefore it is not improbable that the courts for this reason, as well as for the preceding, may have inclined towards construing a limitation to be a remainder, rather than an executory interest not by way of remainder." Smith Ex. Int., §§ 198, 199.

Application of the Rule to a Class.—"If the limitation is in favor of a class, as to some of whom it will be good in its inception if construed as a contingent remainder, while as to others it fails in its inception if construed as a contingent remainder, and can take effect, if at all, only as an executory limitation, this will not generally suffice to exempt the limitation from the above stated rule; and the limitation will take effect as a contingent remainder in favor of those members of the class as to whom it is good in its inception, and will fail as to others. (Testing *v.* Allen, 12 M. & W. p. 301; Rhodes *v.* Whitehead, 2 Dr. & Sm. 532; Brackenbury *v.* Gibbons, 2 Ch. D. 417.) But in a will, if it is the clearly expressed intention of the testator that the whole of the members of the class shall take, this will enable the limitation to be construed as an executory devise, in order to let in those members of the class as to whom it would have necessarily failed in its inception if construed as a contingent remainder. (Rehechmere and Lloyd, 18 Ch. D. 524; Hallett to Martin, 24 Ch. D. 624.)" Challis' Real Prop. 97.

1. 2 Wash. Real Prop. *350; Fearne's Cont. Rem. 525, 526, and Butler's note; 6 Cruise Dig. 422; 2 Prest. Abst. 172; Purefoy *v.* Rogers, 2 Wms. Saund. 388*g*; Doe d. Harris *v.* Howell, 10 B. & C. 191; Hopkins *v.* Hopkins, Cas. temp. Talb. 44.

"A future interest is never construed as an interest under a conditional limitation or as a springing interest, whether by way of use, or devise, where a preceding freehold has once vested, and the future interest is so limited, that, at the time of the limitation, there was a possibility of its taking effect as a remainder; though other

as an executory interest may by change of circumstances become a contingent remainder, but, having once taken effect as a remainder, it can never afterwards, if it fail as a remainder, inure as an executory interest.[1] Thus, under a limitation to A from and after Christmas for life, remainder to his first and other sons in tail, the sons until Christmas, take an executory interest; after

circumstances may seem to indicate that, it was not intended to take effect as a remainder; and though eventually in fact, it may be incapable of operating in that way. But, where a preceding freehold, which was capable of supporting a future interest as a remainder, is, by a subsequent accident (as by the death of the first devisee in the testator's lifetime), precluded from taking any effect at all; the future interest may take effect as a springing interest by way of use or devise." Smith Ex. Int., §§ 574, 675.

Thus a testatrix devised lands to J N his heirs and assigns forever; provided that if J N should die without any issue on the body of his then wife begotten, that the lands, after the death of J N and his wife should go to all the children of the testator's granddaughter, M D, as tenants in common. J N died without issue, in the lifetime of the testatrix, leaving his wife him surviving. It was held, that J N would have taken an estate tail if he had survived the testatrix; and the limitation to M D's children would have operated by way of contingent remainder; but that as the estate tail had lapsed, and the law would not raise an estate for life by implication in J N's widow, there was no estate of freehold to support the interest of M D's children, as a remainder; and that the limitation to them operated by way of executory devise. "As circumstances stood when the will was made, the limitation to M D's children must have been construed a contingent remainder, not because the testatrix meant it to operate in that particular mode, that is, by way of contingent remainder, nor because her intention would be most effectually carried into effect by treating it as a contingent remainder, but because it is a rule of law, that no limitation shall operate by way of executory devise, which, at the time of the testator's death was capable of operating by way of contingent remainder. Where a limitation operates by way of contingent remainder, it is liable to be defeated in many instances by the failure or destruction of the particular estate, which by a technical construction of law, must continue *in esse* in order to support it, and then persons are let in in opposition to the testatrix's intention; whereas a limitation which operates by way of executory devise can never be defeated, and therefore that mode of carrying the intent into effect is always most in unison with the intent of the testator. As therefore Hopkins *v.* Hopkins, Cas. temp. Talb. 44, is an authority that the lapse of a devise in the life of the testator may turn into an executory devise what would otherwise have operated as a contingent remainder, as the limitation in this case is not too remote for an executory devise, and as it will further the intent of the testatrix so to consider it, it seems to us that the operation in this case, by way of executory devise, ought to be allowed." Lord Ellenborough, C. J., in Doe *v.* Roach, 5 Man. & Selw. 482, 491, 492; stated, Smith Ex. Int., § 677.

In Hopkins *v.* Hopkins, Cas. temp. Talbot 44, the leading case on the subject upon the authority of which Doe *v.* Roach was decided, a devise was made to S H for life, and after his death to his sons, and if he died without issue over to the sons of J H, who were then unborn. This was, of course, in terms, a contingent remainder in the sons of J H, expectant upon their being born, and the dying of S H without issue. S H died in the life of the testator without issue, and the testator died before the birth of any son of J H who afterwards had a son. It was held by Lord Talbot that this son took an executory devise in the same manner as if the limitation to S H and his sons had not been contained in the will. Stated 2 Wash. Real Prop. (5th ed.) 749.

1. 2 Wash. Real Prop. *351; 2 Prest's Abst. 173; Wilson's Uses 149; Prest. Abst. 172.

But see Thompson *v.* Hoop, 6 Ohio St. 480; also Wells *v.* Ritter, 3 Whart. (Pa.) 227.

Christmas, a contingent remainder.[1] So if the preceding life estate were engrafted upon a fee simple determinable, when the life estate vested in possession, the ulterior interest would become a remainder.[2] So, where a remainder in fee is subject to a conditional limitation, to take effect upon an event which must happen if at all, before the regular expiration of the particular estate; in such case, although the conditional limitation has no connection with the particular estate in the first instance, yet if the event happens on which the conditional limitation is to take effect, it then becomes a remainder expectant upon the particular estate, in the place of the original remainder in fee; and if contingent, subject to destruction and incapable of taking effect again as a conditional limitation.[3] A limitation may also be so framed as to take effect in one event as a springing interest or conditional limitation, and in another as a contingent remainder; in such case, until the event occur, it is impossible to determine the nature of the ulterior interest.[4] Therefore, in applying the

1. 2 Prest. A hst 173; Wilson's Uses 149.

2. Smith Ex. Int., § 676.

"And, in such cases, an ulterior interest in remainder after such less remote future interest as above mentioned, until the less remote future interest vests, also becomes a springing interest, when regarded abstractedly instead of in relation to the less remote future interest; but, as soon as such less remote future interest vests, then such ulterior interest is not only a remainder in relation to such less remote future interest, but it is simply a remainder, even when abstractedly considered." Smith Ex. Int., §§ 676, 677; Stephens *v.* Stephens, Cas. temp. Talbot 228.

3. Smith Ex. Int., § 673; Jarman on Wills (5th ed.), *876, *877.

A testator devised to his daughter, E H, the wife of W H, for life; remainder to W H for life; remainder to John, his daughter's son, and his heirs and assigns forever; but, in case he should die before the testator's daughter E H, and she should have no other child living at her death, his will was, that his said daughter should give and devise the premises to such person as she should think proper. The testator died in February, 1763, and John, the daughter's son, in April following. In January, 1766, the daughter had another son, W H, the younger. In November, 1770, W H the elder died, and in Hilary term 1773, E H levied a fine with proclamations. *Held*, that on the death of John the limitation became a contingent remainder and was barred by the fine. Until the death of the testator's grandson, John, the limitation by implication to any child or children whom E H should leave at her death, "could avail only as an executory devise, by reason of the previous gift of the whole fee to the testator's grandson John. Upon the death of John, we think the character and quality of this limitation changed, and it became a contingent remainder. . . . For, at the time the fine was levied, the only vested estate was in Elizabeth, the testator's daughter, and her husband in her right; and the only other interest was a contingent remainder in favor of any child or children she should leave at her death, and that remainder the fine has destroyed." Bayley, J., in Doe d. Harris *v.* Howell, 10 B. & C. 197, 202.

4. Jarman on Wills (5th ed.), *876, *877.

Thus a limitation to A for life, and if he shall die on the first of January, then from one year afterwards to B in fee, but if he shall die on any other day, then immediately from the decease of A to B in fee, gives B in the first event a springing interest, in the second a contingent remainder, so that his interest would be destructible or not by act of A or failure of the particular estate according to the event. See Jarman on Wills (5th ed.) *877.

So the ulterior limitation may be so framed as to take effect in one event as a contingent remainder, in another as a conditional limitation. A testator devised his estates to his son G, "to hold

to him, my said son G, for and during the term of his natural life; and from and after his decease, I give and devise the same estates unto all and every the child and children of my said son G lawfully begotten, and their heirs forever, to hold as tenants in common, and not as joint tenants. But if my said son G should die without issue, or leaving issue, and such child or children should die before attaining the age of twenty-one years, or without lawful issue, then I give and devise the same estates unto my son T and my daughter A and my son-in-law D and their heirs forever, to hold as tenants in common and not as joint tenants." Upon testator's death, his son G suffered a recovery, and died unmarried and without issue. *Held* by the K. B., that in the event which had happened the gift over to T, A and D took effect as a contingent remainder, and was destroyed by the recovery. Doe d. Herbert *v.* Selby, 4 Dow. & Ryl. 608; 2 B. & C. 926, Bayley, J., saying:

"If in this case G had had a son, there would have been a vested determinable estate in fee in that son, and the limitation over could only have operated by way of executory devise. The true way of reading this will is, to look at it as applied to the different contingencies. In the one, it is to operate by way of contingent remainder, and in the other as an executory devise. If G died without issue, the first fee would never have vested, and then the remainder would continue a contingent remainder. Now G did die without issue, and therefore the remainders over would take effect as in Loddington *v.* Kime, 73 Lev. 431, because then it would be a limitation to G for life, with remainder to his children in fee, if he had any, but if he had none, then over by way of remainder. But if G died leaving issue at the time of his death, the estate would not be absolutely vested in that issue, but would be a determinable fee. The fee would vest in the issue, but in the mean time it would be liable to be devested by the event of their dying before twenty-one, or without lawful issue. In that event it would operate as the limitation of a fee after a fee, and, therefore, if the limitation was to take place at all, it would be by way of executory devise."

Such a series of limitations differs from a series of two or more contingent alternative remainders in fee, in that the ultimate limitation, instead of being a mere alternative to its predecessor, consists of a conditional limitation engrafted thereon. There are in fact in the above case, as pointed out by Jarman (Jarm. on Wills, 5th ed., 876), two alternative contingent remainders in fee, one of which is subject to an executory limitation in favor of the same persons who were to have been objects of the alternative remainder.

It is essential to such a construction that there should be at least two events upon which the estate is to go over, and it seems to be the better opinion that both events must be expressed and neither can be implied.

D (by will made before 1838) devised land to his daughter E for life, and, from and immediately after her decease, to such of her children as she might have: if a son or sons, who should live to the age of twenty-three years, if a daughter or daughters, who should live to the age of twenty-one years, and their heirs, as tenants in common. In case of the death of a son under twenty-three or a daughter under twenty-one, the share of such child to go to the surviving children attaining the ages named and their heirs, as tenants in common; or if only one should attain the age, to such child in fee: in case all the children of E should die under the ages named, or if she should have none, then to D's daughter A for life, and, upon her decease, to her children, if a son or sons, living to attain the age of twenty-three years, if a daughter or daughters, living to the age of twenty-one years, and their heirs, as tenants in common; and if only one child, to such child in fee; "and, further, in case of the death of" A "without leaving a child, if a son who shall live to attain the age of twenty-three years, or, if a daughter, who shall live to attain the age of twenty-one years" (not adding an express provision for the event of A having no child), "I give the part and parts such children or child would be entitled to as aforesaid to J." After D's death, E died without having had a child; and afterwards A died without having had a child. *Held*, by the court of Queen's Bench, on the authority of Doe *v.* Selby, 4 Dow. & Ryl. 608, that the limitation over to J might take effect as a contingent remainder upon A's death without leaving a child attaining the age named. *Held*, by the court of Exchequer Chamber, revers-

rule that a limitation shall be construed a remainder rather than an executory interest, it is submitted that the first thing to determine is whether the limitation could have taken effect as a contingent remainder at the death of the testator or the time the deed (if the limitation be by way of use) was delivered; if so, it continued a contingent remainder subject to destruction from that time on. If not, the question arises whether it may not have become a remainder by subsequent event, either by reason of one of the preceding interests[1] having vested in possession, or by the ulterior limitation itself having superseded a prior remainder in fee, to which it was alternative or substitutional, or upon which it had been engrafted as a conditional limitation.

4. Classification.—Executory limitations whether created by way of use or devise may profitably be divided into four classes:

(a) Where a fee or other less estate of freehold is limited to take effect after a fee created by the same instrument; or, in the words of Fearne, where the settlor or devisor parts "with his whole fee simple, but upon some contingency qualifies that disposition and limits an estate on that contingency."[2]

(b) Where the devisor or settlor, without parting with the immediate fee, limits an estate of freehold to take effect either upon a contingency or after the expiration of a fixed period, unpreceded by or not having the requisite connection with any immediate freehold to give it effect as a remainder, so that the limitation would have been void in a common-law conveyance as tending to create a freehold *in futuro*.[3]

(c) Where a subsequent interest is limited to arise in derogation or defeasance of an estate tail or an estate for life created by a preceding limitation in the same instrument.

(d) Executory limitations of chattels real and personal.

Of these in their order.[4]

ing this judgment, that the limitation over was not to be considered as expectant upon either the event of A's dying childless or her dying without leaving a child that should attain the age, but upon the single event (however it might happen) of her dying without leaving a child that should attain the age, and was therefore an executory devise void for remoteness. Doe d. Evers *v.* Challis, 18 A. & E. 223, Alderson, B., saying: "The question between the parties is, whether this devise over be void or not. It may be well admitted that the testator intended to include in these words two events: first, the event of A having no child at all; for, certainly, if she never had a child she must die without leaving a son who could attain twenty-three or a daughter who could attain twenty-one; but, secondly, he also intended to include in these same words the compound event of her having a child and that child dying under the prescribed age. This second event is, according to all the cases, too remote an event to take effect according to law. The first, if it stood alone, is legal." *Compare* Mayer *v.* Wiltberger, Ga. Dec., pt. 2, 20, 28, 29.

1. See *infra*, this title, § II, 5, *d*.

2. Fearne's Cont. Rem. 399.

3. Challis' Real Prop. 140; Fearne's Cont. Rem. 399, 400; 2 Wash. Real Prop. (5th ed.) 740; 2 Jarman on Wills (5th ed.) 483, *et seq.*; Nightingale *v.* Burrell, 15 Pick. (Mass.) 111; Scattergood *v.* Edge, 1 Salk. 229; Wilson's Springing Uses, 24, 25.

4. Class (c) is omitted by many standard writers. Since, however, limitations in derogation of a prior in-

a. LIMITATIONS AFTER A FEE.—Since no remainder can be limited on a fee, interests limited to take effect in derogation of a fee simple absolute, or on the natural expiration of a fee simple determinable, are necessarily executory. In such a case it is unnecessary to inquire whether the second limitation creates a

terest cannot take effect as remainders, they would seem to fall directly within the definition of executory interests. Preston adopts the following classification:

1. "Where the devisor departs with his whole fee-simple; but, upon some contingency, qualifies that disposition, and limits an estate on that contingency.

2. When the testator gives a future interest of freehold, to arise either on a contingency, or at a time certain, but does not depart with the fee at present, or limit any immediate freehold, this interest must be void, or operate as an executory devise. This is clear. A single substantive devise to the heir of I S, or to the first son of I S, when he shall have one, is a devise of this description. The devise is future, because at the testator's death there is no person who can take immediately under this devise; and when lands are devised to I S for five years from next Michaelmas, remainder to B in fee, and the testator dies before Michaelmas, then the devise to B is future; for although the remainder is limited to a person already in existence, and without any words of contingency, and is immediately expectant on the term, yet, since the term is limited to commence from a future period, to happen after the testator's decease, and since the term is not vested, and since an interest only, and not an estate, is acquired in the land, the remainder in fee cannot be vested while the term for years remains future and executory.

3. Where the testator gives a future interest of freehold, to take effect in possession after, and in subordination to, a particular estate of freehold; but the estate of freehold must necessarily determine before the more remote interest can come into its place, thus leaving an intermediate space between the actual determination of one estate and the commencement of the other estate. (Plowd. 25; Raym. 144.)

A devise to A for life, and after the decease of A, and one year, then to B in fee, or to several persons for particular estates, is an instance.

The devise to B is a disposition of a future interest of freehold, and is void by the rules of the common law, and to be supported only as an executory devise.

4. Where a particular estate, as distinguished from the fee, either with or without, a disposition of the fee, is given by will, and there is a devise in the same will to take effect in derogation and abridgment of that estate, before the period of its regular and proper continuance is accomplished, or where an estate tail, or an estate for life, is limited to one person, and on an event, that estate is to cease and be defeated; and another estate is to arise, or a remainder is to be accelerated and take its place.

5. Where an estate tail, or an estate in fee, is on some event reduced to an estate for life. (Wright *v.* Wright, 1 Ves. 409.) This could not be accomplished at the common law. In effect, there are two distinct gifts; one is a substitution for the other. That the substitution can take place is the indulgence allowed to the will of testators under the learning of executory devises, springing uses, etc.

6. Where there is a devise of an estate of inheritance, or any other estate, and on some event a particular estate to a stranger is introduced to take place in derogation of the estate of inheritance, and to a partial though not total exclusion of the same, the doctrine of uses admits of substitutions of this nature; and this is a strong reason for concluding that they may be made under the doctrine of executory devises, since executory devises inconvertibly owe their origin to the learning of uses, and particularly to the doctrine of springing or shifting uses, and are deducible from that learning. Therefore, without referring to any authority determined on this particular point, it might, perhaps, be thought sufficient to rely on the learning of uses."

2 Prest. Abst. *123, *125, *130, *132, *139, *140, *142.

He further divides limitations of chattels real and personal into three classes, in regard to which see *infra*, this title, § II, 4, *d*.

springing or a shifting interest, since the fact that it is limited on a fee is in itself sufficient to distinguish it from a remainder. It should be observed, however, that a limitation after a fee simple determinable will be void, unless the contingency upon which the first limitation is to determine, and the second to arise, is within the Rule against Perpetuities.[1]

1. Smith Ex. Int., § 126; Challis' Real Prop. 140; Fearne's Cont. Rem. 394, 395, 399; Wilson's Springing Uses *25, *26; Pells *v.* Brown, 1 Salk. 226; 2 Jarm. Wills. (5th ed.) *866; Carpenter *v.* Smith, Poll. 70; State *v.* Trask, 6 Vt. 363; 3 Keb. 18, 92, 122, 176.

Thus where the devise was to six children in fee with limitations over to the survivors, which would have given them cross-remainders if the first devise had been to them for life only, the limitations over took effect as executory devises. Jackson d. Bushans *v.* Blanshan, 3 Johns. (N. Y.) 229. See Carver *v.* Jackson, 4 Pet. (U. S.) 1; Thaw *v.* Ritchie, 5 Mackey (D. C.) 200; Hillary *v.* Hillary, 26 Md. 274; Buist *v.* Dawes, 4 Strobh. Eq. (S. Car.) 37; Ivins *v.* Scott, 26 Pa. St. 215; Wells *v.* Ritter, 3 Whart. (Pa.) 208; Hart *v.* Thompson, 3 B. Mon. (Ky.) 482; Royall *v.* Eppes, 2 Munf. (Va.) 479; Pendleton *v.* Pendleton, 2 Murph. (N. Car.) 82.

So a devise to A and his heirs, with a gift to B, in case A dies without leaving issue surviving at the time of his death gives B an executory devise. Barnitz *v.* Casey, 7 Cranch (U.S.) 456; Wilson *v.* Wilson, 32 Barb. (N. Y.) 328; Attorney-Gen'l *v.* Wallace, 7 B. Mon. (Ky.) 611; Wilson *v.* Wilson (N. J.), 19 Atl. Rep. 132; Booker *v.* Booker, 5 Humph. (Tenn.) 505; Ivins *v.* Scott, 26 Pa. St. 215; Sherman *v.* Sherman, 3 Barb. (N.Y.) 385; Burfoot *v.* Burfoot, 2 Leigh (Va.) 119.

Under a devise of lands to testator's two sons, but if either die without issue his part to go to the survivor, and if the survivor die without issue the same to go to testator's other children, each of the sons takes a defeasible fee subject to the double contingency of dying without issue and leaving a survivor. Gordon *v.* Gordon, 32 S. Car. 563.

For similar illustrations, see Eaton *v.* Shaw, 18 N. H. 1, 320; Randall *v.* Jossilyn, 59 N. H. 557; Ide *v.* Ide, 5 Mass. 502; Richardson *v.* Noyes, 2 Mass. 56; Randolph *v.* Randolph, 81 Va. 608; Den *v.* Taylor, 5 N. J. L. 413; Vedder *v.* Everston, 3 Paige (N. Y.) 281; Smith *v.* Hunter, 23 Ind. 580; Wilson *v.* Wilson (N. J.), 19 Atl. Rep. 132; Stones *v.* Maney, 3 Tenn. Ch. 731; Whiting *v.* Whiting, 42 Minn. 548; Wells *v.* Ritter, 3 Whart. (Pa.) 208.

In the Earl of Winchelsea *v.* Wentworth, 1 Vern. 402, land was limited to J, the second son [in fee], provided that if the eldest son died without issue, J should, within six months after the death of the eldest son, pay £1,500 to a sister, or, in default thereof, the land to go to the sister and her heirs. The eldest son died without issue, and the sister died within the six months; J refused to pay the £1,500. *Held*, that the land should go to the sister's heir.

And in the case of Lloyd *v.* Carew (Show. Parl. Cas. 137), where lands were limited, by marriage settlement, to the use of A and his wife for their lives, remainder to trustees and their heirs during the lives of A and his wife, to preserve contingent remainders, remainder to the first and other sons of the marriage successively in tail male, remainder to the right heirs of A; with a proviso that if no issue of the marriage should be living, at the decease of the survivor of the husband and wife, and the heirs of the wife should, within twelve months after the decease of the survivor of the husband and wife, pay £4,000 to the heirs or assigns of the husband, then the remainder in fee-simple, so limited to the husband, should, and thenceforth should, remain to the use of the heirs of the wife, the House of Lords held the springing use to the heirs of the wife to be good.

An excellent illustration of the working of executory limitations occurs in the case of "strict settlements of real estate, made by a settlor in contemplation of his marriage. The limitations regularly begin with a limitation to the use of the settlor and his heirs until the solemnization of the intended marriage; and afterwards to certain other specified uses. These subsequent uses are executory limitations, for they are void as remainders at the common-law since they are limited after a determinable fee.

The better opinion is that it is immaterial whether the preceding fee be vested or contingent, provided the subsequent interest be so limited as to defeat the preceding interest after it has vested.[1] But if the subsequent interest is so limited as to vest

Here the precedent fee is a determinable fee, which, if it should determine at all, must determine within the time prescribed by the Rule against Perpetuities; and the subsequent executory limitations are not in defeasance of the fee, but await its regular determination. If the precedent fee had been a fee simple, any subsequent limitation must necessarily (if valid) have been in defeasance of it." Moreover as "such a determinable fee will not, before the solemnization of the marriage and during the joint lives of the parties, admit of enlargement into a fee simple, except by the release of these executory limitations; and these, being partly in favor of the issue of the marriage, who by hypothesis are not in being, cannot be released. Therefore, in order to prevent the inconvenience which would result during the lives of the parties from the making of the settlement, in case the intended marriage should not be solemnized, it is proper to insert into the settlement a proviso that, in case the marriage shall not be solemnized within a specified time (usually twelve months) after its date, the uses of the settlement shall be void and the lands shall revert to the use of the settlor in fee simple." Challis' Real Prop. 141, 142, 203.

1. Fearne's Cont. Rem. 396; Gulliver *v.* Wicketts, 1 Wils. 705; Wilson's Springing Uses, 10, 19, 23; Tiedeman on Real Prop., § 537; Meadows *v.* Parry, 1 Ves. & B. 124; Fonnereau *v.* Fonnereau, 3 Atk. 315; Doe *v.* Selby, 2 B. & C. 930; Doe *v.* Beauclerk, 11 East 657; Carr *v.* Erroll, 6 East 58; Doe *v.* Heneage, 4 T. R. 13; Nicholl *v.* Nicholl, 2 W. Bl. 1159; Nightingale *v.* Burrell, 15 Pick. (Mass.) 104.

The principle would seem to apply to springing interests limited to arise on the natural expiration of a fee simple determinable as well as to shifting interests, although there seems to be no express authority for its extension to such cases.

Wilson, in his work on Springing Uses *10–23, says that the doctrine is as applicable to shifting uses as to executory devises, but that while agreeable to principle it is not sustained by the case of Gulliver *v.* Wicketts, 1 Wils. 105, upon which it is placed by Fearne. Upon this point Fearne's language is as follows: "And even where there is a limitation after a devise in fee simple, though such antecedent devise in fee be not vested, but contingent; yet if the ulterior devise is limited so as to take effect in defeasance of the estate first devised, on an event subsequent to its becoming vested, it has been held to operate as an executory devise.

Thus when a testator devised lands to his wife for life, and after her death to such child as she was then supposed to be *enciente* with, and to the heirs of such child forever; provided that if such child as should happen to be born, should die before the age of twenty-one years, leaving no issue of its body, the reversion should go over. The court held it to be a devise to the wife, remainder to the child in contingency in fee, with a devise over, which they held a good executory devise, as it was to commence within twenty-one years after a life in being; and that if the contingency of a child never happened, then the last remainder was to take effect upon the death of the wife. And that the number of the contingencies was not material, if they were all to happen within a life in being, or a reasonable time after. There is an observation of the reporter on the last noticed case, that the court used a difference of phraseology, viz., executory devise and remainder, in respect to the same limitation; from whence it seemed to him uncertain. whether they determined it an executory devise, or a contingent remainder. But I conceive this doubt would have been prevented by his adverting to the language of the court, when they said it was good as an executory devise, as it was to commence within twenty-one years after a life in being; and that the number of contingencies was not material, if they were to happen within a life in being, or a reasonable time after; neither of which circumstances hath any sort of relation to a contingent remainder, or can be understood as applicable to the idea of it. Upon the same case

if at all, before the preceding, so that it can only take effect in case the preceding limitation fails, the subsequent limitation is alternative or substitutional and if the preceding fee is itself immediately preceded by a life estate the ulterior limitation is a contingent remainder dependent thereon and not an executory devise or shifting use.[1] An executory devise to take effect only as to "what estate the first taker shall leave" is generally held to be void, since what the first taker leaves is his own and not something in which the testator had a reversionary interest; otherwise if the power of disposition be partial only or the gift over be limited on default of appointment.[2] The event upon which the executory limitation is to arise may be either certain as where a devise is to A and his heirs with a proviso that one year after the death of B the land shall devolve on C and his heirs, or contingent as where it is to take effect on the first taker's dying without leaving children.[3]

Interests limited to take effect after a fee may be either springing, as where the ulterior interest is to arise on the natural expiration of a fee simple determinable;[4] or shifting, where it is to arise in derogation or defeasance of the preceding limitation.[5] The latter are commonly called conditional limitations and may be divided into three varieties:

1. Where a fee simple is in some event totally defeated and an entirely new estate thereby created, as where the interior limita-

we are further to observe, that although one of the contingencies on which the ulterior devise was construed to depend, viz., there being no child to take as supposed, must have been decided, immediately on the determination of the particular estate without the antecedent limitation in fee ever becoming vested, and therefore such devise would, had it depended on that event only, have been considered as a contingent remainder, equally with the alternative one to the child; yet the other event, and that indeed on which the limitation over was expressly limited to take effect, viz., the death of the supposed child under the age of twenty-one years, could not possibly happen till after the fee simple had actually vested in such child on its birth; in which case it clearly could not operate as a remainder, and therefore must have been void in its creation, if not allowed to inure as an executory devise."

Fearne's Cont. Rem. 396, 397.

1. Tiedeman on Real Prop., § 537; Luddington *v.* Kime, 1 Lord Raym. 203; Goodright *v.* Dunham, 1 Dougl. 265; Doe *v.* Selby, 2 B. & C. 926; Doe *v.* Challis, 2 Eng. L. & Eq. 215; Dunwooddie *v.* Reed, 3 S. & R. (Pa.) 452; Taylor *v.* Taylor, 63 Pa. St. 481. See *infra*, this title, § II, 5, *e*.

The characteristic of alternative or substitutional limitations is that both are contingent until the event occurs which is to determine which of them is to take effect. See *supra*, this title, § I, 3, *c*, and *infra*, this title, § II, 5, *e*. This is well illustrated by the case of Luddington *v.* Kime, 9 Ld. Raym. 203, in which the limitation was to A for life, remainder to his male issue in fee simple, remainder over to T B if A should die without male issue. These remainders are alternate, one of which alone can vest, and the vesting of one and the defeat of the other are to take place at the same time, viz., at the death of A. If the remainder to T B had been limited on another contingency, and its vesting was to take place at some other time, or if the limitation to A's issue was vested, instead of being contingent, the remainder to T B, would be a remainder limited after a fee.

2. See *infra*, this title, § II, 5, *f*.

3. Fearne's Cont. Rem. 399.

4. Smith Ex. Int., § 126.

5. See *infra*, this title, § II, 2.

tion is itself a fee. This is the ordinary and usual way in which such limitations are framed, as in the case of a devise to A and his heirs, but in case he die within age to B and his heirs. So where a testator devised land to his mother for life, and after her death to his brother in fee, provided that should his wife, who was then *enciente*, be delivered of a son, then the land should remain to such son in fee, and died, and a son was born, it was held that the fee of the brother should cease and vest in the son by way of executory devise.[1] The characteristic of this species of conditional limitation is that on the happening of the contingent event the inheritance is limited over to another description of heirs.[2]

2. Where the event upon which the ulterior limitation is to take effect reduces the preceding fee to a life estate, as where a testator devised real estate to his two daughters in fee, and provided by a subsequent clause that if either married without the consent of his executors the daughter so marrying should have only an estate for life.[3]

3. Where an estate to a stranger is limited to arise in derogation of the preceding fee and in partial, though not total exclusion of the same, in which case after the determination of the

1. Purefoy *v.* Rogers, 2 Wms. Saund. 388 *b*, note *citing* Dyer 127 *a* in margin. See Marks *v.* Marks, 10 Mod. 423; Brightman *v.* Brightman, 100 Mass. 238.

2. It will be observed that this variety, differs from the two others in that the inheritance does not return to the original stock:

"Such a limitation over cannot take effect as a contingent remainder, because it is an established rule of law that a fee cannot be limited after a fee. Co. Litt. 18 *a*, Vaug 269. Gardner *v.* Sheldon. And therefore, when an estate is devised to one and his heirs, and if he dies without heirs, it shall remain over to another, this last limitation is void; Vaug. 269, 271, Cro. Car. 57; except, indeed, where the limitation over is to a person who is a collateral heir of the devisee, in which case the word heirs is construed to mean heirs of the body, from the apparent intent, because it is impossible that the devisee should die without an heir, while the remainder-man or his issue continue. Cro. Jac. 415; Webb *v.* Hearing, Cas. temp. Talb. 1; Tyte *v.* Willis, 1 P. & Will. 23; Nottingham *v.* Jennings, Willis Rep. 165; Preston *v.* Funnell, 3 Lev. 70; Parker *v.* Thacker, 2 P. Will. 369; Attorney-General *v.* Gill, 1 Ves. 89; Tilburgh *v.* Barbut, Cowp. 34; Morgan *v.* Griffiths, S. P. admitted in Ginger *v.* White, Willis Rep. 352; Goodright *v.* Dunham, Dougl. 266, 267. (Accord. 6 Taunt. 485. Doe *v.* Bluck. See also 4 M. & S. 61. Dansey *v.* Griffiths.) [10 B. & C. 433, Ware *v.* Cann.]"

2 Wms. Saund. 388 *a*, note to Purefoy *v.* Rogers.

3. 1 Jarman on Wills (5th ed.) 867; 2 Prest. Abst. 139.

This corresponds in part with Preston's fifth species of executory interest, *i. e.* where an estate tail or an estate in fee is in some event reduced to an estate for life. 2 Prest. Abst. 139.

There seems to be no express decision upon the point. The illustration in the text is taken from Wright *v.* Wright, 1 Ves. 409, but in that case as one daughter died unmarried, and the other married with consent, the validity of the limitation for life in case of marriage without consent did not arise. The statement in 1 Jarman on Wills (5th ed.) *867, that it was held that one of the daughters marrying without consent, her estate was cut down to an estate for life, is therefore inaccurate.

ulterior interest the land reverts to the heirs of the person entitled under the first limitation.[1]

1. Gatenby *v.* Morgan, L. R., Q. B. D. 685; 1 Jarman on Wills (5th ed.) 867; 2 Prest. Abst. 140.

The division in the text is partly coincident with Preston's sixth species of executory devise, *i. e.:* "Where there is a devise of an estate of inheritance or any other estate, and on some event a particular estate to a stranger is introduced to take place in derogation of the estate of inheritance and to a partial though not total exclusion of the same. The doctrine of uses admits of substitutions of this nature, and this is a strong reason for concluding that they may be made under the doctrine of executory devises." 2 Prest. Abst. 140.

Fearne, on the other hand, seems to have been of opinion that such a limitation could not be sustained as to devises. Fearne's Cont. Rem. 530, and of the same opinion is Wilson in respect to limitations by way of use. Wilson Springing Uses 149; and the same view was expressed in Doe d. Harrington *v.* Dill, 1 Houst. (Del.) 398.

Jarman sustains Preston, and the controversy was definitely settled in his favor by the decision of the Queen's Bench in Gatenby *v.* Morgan, 1 Q. B. D. 685, in which the whole subject was critically examined: A testator by will of April, 1811, devised certain hereditaments to his granddaughter E C and her heirs. But if E C died without leaving lawful issue living at her death, the testator devised the hereditaments "unto and to the use of the nine children of J A to be equally divided among them, share and share alike." And he devised all the residue of his estate to his son P C.

E C died, leaving no issue living at her death. One of the nine children of J A survived E C. *Held*, first, that the executory devise over to the children of J A, being before the Wills Act, created in them a tenancy in common for life only; and, secondly, that this executory devise affected the previous estate in fee given to E C to the extent of such life estates only, and that subject to the life estates, the property remained to E C and her heirs, Lush, L. J., saying: "The testator devised it in fee to his son P C, but with an executory devise over that, if P C died without issue living at his death, then the property should go to the testator's granddaughter E C and her heirs; and then there is a further executory devise over, in the event of E C dying without issue living at her death, so the use of the nine children of J A 'to be equally divided among them, share and share alike.' This, as I have already said, gives them only an estate for life; and the question is whether, there being one of those children living at the death of E C without issue, the estate of E C wholly ceased, and on the death of the last of the tenants for life, the reversion of the estate passed to P C as heir-at-law or devisee of the residue; or whether the remainder of the estate reverted to the heirs of E C under the devise in fee to her, this estate being only so far defeated as to let in the life estate. I am of opinion that the latter is the true construction.

In Jackson *v.* Noble (2 Keen 590) there was a similar devise of an equitable fee to the testator's daughter, who became Mrs. Noble, with (precisely as here) an executory devise over, which became impossible to take effect owing to the death of the devisees in the lifetime of Mrs. Noble, and Lord Langdale, M. R., held that Mrs. Noble took the absolute fee simple. That is not precisely this case; because here one of the children who had a life interest survived E C. But can this make any difference? The estate devised to E C was in fee, and at her death was not divested, but survived to her heirs, with the existing devise over, still only a devise for life interposed, and taking place on the event of her death without issue. In 2 Powell on Devises (3rd ed. by Jarman), p. 240, it is said: 'Where an estate is limited in derogation of a preceding estate, and to a partial though not total exclusion of the same—as where a testator devised lands to his son B in fee, and other lands to his son C in fee, subject to a proviso that if either of his sons should die before marriage or before twenty-one, and without issue of their bodies, then he gave all the lands of such of his sons as should so die, etc., unto such of his said two sons as should the other survive—it was held that the sons took the fee, subject to a

b. LIMITATIONS OF FREEHOLD TO COMMENCE IN FUTURO.—This class includes cases in which a devisor or settlor without parting with the immediate fee, limits an estate of freehold to take effect either on a contingency or at the expiration of a fixed interval of time, unpreceded by or without having the requisite connection with any immediate freehold to give it effect as a remainder; as where the limitation is to the first son of B when he shall have one, or the right heirs of a living person, or to take effect six months from the death of the devisor or the date of the settlement without any preceding limitation.[1] So where an

limitation to the survivor for life, in case of either dying unmarried, or under twenty-one, and without issue; and that, one of them having attained twenty-one and died unmarried, the survivor was entitled to his moiety for life:' *citing* Hanbury *v.* Cockerell (1 Roll. Abr. 835–836). Then the author points out that, 'Mr Preston' (a high authority) 'considers that the executory devise did not wholly defeat the original devise to the sons, but only introduced the limitation to the surviving son of an estate for life by way of exception out of the preceding estate in fee. To this important rule, namely, that an estate subject to an executory devise, to arise on a given event, is, on the happening of that event, defeated only to the extent of the executory interest, the only possible objection that can be advanced is the total absence of direct authority for it; for the books do not furnish a single example of its application.' He then proceeds to point out that the point did not arise in Hanbury *v.* Cockerell (1 Roll. Abr. 835–836), and in another case in which it might have arisen. But, surely, if the only possible objection is the want of direct authority, reason and common sense ought to be enough to decide the point. It is further pointed out in Powell on Devises, 'that Mr. Fearne's position (1 Cont. Rem. 251, 538), 'that a condition or limitation must determine or avoid the whole of the estate to which it is annexed, and not determine it in part only, and leave it good for the remainder,' must be received with some qualification.

Fearne seems to be speaking of a condition or limitation at common-law, and not of an executory devise. And I can see no reason why an executory devise should on the happening of the event defeat the estate originally devised to a greater extent than the executory interest itself. There is no direct authority either for or against it; and I think we ought to act on Mr. Preston's view supported, as it seems to me, by common sense and reason. That being so, E C and her heirs retained their interest in the remainder, and became entitled in possession after the death of the surviving tenant for life; and therefore none of the plaintiffs have made out a title; and judgment must be for the defendants." Blackburn, J., saying, at p. 689–691: "The rule of construction before the Wills Act was, that a devise, without words of inheritance, or words clearly importing an intention to give the inheritance, passed only an estate for life. Oates *v.* Brydon (3 Burr. 895) is inconsistent with this rule, no doubt, but it has been virtually overruled. Therefore the executory devise to the nine children of A gave them a life estate only. What was the effect of that executory devise upon the preceding devise in fee to E C? Common sense would say, just so much as the subsequent devise required and no more; that would leave the fee in E C's heirs, subject after her death without issue to the life estates of the children of Atkinson. The case of Watkins *v.* Weston (3 D. J. & S. 434; 32 L. J. Ch. 609, and more directly, Jackson *v.* Noble (2 Keen 590), supports this view. The true rule seems to be that the executory devise takes away from the previous estate in fee only so much as is necessary for the executory devise itself; and after the death of the surviving tenant for life the estate reverts to the heirs of the previous devisee in fee.'

The reasoning is equally applicable to limitations by way of use, and taken in connection with Preston's statement that its application to uses was settled would seem to be conclusive.

1. Fearne's Cont. Rem. 395, 399, 400; Smith Ex. Int., § 119; Gore *v.* Gore, 2 P. W. 28; Beard *v.* Rowan, 1 McLean

estate is limited to arise on the expiration of an interval of time after the determination of a preceding estate of freehold, as if land be limited to A for life and one day after his decease to B, as the latter limitation cannot take effect as a remainder, there seems to be no objection to its taking effect as an executory devise or springing use if confined to the requisite limits of time.[1] For the same reason, a contingent interest of freehold limited to take effect on the expiration of a term of years, as to A for twenty-one years, and then to the first unborn son of B in fee, since it cannot take effect as a remainder, by reason of not having a particular estate of freehold to support it, would on principle be

(U. S.) 135; Miller *v.* Chittenden, 4 Iowa 252. See Blanchard *v.* Maynard, 103 Ill. 60; Rupp *v.* Eberly, 79 Pa. St. 141; Dunn *v.* Bank of Mobile, 2 Ala. 152.

So where one devised lands to J S for five years from Michaelmas then next ensuing, the remainder to C and his heirs, and died before Michaelmas, the limitation to C was held good, although a freehold cannot be in expectancy; for that in case of a devise, the freehold in the meantime should descend to the heir and vest in him; which reason proves the limitation was allowed to operate as an executory devise, though in the report it is inaccurately called a remainder. Pay's Case, stated Fearne's Cont. Rem. 400; Cro. Eliz. 788.

A bequest to children born, and thereafter to be born, is good as an executory devise, as it respects the afterborn child. Dunn *v.* Bank of Mobile, 2 Ala. 152.

A testator devised to M, the daughter of his daughter E, a lot of ten acres; and further devised: "It is my will that in case my said daughter E should happen to have more lawful issue, then it is my will that the whole of my real estate shall be equally divided among my grandchildren of my said daughter E and their heirs forever. Provided, that, in case of more issue, I direct that all my real estate be valued, and my said granddaughter M shall hold and possess said ten acres as part of her legacy." E died without other issue. *Held*, that this was an executory devise to testator's grandchildren, on the contingency of there being others, and there being none, he died intestate as to all his real estate but the ten acres. Rupp *v.* Eberly, 79 Pa. St. 141.

1. Fearne's Cont. Rem. 398; Wilson on Springing Uses, *24, *25.

Such a limitation would be void as a remainder for want of a particular estate, to support it during the interval between the determination of A's estate and the commencement of B's. See *supra*, this title, § I, 1, *a*; § I, 3, *f*, (1).

"In the same manner, if land be limited to A for life, and after his decease to B and his heirs, with a proviso, that if B shall survive A, and afterwards depart this life without leaving issue of his body living at the time of his decease, the land shall devolve to C and his heirs; the limitation to B and his heirs prevents the immediate connection of the estate limited to C, with the life estate of A, and prevents its immediate commencement on the expiration of A's life estate and therefore makes it operate by way of executory devise." Fearne's Cont. Rem., 397 n. (c) per Butler.

Executory interests limited in the mode suggested in the text, should be carefully distinguished from the case put by Lord Hale in Weale *v.* Lower, Poll. 65, stated, Wilson on Springing Uses 26, viz., a feoffment to the use of A for life, and after the death of A and B, to the use of C in fee; under which C would seem to have a contingent remainder of the third class. (See *supra*, this title, § I, 3, *a*, (1)) since if B die in the lifetime of A, the ulterior limitation may take effect on the regular expiration of the preceding estate. This seems clear on principle, and since the limitation is capable of taking effect as a remainder it cannot be construed as a springing interest to save it from possible destruction in case B survived A. (See *supra*, this title, § II, 3.)

The case of Doe d. Dyke *v.* Whittingham, 4 Taunt 20, where A covenanted to stand seised to, from and after the death of himself and wife, to the use of his daughter does not militate against

sustained as a good executory limitation.[1] Formerly it seems to have been held that where an executory devise was limited *per verba de presenti*, that is where the devisee was mentioned as a person *in esse*, and the commencement of the estate devised was not expressly deferred to a future period, the devise was void unless the devisee was capable of taking possession at the death of the devisor; otherwise if the devise was *per verba de*

the position since no estate was limited to the covenantor or his wife by the instrument. Hence the daughter's use had no particular estate to support it and was rightfully held to be a springing use.

Quære, Would the existence of a preceding limitation of freehold to the covenantor have converted the limitation to the daughter into a remainder? On principle it would seem that it would, since if such limitation were inserted the case would be identical with that suggested by Lord Hale, unless the mere fact that the life tenant was also covenantor is sufficient to distinguish them, and as the life estate created by express limitation would oust the resulting use, such distinction would seem without foundation.

1. Smith Ex. Int, § 120. Wilson on Uses, 8. As to devises it has repeatedly been held that a contingent limitation after an estate for years is a good executory devise and not a bad remainder. Gray's Perp., § 60, *citing* Gore *v.* Gore, 2 P. Wms. 28; Haywood *v.* Stillingfleet, 1 Atk. 422; Harris *v.* Barnes, 4 Bur. 2157. See Matter of Sanders, 4 Paige (N. Y.) 297.

But in Adams *v.* Savage, 2 Ld. Raym. 854, 2 Salk. 679, and in Rawley *v.* Holland, 22 Vin. Abr., 189, 2 Eq. Cas. Abr. 753, it was held that a use limited after an estate for years to a person not *in esse* was bad as a contingent remainder unsupported by a freehold.

"The soundness of these two decisions is very questionable. It is well settled that if a future limitation can be construed as a remainder it must be so construed, and not as a springing use; but it is a very different thing to say that a good springing use must be construed into a bad remainder, because it is preceded by an estate which is insufficient to support a remainder. To construe a limitation as a remainder, if it can be a remainder, is one thing; but to insist upon construing it as a remainder, when it cannot be a remainder, seems the very wantonness of destruction. In fact, an estate after an estate for years, though commonly called a remainder, is not strictly so: a remainder is an estate after a freehold; a remainder-man, so called, after an estate for years, has the present seisin, and the reason why at common law an estate cannot be given to a person not *in esse* after an estate for years is, that there is no one to take the present seisin, and that a freehold cannot be granted *in futuro*. (Leake, Land Laws, 320. Challis' Real Prop. 77.) But, by way of use, a freehold can be granted *in futuro*.

The cases of Adams *v.* Savage and Rowley *v.* Holland have, accordingly, been much criticised. (Gilbert on Uses (Sugd. ed.) 167, 168 note. Hayes, Limit. 67 note, 72 note; 1 Sand. Uses (5th ed.) 147, 148. Wilson on Uses, 69, 70.) But, further, they must be considered as overruled by the cases in which it has been repeatedly held that a future contingent devise after an estate for years is a good executory devise, and not a bad remainder. (Gore *v.* Gore, 2 P. Wms. 28 (1722); Haywood *v.* Stillingfleet, 1 Atk. 422 (1737); Harris *v.* Barnes, 4 Burr, 2157 (1768). See Lord Mansfield in Goodtitle *v.* Burtenshaw, Fearne's Cont. Rem., App. 570, 571; Gilbert on Uses (Sugd. ed.) 171.)

There is no intelligible distinction in this respect between springing uses and springing executory devises, and if Adams *v.* Savage and Rawley *v.* Holland have not been formally overruled, as it is in all probability because the question has not arisen under a deed, as it has under wills. The statement may therefore be ventured that a contingent use is good although preceded by an estate for years." Gray's Perp., §§ 59, 60.

And of the same opinion is Wilson on Springing Uses, *69.

For further criticisms upon the doctrine of the above cases see 1 Sand. Uses (5th ed.) 147, 148; Hayes Limit. 67 note, 72 note; Gilbert on Uses (Sugd. ed.) 167, 168 note, 171.

futuro and expressly deferred to a future period.[1] This distinction, if valid at all, is equally applicable to springing uses,[2] but its validity is extremely questionable.[3] A contingent remainder limited by will immediately after an estate for life, will take effect as an executory devise if the life tenant die before the testator, for as the will speaks from its date, and the freehold never vested in the life tenant, the rule that a limitation shall be construed a remainder rather than an executory devise does not apply, and it is precisely the same thing as though the ulterior interest had been limited in the first place without any preceding freehold.[4] But this seems not to apply to limitations by way of

1. Fearne's Cont. Rem. 532.

"As if one devise (immediately) to the heir of J S, and J S is living at the death of the testator, it is said the devise shall not be construed an executory devise, and therefore must be void, but that, if it were to the heir of J S after the death of J S. that would be clearly good as an executory devise, because a future time is mentioned. So it has been said, that a devise to the first son of A, having none at that time is void; but that if it were to the first son of A, when he shall have one, it would be good, though Bridgeman, Ch. J., said, that a devise to J S for fifteen years, remainder to the right heirs of J D, is not good, but that a devise to one for fifteen years, remainder to the first son of J D, is good; because the devisor takes notice that J D hath not a son, and intends a future act." Fearne's Cont. Rem. 533.

But a devise to the unborn children of a person *in esse* is good though in *praesenti*, for the intention of the devise is clearly future in its construction. 2 Wash. Real Prop. (5th ed.) 743; 6 Cruise Dig. 423; Doe *v.* Carleton, 1 Wils. 225.

2. Wilson on Springing Uses, § 150. Lamb *v.* Archer, 1 Salk. 225.

3. Wilson on Springing Uses, 150, says that the distinction has no better foundation that the *dicta* of judges propounded in the infancy of executory devises and never had any real existence. This is perhaps rather too strong. Fearne's examination (Cont. Rem. 532, 533) shows that the cases upon which the doctrine is generally based could have been equally well sustained on other grounds, and the recognition of the distinction was not necessary to the decision. On the other hand in the two leading cases examined by Fearne, Goodwright *v.* Cornish, 1 Salk. 226, Scattergood *v.* Edge, 1 Salk. 229, which were decided in the reign of William and Mary, the distinction was recognized and formed one of the grounds of the decision. In Lamb *v.* Archer, 1 Salk. 225, decided the same year, counsel suggested *arguendo* that a feoffment to the right heirs of B was a good springing use but the whole court held otherwise "because it is by way of present limitation, *aliter* where it is future, as to the right heirs of B after his death."

Fearne's conclusion from the cases is, that the distinction can only affect those cases where there is not the least circumstance from which to collect the testator's contemplation or intention of anything else, than an immediate devise, to take effect in *praesenti*. This view was adopted by the Supreme court of *Iowa* in Miller *v.* Chittenden, 4 Iowa 268, in which a deed to trustees for the use of a Congregational Church, thereafter to be incorporated, was sustained, expressly on the ground that the instrument did not contemplate a corporation *in esse* at the time of delivery. This case contains a careful criticism of the authorities. Similar grants to corporations not *in esse* were sustained in Shapley *v.* Pillsbury, 1 Me. 271; Rice *v.* Osgood, 9 Mass. 38; Reformed Dutch Church *v.* Veeder, 4 Wend. (N. Y.) 494; Town of Powlet *v.* Clark, 9 Cranch (U. S.) 292; 3 Curt. (U. S.) 358; Inglis *v.* Sailors Snug Harbor, 3 Pet. (U. S.) 144.

So a bequest to charitable uses may take effect as an executory devise to a corporation subsequently acquiring capacity to take. Porter's Case, 1 Co. Rep. 22; McIntyre Poor School *v.* Zanesville Canal & Mfg. Co., 9 Ohio 203; Coggleshall *v.* Pelton, 7 Johns. Ch. (N. Y.) 292; Mylne *v.* Mylne, 17 La. Ch. 46.

4. Fearne's Cont. Rem. 524, 525; 1 Jarman Wills (5th ed.) 874; Hopkins *v.* Hopkins, Cas. temp. Talb. 228; 1 Atk.

use, since in them there is no interval between the time of execution and the period of operation, corresponding to the period between the time of execution of a will and the death of the testator.[1] In conclusion, it should be observed that all limitations of this class create springing as distinguished from shifting interests.[2]

c. LIMITATIONS AFTER AN ESTATE TAIL OR AN ESTATE FOR LIFE.—An interest of the measure of freehold limited by way of use or devise to take effect immediately after an estate tail or an estate for life, is *prima facie* a remainder, and will be so construed, unless it distinctly appears that it can only take effect in derogation or defeasance of the preceding interest, in which case it will be construed an executory limitation. The test is, Does the ulterior interest await the natural expiration of the preceding interest upon which it is limited, or does it cut it short? If the former, it is a remainder; if the latter, a shifting interest or conditional limitation.[3] Thus if lands are devised to A for life, and

581; 1 Ves. 268; Doe d. Scott *v.* Roach, 5 M. & Sel. 481; Brownsword *v.* Edwards, 2 Ves. Sr. 243, 249; Goddard *v.* Goddard, 10 Pa. St. 79; Eaton *v.* Straw, 18 N. H. 320.

So where the preceding life estate was devised to the widow, and she elected to take against the will, a contingent remainder dependent thereon was held to take effect as an executory devise. Thompson *v.* Hoop, 6 Ohio St. 480. But this seems to be untenable, since on principle the estate would vest in the widow on the testator's death, and the gift over having once taken effect as a remainder could not be afterwards construed an executory devise. In this case it should further be observed that the limitation was to the widow for life, and after her death to testator's son Isaac. And hence the same result could have been attained by holding that on the widow's election to take against the will, Isaac's vested remainder was accelerated. (See *supra*, this title, § I, 5, *a*.) The fact that Isaac's remainder, like all other limitations in the will, was liable to be disturbed by the widow's election to take against it, cannot be considered such a condition as would affect its character. The case, therefore, cannot with safety be relied upon in other jurisdictions as sustaining the broad proposition that contingent remainders dependent upon a life estate devised to the widow, will be construed executory devises on her electing to take against the will. *Compare supra*, this title, § II, 3.

1. Wilson's Springing Uses 148.

2. See *supra*, this title, § II, 2, and notes.

3. "The true point of distinction, as I take it, between such conditional limitations over as are, and such as are not remainders, in the strict sense of that word, lies here: the former are limited to commence where the first estate is, by the very nature and extent of its original limitation, to expire or determine; whereas the latter are limited so as to be independent of the measure or extent originally given to the first estate, and to take effect in possession, upon an event which may happen before the regular determination, to which that first estate is liable from the nature of its original limitation, and so as to rescind it. And in this latter case, I apprehend it is the same thing, whether the whole fee is disposed of in the first limitation or not." Fearne's Cont. Rem. 13. See Smith's Ex. Int., §§ 148–159.

Class C is coincident with Preston's fourth species of executory limitations, "where a particular estate, as distinguished from the fee, either with or without a disposition of the fee, is given by will; and there is a devise in the same will, to take effect in derogation and abridgment of that estate, before the period of its regular and proper continuance is accomplished; or where an estate tail, or an estate for life is limited to one person, and on an event, that estate is to cease and be defeated, and another estate is to arise, or a remainder is to be accel-

after her death to B and the heirs of her body, provided always and upon condition she marry with consent of D, and in case she marry without such consent or die without issue, then to C, B has an estate tail in remainder, subject to a conditional limitation in favor of C, to take effect on her marriage without D's consent, and on her so marrying her estate tail determines in C's favor.[1] So a limitation to the use of A for life, provided that when C returns from Rome it shall thenceforth immediately be to the use of B in fee, gives B a shifting use, whereas a limitation to the use of A until C returns from Rome and then to the use of B in fee, gives B a contingent remainder of the first class.[2]

d. LIMITATIONS OF CHATTELS.—At common law a limitation of chattels, real or personal, to two or more in succession, conferred an absolute interest on the first taker.[3] Hence all future interests of personalty, whether vested or contingent, and whether preceded by a prior interest or not, are in their nature executory, and fall under the rules by which that species of limitation is regulated.[4] Such limitations were originally sustained in

erated and take its place." 2 Prest. Abst. 132, 139.

Of course if the ulterior interest is so limited as to arise in defeasance of the preceding interest it cannot be a remainder. See *supra*, this title, § I, 1, *a*; § I, 3, *a*, (1), note. And unless allowed to take effect as a conditional limitation it is void.

1. Fry *v.* Porter, 1 Mod. 300.

The fact that B had no notice of the limitation previous to her marriage is immaterial. Fry *v.* Porter, 1 Mod. 300.

An executory limitation after an estate tail differs from other executory interests in being subject to destruction by common recovery. *Infra*, this title, § II, 5, *h*; but in other respects the distinction between executory interests after an estate tail and contingent remainders dependent thereon is as important as in the case of limitations over after an estate for life.

2. Fearne's Cont. Rem. 14. See *supra*, this title, § I, 3, *a*, (1), note, as to distinction between remainders of this class and conditional limitations. See *supra*, this title, § II, 2, for definition of term conditional limitation.

3. 1 Fearne's Cont. Rem. 401. 2 Wash. Real Prop. *375; Burt. Real Prop., §§ 899, 946; 4 Kent Com. 269, 270. See Duke of Norfolk's Case, 3 Cas. Ch. 33; Cooper *v.* Cooper, 2 Brev. (S.Car.) 355. In regard to chattels real, the reason seems to have been that the estate for life was regarded as equivalent to a freehold interest, and hence necessarily greater than the whole term. The result of this doctrine was that the first taker took an estate for life of freehold interest, in which the whole term was merged, and the remainder-man took nothing. 2 Bl. Com. 174, 175; 2 Wash. Real Prop. *375.

In regard to personal chattels, in the early days of the common law there were no means adequate to the protection of interest of the remainder-men, and hence the interest of the first taker was held to be absolute.

4. 2 Wash. Real Prop. (5th ed.) 376. Fearne's Cont. Rem. 402 and Butler's note; 2 Bl. Com. 174; 1 Jarm. on Wills (5th ed.) *879; 4 Kent's Com. *269, *270. See Jones *v.* Zollicoffer, N. C. Term Rep. 212; Treadgill *v.* Ingram, 1 Ired. (N. Car.) 577; Burnett *v.* Roberts, 4 Dev. (N. Car.) 81; Hudson *v.* Wadsworth, 8 Conn. 348; Scott *v.* Price, 2 S. & R. (Pa.) 59; Merrill *v.* Emery, 10 Pick. (Mass.) 507; Field *v.* Hitchcock, 17 Pick. (Mass.) 182; Westcott *v.* Cady, 5 Johns. Ch. (N. Y.) 334; Rathbone *v.* Dyckman, 3 Paige (N. Y.) 8; Eichelberger *v.* Barnitz, 17 S. & R. (Pa.) 293; Henderson *v.* Vaulz, 10 Yerg. (Tenn.) 30; Thornton *v.* Burch, 20 Ga. 791; Jones *v.* Sothoron, 10 Gill & J. (Md.) 187; Powell *v.* Brown, 1 Bailey (S. Car.) 100; Cudworth *v.* Hall, 3 Desaus. (S. Car.) 556; Mazyck *v.* Vanderhorst, Bailey Eq. (S. Car.) 48; Buist *v.* Dawes, 4 Strobh. Eq. (S. Car.) 37; Geiger *v.* Brown, 4 McCord (S. Car.) 427; Royall *v.* Eppes, 2

wills in those instances only in which the testator had expressly restricted the bequest to the first legatee to the use of the property during his lifetime as distinguished from the thing itself, but this distinction is now exploded,[1] and it may be laid down as settled that under a bequest of chattels, real or personal, to A for life, and after his death to B, A's right to the usufruct during his lifetime, and B's right to the ultimate interest will both be protected.[2] It seems further to be the better opinion that whether the bequest consists of chattels real or personal, both the life legatee and the remainder-man have legal as distinguished from merely equitable rights, and are entitled to legal remedies.[3] The execu-

Munf. (Va.) 479; Edelen *v.* Middleton, 9 Gill (Md.) 161; Siegwald *v.* Siegwald, 37 Ill. 430.

A limitation after a life estate may take effect as a vested remainder in the real property and an executory devise of the personalty. Nash *v.* Cutler, 16 Pick. (Mass.) 491.

1. Fearne's Cont. Rem. 402-406; 2 Wash. Real Prop. *376. See Upwell *v.* Halsey, 1 P. Wms. 651; Gillespie *v.* Miller, 5 Johns. Ch. (N. Y.) 21; Merrill *v.* Emery, 10 Pick. (Mass.) 511.

2. Fearne's Cont. Rem. 402–407; Jarman on Wills (5th ed.) 879; Gray's Perp., § 74.

As to chattels real, Manning's Case, 8 Co. 94*b*; Lampet's Case, 8 Co. 46*b*; Goodright d. Revell *v.* Parker, 1 Maule & S. 692; Doe d. Hayes *v.* Sturgis, 7 Taunt. 217; Ammer *v.* Loddington, 3 Leon. 89.

As to chattels personal, Hyde *v.* Parrat, 1 P. Wms. 1; Upwell *v.* Halsey, 1 P. Wms. 651; Martin *v.* Long, 2 Vern. 151; Johnson *v.* Castle, Winch. 116; 8 Vin. Abr. 104, pl. 2; Hoare *v.* Parker, 2 T. R. 376; Philips *v.* Crews, 65 Ga. 274; McCall *v.* Lee, 120 Ill. 261. LEGACIES AND DEVISES, vol. 13, p. 190, *et seq.*

3. Gray's Perp. §§ 85–88; Hoare *v.* Parker, 2 T. R. 376.

"It may safely be considered as settled at the present day that on a bequest of a personal chattel to A for life, and on A's death to B, A's right to enjoy it during his life, and B's right to have it on A's death, will be somehow protected; but the mode of doing so is not entirely clear. There seem to be three modes in which it may be done. 1. A may be considered as having a right to possession at law, and the immediate right of property as being in B. 2. A may be considered as having the legal right of property, which on his death shifts to B. This is what happens in the case of executory devises of leaseholds, and it appears to have been Lord Thurlow's opinion that it happened with personal chattels also. (See Foley *v* Burnell, 1 Bro C.C. 274, 278; Lewis' Perp. 95–98.) It does not seem material which of these two theories is adopted. On either hypothesis, both A and B have legal rights, and are entitled to legal remedies. 3. The whole interest may pass to A at law, who will hold the chattel in trust for himself for life, and on his death for B. This was possibly Mr. Fearne's view (Fearne's Cont. Rem., 401, 404. See Anonymous, Freem, Ch. 37; and *compare* Sabbarton *v.* Sabbarton, Andrews 333, 335; Cas. temp. Talb. 55, 235), but the case of Hoare *v.* Parker, 2 T. R. 376, is perhaps inconsistent with such a theory, for there the person interested in chattels, after the death of the one who had enjoyed them during her life, brought trover for them, to maintain which he must have had a legal right of possession. The case is, however, so imperfectly reported, that it furnishes a dangerous ground for argument. The weight of authority certainly preponderates in favor of one of the two former views. The question is important, for if the last view be sound, the owner for life, having the whole legal estate, may transfer the chattel to a purchaser for value without notice, who will hold it free from the claim of one interested in remainder, for this claim is *ex hypothesi* equitable only." Gray's Perp., §§ 85, 86. See also § 89 *n* (3); Lewis' Perp. 88; Keyes on Chattels, §§ 268, 271.

That the interest of the ulterior legatee is legal and not merely equitable has been repeatedly recognized in *America*. Gray's Perp., § 8; Smith *v.*

tor's assent to the bequest to the life legatee inures to the benefit of the remainder-man.[1]

At common law chattels real were incapable of seisin, hence an estate for years could be created by common-law conveyance to commence *in futuro*, the termor in the meantime having an *interesse termini*.[2] So if a lease be made to A for twenty years, and then to B for twenty years, B's interest is not a remainder, but an independent substantive grant to begin *in futuro*,[3] and on principle there would seem to be no reason why a term should

Bell, 6 Pet. (U. S.) 78; Thrasher *v.* Ingram, 32 Ala. 645; Griggs *v.* Dodge, 2 Day (Conn.) 28 (explaining Smith *v.* Gates, 2 Root (Conn.) 532); Taber *v.* Packwood, 2 Root (Conn.) 52; Moffat *v.* Strong, 10 Johns. (N. Y.) 12; State *v.* Warrington, 4 Harr. (Del.) 55; Dashiell *v.* Dashiell, 2 Har. & G. (Md.) 127; Royal *v.* Eppes, 1 Munf. (Va.) 479; Keating *v.* Reynolds, 1 Bay (S. Car.) 80; Henry *v.* Means, 2 Hill (S. Car.) 328; Rogers *v.* Randall, 2 Speers (S. Car.) 38; Marshall *v.* Rives, 8 Rich. (S. Car.) 85; Russell *v.* Kearney, 27 Ga. 96; Lott *v.* Meacham, 4 Fla. 144; Moore *v.* Howe, 4 T. B. Mon. (Ky.) 199. See Sampson *v.* Randall, 72 Me. 109; Albee *v.* Cummings, 12 Cush. (Mass.) 387; Westcott *v.* Cady, 5 Johns. Ch. (N. Y.) 334; Deihl *v.* King, 6 S. & R. (Pa.) 29; Hill *v.* Hill, Dudl. Eq. (S. Car.) 71, 84; Horry *v.* Glover, 2 Hill Eq. (S. Car.) 523; Riley Eq. (S. Car.) 53; Philips *v.* Crews, 65 Ga. 274; Waldo *v.* Cummings, 45 Ill. 421; Maulding *v.* Scott, 13 Ark. 88; Jones *v.* Zollicoffer, N. C. Term. Rep. 212; Burnet *v.* Roberts, 4 Dev. (N. Car.) 81.

As to *Alabama* see Browne *v.* King, 10 Ala. 819; Price *v.* Talley, 18 Ala. 21; Pickett *v.* Doe, 74 Ala. 122.

In the case of Homer *v.* Shelton, 2 Met. (Mass.) 207, the court in deciding that the life legatee was entitled to possession of the subject of the bequest without giving security say that he will hold it in trust, subject to the limitation over, but whether the court really meant to hold that the executory bequest gave an equitable interest only is extremely doubtful. Mr. Gray is of opinion the case can not be relied on to that extent. Gray's Perp. § 89.

In Hoare *v.* Parker, 2 T. R. 376, the ulterior legatee recovered in trover, chattels which the legatee for life had pledged to a pawnbroker, who had given valuable consideration without notice. *Compare* Price *v.* Talley, 18 Ala. 21; Pickett *v.* Pope, 74 Ala. 712.

In Upwell *v.* Halsey, 1 P. W. 651, the M. R. directed a husband who had on his wife's decease gotten possession of personal property in which she had but a life interest to account for the benefit of the ulterior legatee.

Where the bequest consists of plate, pictures, heirlooms, etc., the loss of which cannot be compensated for by money, the executors, trustees or remainder-man may, after the death of the life legatee maintain a bill in equity to recover back articles which have been aliened. Earl *v.* Macklesford & Davis, 3 Ves. & B. (Sug.) 16. Jarman on Wills (5th ed.) § 880. See Pusey *v.* Pusey, 1 Vern. 273; Fells *v.* Read, 3 Ves. 70; Lloyd *v.* Daring, 6 Ves. 773; Lowther *v.* Lowther, 13 Ves. 94.

Whether or not creditors of the life legatee can levy upon property in his possession, seems somewhat doubtful; the better opinion is that they cannot, although the income and profits arising therefrom may be attached. Foley *v.* Bunell, 1 B. C. C. 274; Fearne's Cont. Rem. 414.

In order to avoid any question it seems that the legal estate in the chattels, ought to be placed in trustees. Jarman on Wills (5th ed.) 881; Cadogan *v.* Kennett. Cow., p. 432.

1. Lampet's Case, 10 Co. 47*d*; Lott *v.* Meacham, 4 Fla. 144.

LEGACIES AND DEVISES, vol. 13, p. 155 and cases cited, note (1).

2. Barwick's Case, 5 Co. 93*b*, 94*b*; Weld *v.* Traip, 14 Gray (Mass.) 330.

3. Wright *v.* Cartwright, 1 Burr. 282.

So an underlease or assignment of a term may be created to take effect *in futuro*. Welcden *v.* Elkington, 2 Plowd. 519, 524; Lewis' Perp. 92–94; Gray's Perp., § 71.

not be limited to commence after the grantor's decease,[1] although some of the older authorities are against it.[2] As a parol gift of a chattel personal is not good without delivery, there can be no gift of a chattel by parol to begin *in futuro*,[3] otherwise, however, if the transfer be by deed or for value,[4] for the same reason, a parol gift of a personal chattel to take effect on the death of the donor reserving a life interest meanwhile is void.[5]

In *England*, as the Statute of Uses does not apply to chattels real or personal, no future use can be raised out of a term of years[6]

1. Weld *v.* Traip, 14 Gray (Mass.) 333.

2. Welcden *v.* Elkington, 2 Plowd. 519, 520. See Kingswell *v.* Kingswell, 1 And. 122; Rayman *v.* Gold, Moore 635; Jermyn *v.* Orchard, Show P. C. 199.

The reason given is that the law presumes that the grantor will live beyond the term.

3. Irons *v.* Smallpiece, 2 B.&Ald. 551; Shower *v.* Pilck, 4 Ex. 478; Noble *v.* Smith, 2 Johns. 42; Bract. 16*a*, Jenk. 109. See GIFTS, vol. 8, p. 1313, *et seq.*

For cases in which the soundness of this position has been questioned, see, Ward. *v.* Audland, 16 M. & W. 862, 870; Flory *v.* Drury, 7 Ex. 581, 583; Lunn *v.* Thornton, 1 C. B. 379, 381, note; London & Brighton R. Co. *v.* Fairchild, 2 M. & G. 674, 691; Douglass *v.* Douglass, 22 L. T. N. S. 127; Martin *v.* Reed, 131 L. & C. P. 126, 127; Wilbraham *v.* Snow, 2 Wms. Saund. 476; Winter *v.* Winter, 4 L. T. N. S. 639; 9 W. R. 747.

4. Gray's Perp. § 77; Abbott, C. J., in Irons *v.* Smallpiece, 2 B. & Ald. 552. See GIFTS, vol. 8, p. 1331; Tankins *v.* Pooley, 3 Keb. 683.

5. Young *v.* Young, 80 N. Y. 422; Withers *v.* Weaver, 10 Pa. St. 391; Jaggers *v.* Estes, 2 Strobh. Eq. (S. Car.) 343, 378, 397; M'Ginney *v.* Wallace, Riley (S. Car.) 290; Pitts *v.* Manguin, 2 Bailey (S. Car.) 588.

In Young *v.* Young, 80 N. Y. 436, the court by Rapallo, J., said: "Such a transaction amounts only to a promise to make a gift, which is *nudum pactum*. (Pitts *v.* Mangum, 2 Bailey (S. Car.) 588.) There must be a delivery of possession with a view to pass a present right of property. 'Any gift of chattels which expressly reserves the use of the property to the donor for a certain period, or (as commonly appears in the cases which the courts have had occasion to pass upon) as long as the donor shall live, is ineffectual.' (Schouler on Pers. Prop., vol. 2, p, 118, and cases cited; Vass *v.* Hicks, 3 Murphey (N. Car.) 494.) This rule has been applied even where the gift was made by a written instrument or deed purporting to transfer the title, but containing the reservation. (Sutton *v.* Hallowell, 2 Dev. (N. Car.) 186; Lance *v.* Lance, 5 Jones (N. Car.) 413.)"

Such a transaction differs from a gift *mortis causa*, in that the latter is accompanied with immediate delivery to the donee.

GIFTS, vol. 8, p. 1341.

6. Gray's Perp. § 73; Leake's Land Law, 118; Challis' Real Prop. 138, 139; Wms. Settlements 223.

"In respect to dealings with chattel interests, there is an important distinction between executory devises and other executory limitations. There may be an executory devise of a chattel real, or term of years, whereby the legal estate in the term may be given to one for life, with a *quasi* remainder over to another person, which, when it becomes executed in possession by the determination of the precedent life estate, will carry with it the legal estate for the residue of the term. (Mathew Manning's Case, 8 Rep. 94; Lampet's Case, 10 Rep. 46; Fearne's Cont. Rem. 401, 4.) Such a limitation of the legal estate in a term is not possible in a deed; because such limitations in a deed can be effected only by the medium of the Statute of Uses, and no use of a chattel interest *in esse*, as distinguished from a chattel interest to be carved *de novo* out of a freehold can be executed into a legal estate by the statute. Such a use of a chattel interest *in esse*, if declared in a deed, not being executed by the statute, can take effect only as a use apart from the statute; that is to say as a trust. Accordingly, settlements of chattel interests, when effected by deed, are necessarily effected by settling the trust of them." Challis' Real Prop. 138, 139.

or other personal property,[1] and as at common law a limitation to two or more in succession confers an absolute interest on the first taker, such limitations *inter vivos* can only be sustained in equity when the legal title is vested in trustees.[2] In

But there would seem to be no objection to raising a term through the medium of the Statute of Uses out of a freehold estate. Gray's Perp., § 73, note (1).

1. Gray's Perp., § 79.

2. Fearne's Cont. Rem. 401, 402; 2 Wash. Real Prop. (5th ed.) 676, 677; Wilson on Springing Uses 27, 45; 2 Prest. Abst. 5; Wms. Settlements 223; Challis' Real Prop. 138, 139; Gray's Perp., § 78; Oakes *v.* Chalfont, Poll. 38; Higgins *v.* Dowber, 1 P. Wms. 508, 518; Cadogan *v.* Kennet, Cowp. 432.

"Leaseholds for years are not within the Statute of Uses. They are even incapable at law of being conveyed so as to vest them in a person for his life; and after his decease in another person absolutely. This may be done by will by way of executory bequest; but by deed it cannot. So that the only way by which land held for a long term of years can be vested beneficially in A for his life with remainder to B absolutely, is to assign it to a trustee or trustees in trust for A for his life, and after his decease in trust for B." Wms. Settlements 223.

In Wright *v.* Cartwright, 1 Burr. 282 E P being seised in fee, demised on the fifth of October, 1676, by deed, (viz., by indenture of lease between him and E C) to the said E C for ninety-nine years, if she should so long live; and after her death, if she happen to die within the said term, the remainder thereof to R C, her oldest son, for and during the residue of the said term, yielding and paying, etc. E C entered and was possessed. She died in 1694, whereupon R C entered and was possessed till he died in 1753. The lessor of the plaintiff was heir-at-law to E P, the lessor. The defendant was the personal representative of R C. The question was whether the term existed; that is, whether it continued beyond the life of E C. Lord Mansfield sustained the gift over on the ground that it was a devise of the residue of the years and not of the term, but in the course of his opinion said: "The old cases held 'that there could be no remainder or substitution of a term after an estate for life, by deed or will.' It was a mere possibility. It was void, from the uncertainty of commencement. There was no particular estate. The gift of a term (like any other chattel) for an hour was good forever. The objections were subtle and artificial. When long and beneficial terms came into use, the convenience of families required that they might be settled upon a child, after the death of a parent. Such limitations were soon allowed to be created by will; and the old objections were removed, by changing the name from remainders to executory devises. The same reason required that such limitations might be created by deed; as for instance marriage-settlements to answer the agreement of parties, and exigencies of families. Therefore, to get out of the literal authority of old cases, an ingenious distinction was invented: a remainder might be limited for the residue of the years, but not for the residue of the term. . . . Limitations of terms are now of general use. Their bounds are settled. The rules concerning them are certain and established. When they came to be allowed by will, or by declaration of trust, the substantial reason was the same for allowing them by deed. A strained construction should not be made to overturn the lawful intent of the parties. It was lawful to secure this lease for the benefit of the mother during her life, and afterwards by way of provision for her son. All the parties undoubtedly intended it."

This case is of interest since upon the theory that Lord Mansfield in it decided that a valid remainder in chattels real might be created by deed, without the intervention of trustees is based the prevalent doctrine in the *United States* referred to in the text. It should be observed that while the *dicta* went to that extent the point actually decided did not. Moreover, his attention does not seem to have been called to the necessity for the intervention of trustees.

The tenant for life of chattels personal whether the interest be acquired

the *United States*, the weight of authority sustains the position that future limitations of chattels real or personal may be created by deed as well as by will, without the intervention of trustees, and that under such limitations both the life legatee and the ulterior legatee take legal as distinguished from equitable interests.[1] A future limitation over after a parol gift is void.[2]

under a will or under settlement cannot pawn them so as to bind those entitled to the ulterior executory interest. Wilson on Springing Uses 46, *citing* Hoare *v.* Parker, 1 Bro. C. C. 578; Macclesfield *v.* Davis, 3 Ves. & Bea. 18.

In such case it seems that the trustees can either maintain trover or recover the specific chattel by bill in equity. Macclesfield *v.* Davis, 3 Ves. & Bea. 18.

1. Gray's Perp., §§ 76, 91; Colberth *v.* Smith, 69 Md. 450; Tucker *v.* Stevens, 4 Desaus. (S. Car.) 532; McCall *v.* Lewis, 1 Strobh. (S. Car.) 442; Nix *v.* Ray, 5 Rich. (S. Car.) 423; Longworthy *v.* Chadwick, 13 Conn. 42; Williamson *v.* Mason, 23 Ala. 488; Price *v.* Talley, 18 Ala. 21; Jones *v.* Hoskins, 18 Ala. 489; Lyde *v.* Taylor, 17 Ala. 270; McCall *v.* Lee, 120 Ill. 268; Keen *v.* Macey, 3 Bibb (Ky.) 39; Bradley *v.* Mosby, 3 Call (Va.) 50; Higginbottham *v.* Rucker, 2 Call (Va.) 313; Horn *v.* Gartman, 1 Fla. 63; Harris *v.* McLaran, 30 Miss. 568. *Compare* Aikin *v.* Smith, 1 Sneed (Tenn.) 310; Owen *v.* Cooper, 46 Ind. 524.

Mr. Gray says that in *North Carolina* alone is the opposite doctrine—*i. e.*, that the intervention of trustees is essential to the validity of the gift over—accepted. Gray's Perp., § 92.

Hence in this State if personal property be limited *inter vivos*, without the intervention of trustees to A for life, and upon A's death to B or to A, with an executory limitation over to B upon a definite failure of A's issue, the gift to B is void. Dowd *v.* Montgomery, 2 Car. Law Rep. (N. Car.) 100; Smith *v.* Tucker, 2 Dev. (N. Car.) 541; Morrow *v.* Williams, 3 Dev. (N. Car.) 263; Hunt *v.* Davis, 3 Dev. & B. (N. Car.) 42; Harrell *v.* Davis, 8 Jones (N. Car.) 359. See Harrell *v.* Harrell, 5 Jones Eq. (N. Car.) 229; Lewis *v.* Lewis, 1 Jones (N. Car.) 444; Taylor *v.* Wilson, 5 Ired. (N. Car.) 214.

The *North Carolina* courts presume the law in other States to be the same. Griffin *v.* Carter, 5 Jones Eq. (N. Car.) 413.

In the following cases, however, while the point was not expressly decided, the validity of executory limitations of personalty created by deed without the intervention of trustees was considered doubtful: Welsch *v.* Bellville Sav. Bank, 94 Ill. 205; Young *v.* Young, 80 N. Y. 440; State *v.* Savin, 4 Harr. (Del.) 56, note; Belty *v.* Moore, 1 Dana (Ky.) 237.

In Wilson *v.* Cockrill, 8 Mo. 7, and Keen *v.* Malley, 3 Bibb (Ky.), it seems to have been thought that such limitations were permitted at common law. As this appears to be an error due to *dicta* of Lord Mansfield, in Wright *v.* Cartwright, 1 Burr. 282, it may be questioned how far these cases can be relied upon.

In this condition of the authorities it is submitted that unless the practitioner can put his hand upon a decision in his own State sustaining the creation of executory limitations of personalty by deed without the intervention of trustees, the only safe course, whether the limitation concern leaseholds or chattels personal, is to vest the legal estate in trustees in the mode prescribed by the English cases.

2. Gray's Perp., § 96; Kirkpatrick *v.* Davidson, 2 Kelly (Ga.) 303; Dreer *v.* Devin, 1 Humph. (Tenn.) 66; Fitzhugh *v.* Anderson, 2 Hen. & M. (Va.) 302; Landen *v.* Turner, 11 Leigh (Va.) 412; Ragsdale *v.* Norwood, 38 Ala. 21.

Mr. Gray seems to be of opinion that while a parol gift to take effect on the death of the donor is bad, because unaccompanied by delivery, the reason is inapplicable where the parol gift of a personal chattel to A for life with a limitation over on A's death to B, is accompanied by delivery of the chattel to A, and that on principle the limitation over should be good. In the above cases, however, the gift over was held void; but in these cases the limitation was verbal. Whether or not such limitations if created by writing, though not under seal, would be sustained, is perhaps doubtful. In Brummel *v* Barber, 2 Hill (S. Car.) 549, a future limitation of a gift of a personal chattel, evidenced by writing, though not under seal,

If the gift to the first taker is absolute in its terms, the gift over will be void for repugnancy.[1] Hence, as the statute *De Donis*[2] does not apply to chattels real or personal, there can be no estate tail therein, and words which would create an estate tail in realty, create an absolute interest in personalty, and the limitation over is void.[3] This is equally true whether the limitation be legal or equitable.[4] So, if the first taker is given the absolute power of disposition,[5] or if the subject-matter of the gift or bequest is consumable in the use.[6]

It is no more essential to the validity of the limitation over, that the person to take the remainder shall be *in esse* and ascertained, than in the case of corresponding limitations of freehold.[7] All that is required is that the ulterior interest be so limited as to vest within the time prescribed by the Rule against Perpetuities.[8]

Executory limitations of personalty are divided by Preston into three kinds:

1. Where a term of years or other personal estate is devised to one with a limitation over.[9]

2. Where there is a complete disposition of the property, and there is a substitution of another person to take in some event which is to defeat or abridge the former gift.[10] The distinction

was sustained, and Mr. Gray, Perp., § 96 thinks this the sounder doctrine. In this case, however, it should be observed that the *dicta* go to the full length of holding that the ulterior limitation is good even if created verbally.

1. Merrill *v.* Emery, 10 Pick. (Mass.) 512.

2. 13 Edw. I.

3. Wash. Real Prop. (5th ed.) 786, 789; Gray's Perp., § 75; Fearne's Cont. Rem. 461, 463; 2 Rop. Leg. (2d ed.) 393; Burt. Real Prop., §§ 948, 956; Lewis' Perp. 34; 6 Cruise Dig. 396; Watk. Conv. 200, Coventry's note; Levethorpe *v.* Ashbie, 1 Roll. Abr. 381; Doe d. Lyde *v.* Lyde, 1 T. R. 593; Bronckner *v.* Bagot, 1 Mer. 271; Kirkpatrick *v.* Kilpatrick, 13 Ves. 484; Lovies' Case, 10 Rep. 87; Hall *v.* Priest, 6 Gray (Mass.) 22; Powell *v.* Glenn, 21 Ala. 458; Powell *v.* Brandon, 24 Miss. 343.

As to the modification of the principle in the case of the word issue, see ISSUE, vol. 11, p. 877, *et seq.*

The principle is equally true whether the limitation be by deed or will. Wilson, Springing Uses 87; Bullock *v.* Knight, 1 Ch. Cas. 265; 2 Ch. Cas. 114; Webb *v.* Webb. 1 P. W. 132.

The only exception appears to be in the construction of executory trusts, when the court assumes the power of molding the limitations to effect the evident purpose of the parties. Wilson Springing Uses 90; Duke of Newcastle *v.* Countess of Lincoln, 3 Ves. Jr. 387. See ISSUE, vol. 11, p. 877, note; also WILLS.

4. Gray's Perp., § 75; Bronneker *v.* Bagot, 1 Mer. 271.

5. See *infra*, this title, § II, 5, *f.*

6. 1 Jarman on Wills (5th ed.) *504.

The same rule applies where the use only of the property is given when from its nature, its use is its consumption. Randall *v.* Russell, 3 Mer. 194; Gillespie *v.* Miller, 5 Johns. (N. Y.) 21.

For other authorities on the question of goods consumable in the use, as well as the extent to which the principle applies to gifts of stock in trade, see LEGACIES AND DEVISES, vol. 13, p. 208.

7. 2 Wash. Real Prop., *378; Wilson's Springing Uses 27; Amner *v.* Loddington, 1 Rolle Abr. 612; 6 Cruise Dig. 394. Earlier English cases held otherwise. Goring *v.* Beckerstaffe, Poll. 31; Sackville *v.* Dobson, Cas. Ch. 33.

8 See PERPETUITIES. The time prescribed varies in different States, and local statutes should be consulted.

9. 2 Prest. Abst. 143.

10. "The second sort is where there is a complete disposition of the term

between these two subdivisions is manifestly analogous to that which exists between a remainder and a conditional limitation, in limitations of freehold.

3. Where there is a substantive and independent limitation to wait for effect till the termination of a life or lives in being or till a contingency, in some manner connected with that event simply or with that event attended with a failure of issue at that time or any given period, as a bequest to A after the death of B to whom no interest is given.[1]

Of all future interests arising from dispositions of chattels real or personal, it should be observed that none give a remainder in the proper sense of that term. They give interests which are only in the nature of remainders. Even in those instances in which one limitation is to wait for effect till the interest created by another is determined, as to A for life and after his death to B, B has not any remainder properly so termed; the whole estate is in A till his interest determines by his death.[2]

(1) *Conditions.*—A condition may be attached to an under lease, on breach of which it may be determined without entry,[3] and the entire term may be assigned subject to a condition of which the assignor may take advantage, although he has no reversion.[4] Chattels personal also may be granted on condition, and

or property; and there is a substitution of another person to take in some event which is to defeat or abridge the former gift. This secondary disposition does not operate by way of remainder, and in a deed would not, except by way of trust, be allowed to have effect. In wills it is permitted to be valid in favor of the testator's intention, and that his will may not be disappointed. Perhaps it may be said that this sort of bequest is the same in principle with the sort first mentioned. It differs materially in circumstances; and this difference is a sufficient inducement for pointing to the distinction; urging it as falling under another class, though clearly to be referred to the same origin. Between these two classes of gift there is as much diversity as there is between the several sorts of executory devises of freehold interests, which Mr. Fearne has noticed. They are all branches from the same root, and differ only in their ramifications." 2 Pres. Abst. 142, 143.

1. 2 Prest. Abst. 144.

"At least, unless this instance be an example of an executory bequest, it involves all the learning on the subject, as to the creation and qualification of such interests. Numerous instances, fully exemplifying the proposition, and descriptive of executory bequest, are to be found in books which treat on the subject of executory devise, and are referred to this learning. The only doubt which can be raised of their coming fully within the definition of an executory bequest is, that perhaps they are good at the common law. But the example of a bequest of a term to A, after the death of B, to whom no interest is given, seems fully to establish this third species or variety, for such a gift would not be good if found in a grant at the common law. Jermyn *v.* Orchard, Show. Par. Cas 199." 2 Prest. Abst. 144.

Preston in the above subdivisions only speaks of executory bequests, but it is conceived the classification is equally applicable to limitations by way of use.

2. 2 Prest. Abst. 144, *citing* Lampet's Case, 10 Rep. 46; Manning's Case, 8 Rep. 95. *Compare* Smith's Ex. Int. § 168.

This is merely the common-law view which, as already stated in the above section, has been modified in many States by holding both A and B entitled to legal remedies.

3. Gray's Perp., § 72.

4. In Doe d. Freeman *v.* Bateman,

upon breach the grantor can revest the property in himself without redelivery.[1]

(2) *Reversionary Interests in Chattels.*—See REVERSIONS.

5. Incidents and Characteristics—*a.* ACCELERATION OF EXECUTORY INTERESTS.[2]—An executory interest limited after a preceding estate, which fails altogether, as where the first devisee dies in the lifetime of the testator, is thereby accelerated and takes its place,[3] unless the event upon which the estate is to shift

2 B. & Ald. 168, Abbott, C. J., said "The single question of law was this, whether a lessee for years, having made a conveyance operating as an assignment of his whole interest in the land, containing a covenant on the part of the assignee not to open a public house on the demised premises without license, and containing also a clause of re-entry on breach of the covenant, could upon an actual breach thereof enter upon the land and avoid his conveyance. Or, in other words, whether, if an assignment of a term of years be made upon a condition, the assignment shall be absolute, and the condition void. No question arose as to the capacity of a real or personal representative to make the entry; for the entry was made by the assignor himself. The only argument adduced against the right of entry or validity of the condition was, that an entry must always be made by a person entitled to the reversion, and by no other; and consequently that as the original termor had in this case, by the deed of assignment, parted with his whole estate, and no reversion was left to him, he could not enter. And, to be sure, if the premises here assumed be true, the conclusion is properly drawn. But we think the premises from which the conclusion was drawn are untrue. And that they are untrue is manifest from the familiar case put in Litt., § 325, of a feoffment in fee rendering rent, with a clause of re-entry, if the rent be unpaid; in which case it is said the feoffor or his heirs may enter for the condition broken. In this case the feoffor has no reversion; the lands are not, nor since the statute of *Quia Emptores*, can be holden of him, but must be holden of the superior lord of the fee. Another instance is also mentioned in Lord Coke's commentary upon this section (Co. Litt., fo. 202). According to the text of Littleton, the party making the entry shall have and hold the land in his former estate; but according to the commentary, although this is regularly true, yet it faileth in many cases, and one of the cases of failure is that of a feoffment in fee upon condition, made by a man seised in right of his wife. The feoffor dieth, and the condition is broken. The heir of the feoffor shall enter; yet the heir at the time of his entry hath no reversion, and after the entry his estate doth vanish, and presently the estate is vested in the wife. For these reasons, we think the defendant was entitled to the verdict, and the *postea* must be delivered to him."

1. Gray's Perp., §§ 72, 78.

2. As to acceleration of Quasi Remainders, see *supra*, this title, § I, 5.

3. 2 Wash. Real Prop. (5th ed.) 757; Avelyn *v.* Wand, 1 Ves. St. 420; Bullock *v.* Bennett, 31 Eng. L. & Eq. 463; Mathis *v.* Hammond, 6 Rich. Eq. (S. Car.) 121. The first estate is considered in such case only as a preceding limitation, and not as a preceding condition to give effect to the subsequent limitation. 6 Cruise Dig. 412–413. See Jarman on Wills (5th ed.) 857–876; Fearne's Cont. Rem. 507–511; Smith's Ex. Int., § 671; Meadows *v.* Parry, 1 Ves. & B. 123; Murry *v.* Jones, 2 Ves. & B. 313; McKinnon *v.* Sewell, 2 M. & K. 202; McKinnon *v.* Peach, 2 Kee. 555; Wilson *v.* Mount, 2 Beav. 397; Sauter *v.* Mueller, 4 Dem. (N. Y.) 389; Den *v.* Hanee, 11 N. J. L. 244. Thus where there was a devise to A for life, remainder to B in fee with a gift over, if B died without "lawful child," and B died in the lifetime of a testator, never having had a child, the gift over took effect as though there had been no limitation to B. Mathis *v.* Hammond, 6 Rich. Eq. (S. Car.) 121. So a gift over on death or marriage of a widow has been held to take effect on testator's death, if she marry in his lifetime. Bullock *v.* Bennett, 31 Eng. L. & Eq. 463; so if the prior limitation be void. Burbank *v.* Whitney, 24 Pick. (Mass.) 146.

In Avelyn *v.* Ward, 1 Ves. Sr. 419,

land was devised to A and his heirs, on condition that within three months after testator's decease he would execute a general release of all demands against the estate, but if he should neglect to give such release, the said devise to him should be null and void to all intents, and in such case he devised the land to B. A died in the lifetime of the testator. *Held*, that the gift over took effect on the testator's death, Lord Hardwicke saying: "The question will very much turn on this: whether this devise over is to be considered, and the contingency on which it is given, as a strict condition or conditional limitation; for if the former, it would be very difficult to maintain that the second devisee could have the estate but upon a strict breach or nonperformance. If the condition had been performed, or it became impossible by act of God, that cannot be; but if it be a conditional limitation, the consideration is different; and I know no case of a remainder or conditional limitation over of a real estate, whether by way of particular estate so as to leave a proper remainder, or to defeat an absolute fee before by a conditional limitation, but if the precedent limitation, by what means soever, is out of the case, the subsequent limitation takes place; and I am of opinion this must be so construed."

So in Scatterwood *v.* Edge, 1 Salk. 229, where there was a devise to trustees for eleven years, remainder to the sons of B successively in tail male, provided they should take the testator's surname, and in case they refused, or died without issue, remainder to the first son of C. The first devise failed, B having no son, but it was held that the limitation to the son of C took effect. In Jones *v.* Westcomb, Pre. Ch. 316; 1 Eq. Ca. Ab. 245. pl. 10, A, possessed of a term, bequeathed it to his wife for life, and, after her death, to the child she was then (*i. e.*, at the making of the will) *enciente* with, and if such child should die before the age of twenty-one, then one-third part to his wife, and the other two-thirds to other persons. *Held*, by Lord Harcourt that although the wife was not *enciente* the gifts over were good. In such a case, another child afterwards coming into existence is excluded. Foster *v.* Cook, 3 B. C. C. 347.

The same question came before the court of King's Bench in Andrews *v.* Fulham, 2 Str. 1092, cited 1 Ves. Sr. 421, and the opinion of the court delivered by Lee, chief justice, was that the limitation over was good. See also Gulliver *v.* Wicket, 1 Wils. 105.

So in Stratham *v.* Bell, Cowp. 40, where a testator reciting that his wife was pregnant, devised that if she brought forth a son then that he should inherit his estate; but if a daughter, then one moiety to his wife, and the other to his two daughters (he had one daughter then living) at twenty-one. If either died before that time, the survivor to have her sister's share; if both died before that time, then both shares to his wife and her heirs. The wife was not *enciente*, and the other daughter dying under twenty-one, the wife was held to be entitled to the whole.

In Doe d. Wells *v.* Scott. 3 M. & S. 300, the devise was to J M and his heirs, provided that within six months after testatrix's decease, he assured a certain estate to R M and his children, as therein mentioned. J M died in the testatrix's lifetime, as did R M, without children, and it was, in the discussion of another question, assumed by the court, that if J M had died before, and R M had survived the testatrix, he would have taken as if there had been no precedent devise to J M, or he had survived the testatrix, and failed to perform the condition.

Fonnereau *v.* Fonnereau, 3 Atk. 315, and Meadows *v.* Parry, 1 Ves. & Bea. 124, are both instances of the application of the principle, in the common case of a bequest to persons (children, for instance) not *in esse*, with a bequest over in case they die under age, but not providing in terms for the contingency of such children never coming into existence. The latter event happened, but the bequests over were sustained and the same rule, of course, applied where the child, whose death under a certain age was the event on which the property was to go over, was still-born. See Foster *v.* Cook, 3 B. C. C. 347. From the above cases Jarman deduces the following propositions: "First, that wherever an executory limitation is limited on the failure of the preceding devisee to do certain acts; after the testator's decease, it will not be defeated by the death of such devisee in the testator's lifetime. Secondly, that where an estate is limited to a person not *in esse*, with a limitation over in case he omit to do certain acts, or in the event of his dying under twenty-one, or without issue, the devise over will take effect, though the preceding

from the first devisee be such as may happen as well in the life of the testator as afterwards, and the first devise lapse by the

devisee never come into existence." 1 Powell on Devises (3rd ed.), *196, *199, note by Jarman.

Gift Over in Case Prior Legatee Die Having but One Child.—Upon the same principle a bequest over in the event of the prior legatee having but one child, has been held to extend to the event of her not having any child. 1 Powell on Devises 199, note by Jarman. A testatrix, after bequeathing the residue of her personal property to her daughters and younger sons, provided that in case she should have but one child living at the time of her decease, or in case she should have two or more sons, and no daughter or daughters living at the time of her decease, and all of them, but one, should depart this life under the age of twenty-one years, or in case she should have two or more daughters and no son or sons living at the time of her decease, and all of them but one should depart this life under twenty-one and without having been married, or in case she should have both sons and daughters, and all but one, being a son, should die under twenty-one, or being a daughter under that age and unmarried, then over. The testatrix died without ever having had a child. *Held*, that the ulterior gift, nevertheless, took effect. Murray *v.* Jones, 2 V. & B. 313, Sir W. Grant saying: "At first sight, a proposition relative to the having but one child may seem to include in it and to imply the having one. That is true, if the proposition be affirmative; but by no means necessarily so, if the proposition be hypothetical, or conditional. The proposition that A has but one child, is as much an assertion that he has one, as that he has no more than one; but when the having but one is made the condition on which some particular consequence is to depend, the existence of one is not required for the fulfillment of the condition, unless the consequence be relative to that one supposed child.

As if I say, that in case I have but one child, it shall have a certain portion, it is in the nature of the thing necessary that the child should exist, to be entitled to the portion; but if I say, that in case I shall have but one child of my own, I will make a provision for the children of my brother, it is quite clear that my having one child is no part of the condition, on which the supposed consequence is to depend. My having one child of my own would rather be an obstacle, than an inducement to the making a provision for the children of another person. The case I guard against is the having a plurality of children; and it is only the existence of two or more that can constitute a failure of the condition on which the intended provision of my brother's children was to depend. The plain sense of the proposition is, that unless I have more than one the provision shall be made."

Exception—Remoteness.—When an executory limitation is too remote, all subsequent interests limited thereon are also too remote, they fail. Fearne's Cont. Rem. 307, note (k); Proctor *v.* Bishop of Bath and Wells, 2 H. Bl. 358; Routledge *v.* Donill, 2 Ves. J. 356. *Compare* Gray's Perp., § 251, *et seq.* See, *infra*, this title, § II, 5, *e*. "But if the testator distinctly makes his gift over to depend upon what is sometimes called an alternative contingency, or upon either of two contingencies, one of which may be too remote and the other cannot be, its validity depends upon the event; or in other words, if he gives the estate over on one contingency which must happen, the validity of the distinct gift over in that event will not be affected by the consideration that upon a different contingency, which might or might not happen within the lawful limit, he makes a disposition of his estate which would be void for remoteness. The authorities upon this point are conclusive." Jackson *v.* Phillips, 14 Allen (Mass.) 572, *citing* Longhead *v.* Phelps, 2 W. Bl. 709; Sugden *v.* Preston, *arguendo* in Beard *v.* Westcott, 5 B. & Ald. 809, 813, 814; Winter *v.* Wraith, 13 Sim. 52; Evers *v.* Challis, 7 H. L. Cas. 531; Armstrong *v.* Armstrong, 14 B. Mon. (Ky.) 333; 1 Jarman on Wills 244; Lewis on Perp., ch. 21; 2 Spence on Eq. 125, 126.

To justify such construction, however, it is essential that both the events upon which the estate is to go over should be expressly set forth, neither can be implied. Evers *v.* Challis, 7 H. L. Cas. 531, stated *supra*, this title, § II, 3, note.

death of the devisee in his lifetime, under circumstances which had they happened after his decease, would have vested the property in the first devisee to the exclusion of the substituted devisee, in which case the executory limitation is defeated, though the precedent limitation is out of the case.[1] On the other hand,

1. Powell on Devises (3d ed.) 200, note by Jarman; Mathis *v.* Hammond, 6 Rich. Eq. (S. Car.) 127.

"Thus, where the devisor devised in trust for and to the use of his daughter, Sarah, her heirs and assigns, but in case of her decease under twenty one and unmarried in trust and to the use of his daughter Elizabeth, her heirs and assigns. Sarah died in the lifetime of the devisor under twenty-one, but having been married. One of the questions was, whether, in the events that had happened, the devise over to Elizabeth was good. Her counsel considered it to be so obviously untenable, that he gave up the point, and Lord Rosslyn seems to have expressed an opinion to the same effect. Williams *v.* Chitty, 3 Ves. 549; see also Miller *v.* Faure, 1 Ves. Sr. 85, which is to the same point. And this principle appears to have been acted upon in two anterior cases of bequests of legacies.

Thus, in Calthorpe *v.* Gough, at the Rolls, 18 Feb. 1789, cited 3 B. C. C. 395, £10,000 were given to trustees in trust for Lady Gough for life; and in case she should die in the lifetime of her husband, as she should appoint, and in default of appointment, to her children, but if she should survive her husband, then for her absolutely. She survived her husband, and died in the lifetime of the testator. The Master of the Rolls held the legacy lapsed, and the children were not entitled.

So in Doo *v.* Brabant, 3 B. C. C. 393, 4 T. R. 703, a legacy was bequeathed in trust for A, until she attained twenty-one and then to her executors and administrators; and in case A should die under twenty-one, leaving any child or children of her body, lawfully begotten, then in trust for such child or children; but in case A should die under twenty-one without leaving any child or children, then over. A attained the age of twenty-one and died in the lifetime of the testator, leaving children. Lord Thurlow, on the authority of Calthorpe *v.* Gough, held that the legacy lapsed, and the children were not entitled; and the court of King's Bench on a case from chancery certified the same opinion.

But though it has been suggested that these decisions are referable to the principle, upon which the case of Williams *v.* Chitty, 3 Ves. 549, has been distinguished from Avelyn *v.* Ward, 1 Ves. 420, and that line of cases, and as such are perfectly reconcilable with those cases; yet, it is proper to state, that Lord Thurlow in Doo *v.* Brabant, treated Calthorpe *v.* Gough, on which he founded his own decision, as wholly inconsistent with, and subversive of, the authority of those cases. The reader is therefore placed upon his guard against the too hasty admission of a distinction, which either escaped the observation, or received the disapproval of so high an authority. At the same time it must be recollected that not only in the case of Williams *v.* Chitty, but also in the late case of Humberstone *v.* Stanton, 1 Ves. & Bea. 385, the principle of Lord Thurlow's decision in Doo *v.* Brabant, has been acted upon, without impugning the authority of Jones *v.* Westcomb, Avelyn *v.* Ward, and that class of cases; and Avelyn *v.* Ward (stated in preceding note) was tacitly recognized in Doe d. Wells *v.* Scott, 3 M. & S. 300.

But not only is the distinction supported by authority, but it is also consistent with principle. A solid difference, it is submitted, exists between holding a devise limited to take effect on the event of a person not *in esse* dying under twenty-one to arise, though such person never come into existence, and holding it to take effect in the event of his being born, and dying above that age in the lifetime of the testator. In the former case, the contingency of no such person coming *in esse*, may be considered as included and implied in the contingency expressed; but in the latter the event to which it would be extended, is the exact alternative of the event provided for; to hold the devise to be good, would be to give the estate to the devisee in the very event in which the testator has given it to another. In the event that had happened, the

if the preceding estate once takes effect, and is afterwards determined in some other way than that expressed, the limitation over is defeated.[1] So if a legacy is given to promote a particular object, with a gift over if the legatee die before the object is completed, and the first legatee accomplishes the object and then dies in the lifetime of the testator, the ulterior limitation is prevented from taking effect by the very terms of the bequest.[2]

b. EFFECT OF FAILURE OF EXECUTORY LIMITATIONS UPON PRIOR INTERESTS.—The better opinion is that where an executory interest is limited after a fee simple in realty or an absolute interest in personalty, the prior interest becomes indefeasible, on the failure of the ulterior interest, since the prior interest is only to be defeated for the benefit of the ulterior interest, and that purpose failing the original interest remains. Hence on principle it would seem immaterial whether the ulterior interest failed because the contingency upon which it was limited to take effect had not happened, or had become impossible, or because the ulterior limitation itself was void in its creation, or had lapsed by the death of the executory devisee in the lifetime of the testator.[3]

lapsed devise must be read as an absolute gift. And in exact accordance with this principle, it is clear, on the other hand, that if property be given to a person with a limitation over, if he die under twenty-one or any other event; and he die under the prescribed age, or such other event happen in the lifetime of the testator, the devisee, or the legatee over, is entitled. Willing *v.* Banie, 3 P. W. 113; Haughton *v.* Harrison, 2 Atk. 329. See also Darrell *v.* Molesworth, 2 Vern. 378; Walker *v.* Main, 1 Jac. & Walk. 1." 1 Jarman's Powell on Devisees (3d ed.) 290–202, n. (8).

1. 1 Jarman's Powell on Devises (3d ed.) 202, note (8). *Compare* Smith's Ex. Int. § 671.

Thus where the devise was to A for life, remainder to his first and other sons in tail, on condition that he and his issue male should assume a particular name; and in case he or they refused, then that devise to be void, and in such case the devisor devised the lands over. A complied with the condition, and died without issue, and it was held in B. R on a case from chancery, that the limitation over did not arise. Amherst *v.* Darnelly, 8 Vin. Abr. 221, pl. 21, and which was affirmed in the House of Lords. Amherst *v.* Lytton, 5 B. P. C. Toml. Ed. 254. See McKinnon *v.* Sewell, 2 M. & S. 202, 217.

Gift Over on Marriage of Widow.—An exception, however, exists in the case of a devise to a widow for life if she shall so long continue a widow, and if she shall marry, over, in which case the gift over takes effect on either death or marriage. Luxford *v.* Cheeke, 3 Lev. 125; Gordon *v.* Adolphus, 3 B. P. C. Toml. Ed. (Sug.) 306; Lady Fry's Case, 1 Vent. 203. *Compare* Jordan *v.* Holkham, Amb. 209; Sheffield *v.* Orrery, 3 Atk. 284. *Compare, supra,* this title, § I, 3, *a,* (2), (*b*).

2. 1 Rop. Leg. (2d Am. ed.) 479; Humberstone *v.* Stanton, 1 Ves. & Bea. 385; Mathis *v.* Hammond, 6 Rich. Eq. (S. Car.). 128. *Compare* LEGACIES AND DEVISES, vol. 13, p. 99.

3. 2 Redfield on Wills (3d ed.) *265; Jackson *v.* Noble, 2 Keen. 590; Proprietors of Brattle Square Church *v.* Grant, 3 Gray (Mass.) 142; Brightman *v.* Brightman, 100 Mass. 238; Grimball *v.* Patten, 70 Ala. 626; Gorham *v.* Betts, 86 Ky. 164; *In re* New York etc. Co., 105 N. Y. 89; Drummond *v.* Drummond, 4 C. E. Green (N. J.) 234. *Compare* Pennington *v.* Pennington (Md.) 17 Atl. Rep. 329.

Of this opinion was Mr. Jarman before the decision in Doe *v.* Eyre, 5 C. B. 713, upon the authority of Jackson *v.* Noble, 2 Keen 590, in regard to real estate, and Taylor *v.* Landford, 3 Ves. 119, in regard to personalty. Jarman on Wills (5th ed.) *868, *870.

A testator left his property to his

daughter Jane, when she should attain twenty-one, with a gift over to his nephew in the event of her death without leaving issue. The nephew died before the testator. *Held*, that the daughter took an absolute interest. Drummond *v.* Drummond, 11 C. E. Green (N. J.) 234. Runyon, Ch. saying: "The gift to Jane was absolute, subject to be defeated by the contingent executory gift over. She was the primary object of his bounty. The provision made in the contingency of her dying without leaving lawful issue, was made expressly for another object of his bounty whom he desired and intended to benefit in that event. That object had ceased to exist, and the provision, therefore, was at an end, and the primary gift was left wholly unaffected by it. The testator did not provide that Jane should have a life estate, merely, and that, after her death, the property should go to her children, if she should have any, but he gives the property to her without qualification in the gift. The principle of the rule that, where there is an estate in fee liable to be defeated on a condition subsequent, and that condition originally was, or by matter subsequent has become impossible to be performed, the defeasible estate is made absolute, (Co. Litt. 206*a*,) applies to this case, for the estate was made liable to be defeated by a gift over, which could never, by possibility, take effect, and the primary gift therefore, is the same as if there were no provision for its defeasance. It was so held in Den *v.* Schenck, 3 Halst. (N. J.) 29. There the devise was to the testator's son and daughters in fee, with provision that if any of them should die without issue, at his or her death, the estate of such decedent should go to the survivors. The daughters died in the son's lifetime. He died without leaving issue. It was held that the death of the daughters made it impossible that the estate should be defeated by going over to the survivors, when there were none, and that, from that time, it became an absolute fee simple in the son. So, too, in Jackson *v.* Noble, 2 Keen 590, where a testator gave real and personal estate to his daughter and two others in trust, to permit her to receive the rents and interest for life, and, after her decease, to convey to her heirs, executors, etc., with provision that, in case she should marry and have no children, then the property was to belong his son, or, in case of the son's decease before her death, then to the son's children, it was held by Lord Langdale, M. R., that the daughter took an absolute equitable estate, with an executory gift over to the son and his children, and the son having died in the lifetime of the daughter, leaving no child, it was further held that the contingent executory gift could not take effect, and that the estate already vested in the daughter could not be devested. See, also, 1 Jarman on Wills, 483. 'The general rule,' says Redfield, 'that where the devise over fails, the estate remains in the former taker, seems to be recognized as a general principle, where the terms of the first devise are sufficient to carry the whole interest, and there is nothing in the circumstances indicating that such could not have been the intention of the testator.' 2 Redfield on Wills, 647. If an executory devise be void on account of remoteness, or any other cause, the prior devise will be absolute."

This is admittedly true, both in *America* and *England*, if the gift over is too remote. Proprietors of Church *v.* Grant, 3 Gray (Mass.) 157, *citing* Nothingham *v.* Jennings, 1 P. W. 25; 1 Pow. Dev. 178, 179; 2 Saund. 388 *a*, *b*; 1 Fearne's Cont. Rem. 467; Attorney *v.* Gill, 2 L. W. 369; Kapf *v.* Jones, 2 Keen 756; Ring *v.* Hardwick, 2 Beav. 352; Miller *v.* Macomb, 26 Wend. (N. Y.) 229; Ferris *v.* Gibson, 4 Edw. Ch. (N. Y.) 707; Tator *v.* Tator, 41 Barb. (N. Y.) 431; Conklin *v.* Conklin, 3 Sandf. Ch. (N. Y.) 64. See Lewis' Perp. 657; Courtier *v.* Oram, 21 Beav. 11; Webster *v.* Parr, 26 Beav. 236. So where the ulterior interest is to arise on a devesting condition which is illegal. Egerton *v.* Brownlow, 4 H. L. Cas. 1.

Where there is a devise to one person in fee, and, in case of his death, to another, the contingency referred to is the death of the first-named devisee during the testator's lifetime and if such devisee survives the testator he takes an absolute fee. *In re* New York etc. R. Co., 105 N. Y. 89; Philps *v.* Philps, 55 Conn. 359. For construction of words importing death, see WILLS.

Legacy Subject to Discretionary Power.—A legacy subject to be defeated by the exercise of a discretionary power becomes absolute, if that power is extinguished. Keates *v.* Burton, 14 Ves. 434.

In *England*, however, it has been held that if the event upon which the ulterior interest is to take effect actually occurs, the prior interest is defeated, although the ulterior limitation fails, unless its failure is due to remoteness.[1] The soundness of this position has been seriously questioned in *England*, and it is sub-

Absolute Bequest Restricted in Enjoyment.—"If a testator leave a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment of it, to secure certain objects for the benefit of the legatee, upon failure of such objects the absolute gift prevails; but if there be no absolute gift as between the legatee and the estate, but particular modes of enjoyment are prescribed, and those modes of enjoyment fail, the legacy forms part of the testator's estate, as not having in such event been given away from it. In the latter case the gift is only for a particular purpose; in the former, the purpose is the benefit of the legatee, as to the whole amount of the legacy, and the directions and restrictions are to be considered as applicable to a sum no longer part of the testator's estate, but already the property of the legatee." Lord Cottenham in Lassence *v.* Tierney, 1 Mac. & G. 561.

"It is in determination of this previous question, whether, namely, the gift to the primary legatee is absolute or qualified, that the real difficulty of these cases generally lies. The intention is, of course, to be collected from the whole will. Suppose, for instance, that after the gift to the primary legatee there are gifts over in alternative contingencies exhausting every possible event: this is wholly inconsistent with an intention that there should in an event be an absolute gift to the primary legatee. But the point can only be material when the first expressions are ambiguous, for if there is a distinct positive gift, and the intention is express, nothing that afterwards follows can affect the construction of the positive gift; but where the first gift is capable of two constructions, other parts of the will are to be looked at to see what the intention was, and no doubt a disposition of the whole property, under all circumstances that can arise, is an important consideration in putting a construction on ambiguous expressions. It does not seem possible that the two intentions could exist together if they are both found in the same will, the court may have to decide which is to prevail. (See Findon *v.* Findon, 1 De G. & J. 380. *In re* Lord Sonde's Will, 2 Sm. & G. 416; Salmon *v.* Salmon, 29 Beav. 27) but if the first is ambiguous and the other is not, the unambiguous expression must have great effect in controlling that which is ambiguous. (Per Lord Cottenham, Lassence *v.* Tierney, 1 Mac. & G. 562, 567; Reid *v.* Reid, 25 Beav. 469; Butler *v.* Gray, L. R. 5 Ch. 26. *Compare* Rucker *v.* Scholefield, 1 H. & M. 36; Scawin *v.* Watson, 10 Beav. 200; Gompertz *v.* Gompertz, 2 Phil. 107; Whitehead *v.* Rennett, 22 L. J., Ch. 1020; Waters *v.* Waters, 26 L. J., Ch. 624; Fullerton *v.* Martin, 1 Dr. & Sm. 31; Savage *v.* Tyers, L. R., 7 Ch. 356; Nevill *v.* Boddam, 28 Beav. 554; Campbell *v.* Brownrigg, 1 Phil. 301; Lord *v.* Lord, 3 Jur. N. S. 485; Watkins *v.* Weston, 3 D., J. & S. 434; McCulloch *v.* McCulloch, 3 Gif. 606; Combe *v.* Hughes, 2 D., J. & S. 657; Martin, L. R., 2 Eq. 404; Kellett *v.* Kellett, L. R., 3 H. L. 160.)" 1 Jarman on Wills, *872, *873, and cases cited.

For further discussion see WILLS.

1. Doe d. Blomfield *v.* Eyre, 5 C. B. 743; O'Mahoney *v.* Burdett, L. R., 7 H. L 388; Jarman on Wills (5th ed.) *869, *870; Sugd. Powers (8th ed.) 514; Robinson *v.* Wood, 4 Jur.. N. S. 625; 27 L. J. Ch. 726; Joslyn *v.* Hammond, 3 My. & K. 110.

In Doe d Blomfield *v.* Eyre, 5 C. B. 713, decided by the Exchequer Chamber in 1848, upon which the English doctrine is based, a mother having exclusive power of appointing lands by will amongst her children, appointed them to her eldest son John in fee, but if John and his brother William both died in her husband's lifetime, then she appointed the lands to her father in-law (who was a stranger to the power) upon certain trusts. John and William both died in their father's lifetime, and it was held in the exchequer chamber that, although the father-in-law could not take, John's interest was defeated by his death, Parke, B., in delivering the opinion of the court, saying: "The learned counsel contended, that, where there

mitted that it is very doubtful whether it would be accepted in the *United States*.[1] Of course if it appear from the entire context of the will that it was the intention of the testator that the

is an estate in fee, liable to be defeated on a condition subsequent, and that condition either originally was, or by matter subsequent became impossible to be performed, the defeasible estate was made absolute; and he cited Co. Litt. 206*a*. Of this there is no doubt; the principle is applicable to this case, if the condition was impossible. But the question is, what was the condition by which the testatrix meant the estate to be defeated. Was it—if the two sons should die in the father's lifetime? or was it—if they so died, and the estate should, by law, vest in the father-in-law? In the former case the plaintiff would fail; in the latter he would succeed.

"This question is not peculiar to cases of appointments under powers; it might arise upon an ordinary will. If a testator were to devise to A B in fee, and to direct that, in the event of A B dying in the lifetime of J S, the estate should go over to a charity, it surely is perfectly clear, that, if A B died in the lifetime of J S, he, A B, or rather, his heirs, would lose the estate. The testator could not give to the charity, without taking away from the devisee. The testator, therefore, in such a case, by his will, says: 'If A B dies in the lifetime of J S, I do not mean that A B or his heirs should any longer have the estate.' The estate of A B is in such case defeated, not by the giving over of the estate to the charity, but by the happening of the event on which the testator intended it should go over. So, in the case before us; the testatrix (for this purpose she may be treated as an ordinary testatrix) says, in substance: 'If my son John and his brother William die in their father's lifetime, I do not mean him (John) to have the property; but I give it over to strangers.' That which defeats the estate of John, is the death of himself and brother in his father's lifetime—not the giving over of the estate to strangers. The reason why John's representatives cannot claim the property, is, that his mother expressly declared, that, in the event which happened, he should not have it. How she should have disposed of it, if she had known that she could not give it in the mode proposed by her will, can only be matter of conjecture. One thing quite certain is, that she has not expressed any intention, that in the events which have happened, John should take; and, as he could only be entitled by virtue of an expressed intention in his favor, we think that he fails to establish any right."

In Robinson *v.* Wood, 4 Jur., N. S. 625, 626, Kindersley, V. C., said that the effect of the above decision was that "when there is a gift over purporting to devest a prior estate in fee simple and the devise over fails, it was the intention of the testator to devest the estate which was given in the first instance." But it is submitted that this must be confined to the single instance in which the devesting contingency has occurred as appears not only from the point actually decided in Robinson *v.* Wood, 4 Jur., N. S. 625, but from the above-quoted language of Parke, B., in Doe *v.* Eyre, 5 C. B. 743.

In O'Mahoney *v.* Burdett, L. R., 7 H. L. Cas. 388, 407, the same principle was applied by Lord Selborne to bequests of personalty in a case where the ulterior legatee died before the testatrix.

Exceptions—Remoteness.—In Doe *v.* Eyre, 5 C. B. 743, it was admitted by Rolfe, B., that if the ulterior limitation were void for remoteness, the principle would not apply.

Gifts to a Class.—Where personalty is bequeathed to individuals or to a class to come into possession at a future period (as after a life estate to A), and in case any of the class should die before the period of distribution, then to their children, the original gift is divested only in case of those who have children. Jarman on Wills (5th ed.) *870. Smither *v.* Willock, 9 Ves. 233. See Henry *v.* McLaughlin, 1 Price 264; Salisbury *v.* Petty, 3 Price 86; Whittell *v.* Dudin, 2 J. & W. 279.

1. The decision in Doe *v.* Eyre has been attacked in the following note to the report of the case, 5 C. B. 748, on the ground that it conflicts both with settled analogies and the intention of the testator: "In the case of devise by A to B in fee, upon a contingent event, without more, the land descends to the heir of A, subject to the contingent executory devise,

and the fee is in the heir of A until that devise takes effect. Any declaration that, until the event contemplated, A's heir shall not have the land, would be nugatory, as the heir necessarily takes in the absence of an immediate effectual disposition thereof. So, in the case of a devise by A to B in fee on a contingent event, and subject to the contingent devise to C in fee, C is substituted for the heir of C, and the fee vested in C remains undivested until the devise to B takes effect. In each case the intention is, in the event contemplated, not simply that the primary taker shall not retain the land, but that the land shall go preferably to B, and if, from any cause whatever, B is incapable of taking, the divesting intention fails. The effect is, in substance, the same where A devises to B in fee, with a contingent executory devise over to C. If, by any means, the devise to C is removed out of the way, or if the devise to C is of a less estate than the fee, the estate of B is not defeated, or is only partially defeated. The estate was not intended to be taken from B, for any other purpose than that of giving it to C, and that purpose failing, A's original bounty remains in full operation. It appears to be immaterial from what cause the executory devise to C fails of effect, whether by reason of the contingency itself not arising, or of its being too remote, or of the death of C in the lifetime of A, or of C's incapacity to take. The late case of Jackson *v.* Noble, 2 Keen 590, appears to be in substance this: A devises to B in fee, but in case B shall leave no child, then to C or his children surviving B; C dies in the lifetime of B without leaving any child. It was held, that the estate already vested in B could not be divested, although B (who was living) should die without issue—that B had 'an absolute estate, subject to be defeated by the contingent executory gift over,' of which gift the object had failed. It was not attempted to be argued that the contingency on which the estate was limited over could be incorporated, as a qualifying ingredient in the primary gift to B. The principle seems to be, that the intention in favor of the primary devisee is qualified for the benefit of another object of bounty, and is for that reason only, not absolute, and that whenever, and by whatever means, that object is removed, the inducement to disturb the primary gift has ceased. The same principle appears to apply equally to a conveyance *inter vivos*, and to a posthumous conveyance by devise, although in the latter case, the manifestation of the intention of the disposing party, may be less fettered by technical rules of construction. Before the 1 Vict., ch. 26, § 25, if A had devised Blackacre to B in fee, on a contingency which happened—so that the intention in favor of B took effect absolutely—the devise, by the death of B, in A's lifetime, lapsed, for the benefit of the heir of A, notwithstanding the existence of an operative residuary devise to C; for, every devise of land being at that time really specific, the devise of the residue was nothing more than a devise of the lands of which A was then seised, other than Blackacre, which A supposed himself to have already disposed of in all events. But now Blackacre would pass under the residuary devise, such a devise embracing all the realty from any cause whatever not effectually disposed of; and thereby constituting an universal *hæres factus*. So, under the old law, A might have expressly devised Blackacre to B, in every event in which it was not effectually devised to C, and might have thereby constituted B a special *hæres factus;* and the question is, whether A, by devising to B, with a contingent executory devise to C, would not have sufficiently declared that intention. (And see Sweet, Convey. (2d ed.) 424–427, Where there is a devise by A to B in fee, defeasible on an event which happens, in favor of C in fee, and C dies in the lifetime of A, the only mode, it is conceived, by which the heir of A could be let in, would be, to treat the devise to B as revoked by the devise to C becoming absolute, and to consider the heir of A as in by the lapse of the devise to C, instead of treating the devise to B as ceasing to be defeasible on the failure of the devise to C. But A, it is submitted, declares, not that if the contingency happens, B shall lose the estate, but simply, that if the contingency happens, B shall have the estate."

In addition to these objections it is suggested that the decision presents no solid reason for the distinction between cases in which the limitation over is void for remoteness and those in which it is void for any other reason. If it be said, as suggested by Rolfe, B., in Doe *v.* Eyre, at p. 743,

first devisee or legatee should in no event have other than an estate for life, his interest will be so confined.[1]

c. SUBSEQUENT INTERESTS DEFEATED BY PRIOR INTERESTS TAKING EFFECT.—After much controversy it may now be considered settled that any number of executory interests may be limited after a fee simple in realty or an absolute interest in personalty, and in such case any one of the series, if so limited as to take effect within the time prescribed by the Rule against Perpetuities, may be good in event, unless some one of the preceding limitations which carries a fee simple in realty or an absolute interest in personalty becomes indefeasible, in which case all subsequent limitations thereupon become void.[2] If, however, the

that cases of perpetuities are distinguishable because "the first taker is clearly intended to take and takes forever, unless the estate goes over to another," it may be answered with equal truth that in nearly every instance the testator intends the first taker to hold until the devise shifts to the second. Why should the first taker be supposed to be intended to take "forever" in the one case and not in the other? In neither did the testator contemplate an intestacy. Sir E. Sugden's principle of distinction, Sugd. Powers (8th ed.) 514, *i. e.*, that in the case of a perpetuity the testator could not by law defeat the first devise in the event which he provided for—the law forbade the devise over and therefore the first devise remained unaffected by it—is altogether too artificial. In no case of a void limitation over can the testator defeat the first devise in the event provided for. The event provided for is the shifting of the interest on the contingency from the first to the second devisee, and as the latter cannot take in the case of a void devise, there would seem to be no distinction in principle between perpetuities and other cases of void devises. If by the suggested distinction it is meant that in cases where the ulterior gift fails for any other cause than remoteness, the testator could have inserted an express provision as to the devolution of the property in the event of such failure, whereas if the ulterior limitation fail for remoteness any alternative limitation would itself be too remote, the answer seems to be that this assumes that the testator knew or at least suspected the ulterior interest was void; whereas, whether the failure arose from the fact that the ulterior devise is void for remoteness or any other cause the testator doubtless supposed it good. In Wood *v.* Robinson, 4 Jur. N. S. 625, Kindersley, V. C., expressed his dissatisfaction with the decision in Doe *v.* Eyre, although he considered himself bound to follow it.

1. Drummond *v.* Drummond, 11 C. E. Green (N. J.) 239. See Joslyn *v.* Hammond, 3 M. & K. 110; Savage *v.* Tyers, L. R., 7 Ch. App. 356.

2. The principle in the text is ordinarily stated thus: "Whatever number of limitations there may be, after the first executory devise of the whole interest, any one of them which is so limited that it must take effect (if at all) within twenty-one years after the period of a life then in being, may be good in event, if no one of the preceding executory limitations, which would carry the whole interest, happens to vest. But when once any preceding executory limitation, which carries the whole interest, happens to take place, that instant all the subsequent limitations become void, and the whole interest is then become vested." Fearne's Cont. Rem. 517 and note (*l*), per Butler 514; Wilson's Springing Uses 147; 2 Wash. Real Prop. (5th ed.) 752. See the following cases cited by Fearne: Massenburgh *v.* Ash, 1 Vern. 304; Higgins *v.* Dowler or Derby, 1 P. W. 28; Vaughan *v.* Farrer, 2 Ves. Sr. 182; Stanley *v.* Leigh, 2 P. W. 686; Studhome *v.* Hodgson, 3 P. W. 300; Stephens *v.* Stephens, Cas. temp. Talb. 228; Gower *v.* Grosbenor, Rep. Ch. 54; Trafford *v.* Trafford, 3 Atk. 347; Green *v.* Ekins, 3 P. W. 306; Sheffield *v.* Orrery, 3 Atk. 287.

It is submitted that the statement is inaccurate. If the subsequent interests were conditional limitations, they would not necessarily fail. The principle, as ordinarily stated, so far from being gen-

erally true, only applies "when the subsequent limitations are mere alternative limitations." Fearne's Cont. Rem., App. IX, note 4 to p. 517, by Smith. See Smith's Ex. Int., § 149, *et seq.*

Thus, if there be a series of conditional limitations, as where real estate has been limited to A and his heirs, and if A die under twenty-one, to B and his heirs, and if B die under twenty-one to C and his heirs, and if C die under twenty-one to D and his heirs, the vesting of earlier limitations does not defeat later. Thus, on A's death under twenty-one, B's interest vests, but the interests of C and D are not thereby defeated; on the contrary, if B afterwards dies under twenty-one, the fee shifts to C and his heirs; but if B lives to be twenty-one the contingency upon which C's interest is to vest becomes impossible, B's interest becomes forthwith indefeasible, and all subsequent interests are defeated. Furthermore, before A attains twenty-one, B's interest is contingent; before he attains twenty-one himself, his interest is defeasible. If, therefore, both A and B are under twenty-one, B's interest is both contingent and defeasible; his interest may therefore, be described as a conditional limitation subject to a divesting contingency. If B attains twenty-one before A, his interest, although still contingent, becomes indefeasible, for the contingency upon which the ulterior interest depends thereby becomes impossible. Therefore it is submitted that the true test as to the validity of ulterior executory interests is not whether or not one of the preceding interest has vested, but whether it has become indefeasible.

Mr. Butler, with a view to meeting some such difficulty, suggests that the vesting which, when it takes place, is said to defeat ulterior executory limitations must be understood of an absolute vesting or of an estate or interest so vested as to be subject to no ulterior executory limitation by which it is liable to be defeated. Fearne's Cont. Rem. 515, note. It is submitted that this use of the term is improper; vesting and indefeasibility are entirely distinct conceptions—the one is not implied by the other.

Furthermore, in regard to alternative limitations (see *infra*, this title, § II, 5, *e*.), it is submitted that while the ordinary statement of the doctrine may be sustained, if the words "happens to vest," instead of being strictly and technically construed, are understood to mean that where a prior devisee acquires a "fixed right" to the whole interest, whether vested or contingent; in other words, if he acquires either a vested or a *quasi* vested interest, ulterior interests fail: the test suggested in the text is more convenient and more accurate, as appears from Butler's own illustration of the working of the principle. Fearne's Cont. Rem. 514, note (*l*): "If real estate is limited to A and his heirs, and if he shall leave no child of his body living at his decease, to the first son of B who shall attain the age of twenty-one years, and his heirs. But if B shall have no such son, to all the daughters of B who shall attain the age of twenty-one years or marry, and their respective heirs and assigns, to be divided between or among such daughters, if more than one, in equal shares; and if there shall be but one such daughter, to the use of that one daughter and her heirs, and if there shall be no such daughter, to the use of C and his heirs: in that case, during the life of A, the limitations to the son and daughters of B, and the limitation to C are executory; but, being so framed that they must take effect (if at all) within twenty-one years after the decease of A or B, as the case happens, they may be good in event. Then if A dies leaving a child living at his decease, the fee simple limited to A, which, till then, was defeasible, being subject to the contingency of his leaving no child, becomes absolute, and the limitations to the son and daughters of B and the limitation to C become void. If A leaves no such child, and a son of B attains twenty-one, the fee vests in him, and the limitations to the daughters of B and the limitation to C become void. If, in the event of A's leaving no child, a daughter of B attains twenty-one, or marries while B has no son who has attained twenty-one, that daughter acquires a fixed right to the fee simple if B has no son who attains the age of twenty-one years, and the limitation to C then becomes void. This fixed right of the daughter of B continues such, while B's having a son who attains twenty-one is in suspense: if B has a son who attains the age of twenty-one years, an estate in fee simple vests in the son, on his attaining that age; if he has no such son, an estate in fee simple vests in the daughter. If, either while the daugh-

ter's right is executory, or after it becomes an absolute estate in fee simple, B has another daughter who attains twenty-one or marries, the right or estate of the first daughter opens, and lets in that other daughter to a participation of it. The same holds in respect to personal estate. If personal property is settled in trust for A, his executors, administrators, and assigns, and if he shall leave no child living at his decease, in trust for the son of B, who first or alone shall attain the age of twenty-one years, and if he shall have no such son, in trust for the daughters of B who shall attain that age or marry, to be divided between such daughters, if more than one, in equal shares; and if there shall be but one such daughter, in trust for that one daughter, and if there shall be no such daughter in trust for C; in that case, during the life of A, the trusts for the son and daughters of B and for C are executory, but being so framed that they must take effect (if at all) within twenty-one years after the decease of A or B, as the case happens, they may be good in event. Then if A dies leaving a child living at his decease, the interest of A in the property, which till then was defeasible, being subject to the contingency of his leaving no child, becomes absolute, and the trusts for the sons and daughters of B and for C become void. If A leaves no such child, and a son of B attains twenty-one, the property vests absolutely in him, and the trusts for the daughters of B and for C become void. If, in the case of A's leaving no child, a daughter of B attains twenty-one, or marries while B has no son who has attained twenty-one, that daughter acquires a fixed right to the absolute interest of the property, if no son of B attains the age of twenty-one years, and the trust for C becomes void. This fixed right of the daughter of B continues such, while B's having a son who attains twenty-one years, is in suspense; and if B has a son who attains the age of twenty-one years, the absolute interest of the property vests in him on his attaining that age; if B has no such son, the absolute interest of the property vests in the daughter. If, either while the daughter's interest is executory, or after she obtains an absolute interest in the property, B has another daughter who attains twenty-one or marries, the right or interest of the first daughter opens and lets that other daughter into a participation of it."

Now, in the first place, it should be observed that the limitations to C and the sons and daughters of B, are, as regards A's interest, conditional as regards one another, alternative (see *infra*, this title, p. 954, n. 1, § II, 5, *e*), and that A's death without children living at his decease forms an essential part of the combination of facts upon which each of the ulterior interests is to arise. To entitle B's first son to take, A must die without children surviving; to entitle B's daughters to take A must die without children surviving, and there must be no sons of B who have attained twenty-one; to entitle C to take, A must die without children, and B's sons and daughters must both be out of the road; hence, if A dies leaving a child living at his decease, the particular combination of facts upon which, and upon which only, each of the succeeding limitations is to arise becomes impossible, A's interest becomes indefeasible and all the ulterior limitations are thereby defeated. So if A leaves no such child and a son of B attains twenty-one, the limitations to the daughters of B and the limitation to C are defeated, not because the fee vests in B's son, but because, under the original limitation, those interests could only take effect in case there was no such son. Again "if in the event of A's leaving no child, a daughter of B attains twenty-one, or marries while B has no son who has attained twenty-one, that daughter acquires a fixed right to the fee simple if B has no son who attains the age of twenty-one years, and the limitation to C then becomes void." Why? Not because the daughter's interest is vested; for the limitation to the daughters is only to take effect, if B shall have no son who shall attain the age of twenty-one years, and, until it is determined whether or not B will have such a son, is necessarily contingent, but because the limitation to C was only to take effect in case there was no such daughter, which has now become impossible. Such daughter, therefore, takes an indefeasible contingent interest. The distinction between a defeasible and an indefeasible contingent interest was pointed out in Egerton *v.* Earl of Brownlow, 4 H. L. Cas. 1 (stated, *supra*, this title, § I, 2, *a*, note) and may be of importance.

preceding limitation which becomes indefeasible does not carry the whole interest, a subsequent limitation does not necessarily fail, but in the event of the preceding interest vesting in possession, may take effect as a remainder or *quasi* remainder, expectant thereon, and in case the preceding interest fails to vest in possession, becomes itself an estate in possession at the time limited for the preceding interest to vest.[1]

d. LIMITATIONS SUBSEQUENT TO AN EXECUTORY LIMITATION ARE THEMSELVES EXECUTORY.—Whenever one of several successive limitations is taken to be executory, all subsequent limitations must likewise be so taken.[2] If the preceding limitation is of a fee, as no remainder can be limited after a fee, the fact that the subsequent limitation is executory is patent.[3] So all interests expectant on an estate for life limited out of a term for years are necessarily executory, for all are equally limitations of a term after a disposition thereof for life, after which there cannot be a remainder at common law.[4] So any number of freehold life estates limited after a life estate to commence *in futuro*, are all necessarily executory, since they are all freeholds *in futuro*. So any estate of freehold to take effect after an estate tail or for life, which is itself limited after a fee is executory.[5]

Lastly, the statement of the principle in the usual form is misleading in the *United States*, because it implies that the Rule against Perpetuities is uniform, whereas it is so largely affected by express legislation in the several States as to render so general a statement unsafe.

For these reasons, the ordinary statement of the general principle has been modified in the text.

1. Fearne's Cont. Rem. 514, note (*l*), by Butler. See Smith's Ex. Int., §§ 678–682*a*; 2 Prest. Abst. 145.

"As if lands had been limited to the use of A and his heirs, and if he should have no child living at his decease, to the first son of B who attains twenty-one years in tail, remainder to C in fee; in this case, during the life of A, both the subsequent limitations are executory, and the limitation to B's son conferring an estate tail, and not an estate in fee simple, the limitation to C operates as conferring on him a fixed right to an estate in fee simple in possession, if A leaves no child, and B has no son who attains twenty-one years, and to an estate in fee simple in remainder expectant on the estate tail of the son of B, if A should leave no child, and B should have a son who attains that age." Fearne's Cont. Rem. 514, note (*l*), by Butler.

2. Fearne's Cont. Rem. 503 and note (*g*), by Butler; Wilson's Springing Uses 143.

3. See *supra*, this title, § I, 1, *a*; § II. 4, *a*.

4. Fearne's Cont. Rem. 503.

5. Fearne's Cont. Rem. 503. See Gore *v.* Gore, 1 P. W. 27.

"An executory devise may confer either an estate in fee simple, or a less estate. On every estate conferred by an executory devise, other executory devises may be limited; and, if the estate conferred by an executory devise, be an estate in tail, for life or for years, it may be followed by a remainder; but, while the executory estate, after which the remainder is to arise, is in suspense, it is not properly a remainder, but a right which is to be converted into a remainder, on a particular event. Thus, if land is devised to A and his heirs, and if A should not leave issue living at his decease, to B for life, and after B's decease to C in fee, the limitation to C would immediately vest in C a fixed right to a remainder in fee, if A should die without issue in B's lifetime, and to an estate in fee simple in possession, if A should survive B, and afterwards die without leaving issue; but during A's life, C would only have an executory fee." Fearne's Cont. Rem. 503, note (*g*), by Butler.

In the two last instances if the first life estate or the first freehold after the fee vests in possession, all the subsequent interests are converted into remainders; if the first freehold fails, the next vested interest takes effect in possession, and subsequent interests become remainders dependent thereon.[1]

e. OF THE TIME WITHIN WHICH AN EXECUTORY INTEREST MUST VEST—WHEN TOO REMOTE—SUBSTITUTIONAL AND ALTERNATIVE LIMITATIONS.—Every valid executory interest must be so limited as to vest within the time prescribed by the Rule against Perpetuities; and if so limited that it may possibly take effect at too remote a period, whether there is a preceding limitation or not, it is void in its creation, and no subsequent accident can make it good.[2] When there are several successive limitations it is essential to determine whether each ulterior limitation is really limited to take effect after that which precedes it or is merely alternative or substitutional; for if the latter, it will not be too remote unless the limitation in substitution of which it is to arise is also too remote, as the contingency upon which it depends is alternative to that upon which the preceding limitation depends and must take place at the same time.[3] If the former,

1. 2 Prest. Abst. 145, 146. Fearne's Cont. Rem. 504, 505.

"Notwithstanding the rule, that if one limitation be executory every subsequent one must be so likewise, yet a preceding executory limitation may be uncertain and contingent, when a subsequent limitation though it be to take effect in future, may not be uncertain or conditional (otherwise than in respect of the possibility of its expiration before the former vests or fails), but may be so limited as to take effect, either in default of the preceding limitation taking effect at all, or by way of remainder after it, if that should take effect. In either of those cases, we see, it must vest at the time appointed for the preceding limitation to vest; for should the preceding limitation fail of taking effect, the subsequent one will then vest in possession; should the preceding take effect, the subsequent will at the same instant vest in interest as a remainder upon the preceding one, and then become liable to the same modes of destruction as other remainders of the same kind are subject to." Fearne's Cont. Rem. 506. See Brownsword *v.* Edwards, 2 Ves. Sr. 243; Southby *v.* Stonehouse, 2 Ves. Sr. 610; Colleuson *v.* Wright, 1 Sid. 148; Barker *v.* Suretees, Stra. 1175.

Smith Ex. Int., § 668. *Compare* Doe *v.* Jessup, 12 East 288.

2. Fearne's Cont. Rem. 523, Butler's note. Booker *v.* Booker, 5 Humph. (Tenn.) 505; Lovett *v.* Lovett, 10 Phila. (Pa.) 537; Mayer *v.* Wiltbeger, Ga. Dec., pt. 2, 29. See PERPETUITIES.

3. Fearne's Cont. Rem. 523. "An alternative or substitutional limitation as distinguished from other executory limitations (as to which see *supra*, this title, § II, 2) has been defined as a sentence which creates an interest that is only to vest in case the next preceding interest should never vest in any way, through the failure of the contingency on which such preceding interest depends. As where a testator devises to A for life; and if he have issue male, then to such issue male and his heirs forever; and if he die without issue male, then to B and his heirs forever; or, where a testator bequeaths personal estate to the first son of A; and if A should have no son, then to B. (Loddington *v.* Kime, 1 Salk. 224. And see Doe d. Brown *v.* Holme, 3 Wils. 237, 241; and Higgins *v.* Dowler, or Derby, 1 P. W. 98; Stanley *v.* Leigh, 2 P. W. 686; Stephens *v.* Stephens, Cas. temp. Talb. 228; Green *v.* Ekins, 3 P. W. 306.

"These limitations or the gifts made by them, considered in conjunction with those for which they are substitutionary, are sometimes termed contingencies with a double aspect. (See Goodtitle *v.* Billington, Dougl. Rep. 725, or 735 ed. 3; and Hockley *v.* Mawbey, 1

Ves. 149) or gifts upon a double contingency (Arg. of Counsel in Leake *v.* Robinson, 2 Meriv. 382), or gifts or devises upon two alternative contingencies. (Hockley *v.* Mawbey, 1 Ves. 150.)

"From the definition it will appear, that a subsequent limitation cannot be an alternative limitation, unless the prior limitation for which it is a substitute is either an hypothetical limitation (*i. e.*, a sentence which creates an estate in an event or on a condition fulfilled or decided at or before the delivery of the deed, or to be fulfilled or decided at or before the death of the testator), or a contingent limitation when considered antecedently to the event on which the subsequent limitation is to take effect; nor unless the contingency on which the subsequent limitation is to take effect, is the reverse of the contingency on which the preceding limitation is to take effect.

"Where the event on which an alternative limitation is to take effect, is the non-existence, at a particular time, of the person who is to take under the preceding limitation, the condition that such person shall be *in esse* at that time, in order to enable such prior limitation to take effect, is seldom expressed, and is only implied by the circumstance that another person is to take if such first mentioned person is not *in esse* at that time. (Hockley *v.* Mawbey, 1 Ves. 142; Doe d. Davy *v.* Burnsall, 6 D. & E. 30; Doe d. Gilman *v.* Elvey, 4 East 313; Merest *v.* James, 4 Moore 327; 1 Brod. & Bing. 127.) It is this which so frequently causes a doubt, whether the existence of the party is a condition precedent to the vesting of the prior limitation, and consequently, whether the subsequent limitation is an alternative or not. It would, therefore, be desirable that the condition should be expressed, upon which the prior limitation is to take effect, as well as the opposite condition on which the subsequent alternative limitation is to take effect.

"Alternative limitations, as regards their form, may be divided into two kinds. The one may be termed an alternative limitation of the proper or explicit form; the other, an alternative limitation of the improper or elliptical form:

"1. An alternative limitation of the proper or explicit form is one in which the reverse contingency on which the alternative interest is to arise, is expressed; as in the example above given in illustration of the definition of an alternative limitation.

"2. An alternative limitation of the improper or elliptical form, is one in which the reverse contingency on which the alternative interest is to arise, is only implied.

"The contingency is sometimes implied by the word 'or,' introducing the limitation.

"Thus, where a testator bequeathed a sum of stock to each of his nephews and nieces, or to their respective child or children; should any die without child, his share to revert to the residuary legatee. It was held, that the legacies vested absolutely in the nephews and nieces who survived the testator, and that the child or children of the nephews or nieces took only as substitutes for their parent or parents' dying in the testator's lifetime. The same testator appointed as his residuary legatee E P M, his child or children; in case of his death without any such, then the residuary interest to vest in his other nephews and nieces then alive, share and share alike; and, as before, to each of their respective child or children; and in case of either of their deaths without any such issue, then his or her share to be divided among the survivors, or to vest in the last survivor, or his or their representative or representatives. It was held that the words 'E P M, his child or children,' must be read as 'E P M, or his child or children;' and the residuary clause must be construed as the previous clause was; and as E P M survived the testator, the residue, upon that construction, vested in him absolutely. If he had died, leaving children who survived the testator, they would have taken the residue; had they died in the testator's lifetime, his other nephews and nieces and their children would have become entitled in a similar manner. (Montagu *v.* Nucella, 1 Russ. 165.)

"A testator bequeathed £6,000 in trust for his daughter, for life; and, after her decease, he gave the same to the children, or their descendants of T F, in such proportions to each as his daughter might direct. Sir L. Shadwell, V. C., held, that the descendants were mentioned merely as substitutes for the children, and that the children were entitled to the fund, there being a

the ulterior limitation may assume the form of a springing interest[1] to take effect on the natural expiration of a fee simple determinable, or an absolute interest in personalty,[2] of a contingent remainder (in the case of limitations of real estate) to take effect on the expiration of a preceding estate for life, which is itself without sufficient support or limited after a fee,[3] of a quasi remainder (in the case of limitations of personalty) after a life interest limited to commence in *futuro* or after an absolute interest,[4] or of a conditional limitation;[5] if the latter, it will take the form of an alternative remainder[6] or quasi remainder,[7] or of a springing interest limited upon the estate which next precedes

direct gift with a power of selection. (Jones *v.* Torin, 6 Sim. 225.)

"Sometimes the contingency on which the alternative interest is to arise is implied in the context, and this would appear to be the case where a fund is bequeathed in trust for a person and his issue with a direction to the trustees to pay over to such person the *corpus* and not merely the interest of the fund.

"A testator bequeathed all his personal property, not before disposed of, unto his trustees, in trust for his five sons and their respective issue (if any), such issue to take *per stirpes* and not *per capita*, to be divided amongst them in equal shares and proportions; the shares of such of them as should have attained twenty-one to be paid to them, respectively, forthwith after his decease, and the shares of such of them as should be under the age of twenty-one years, to be paid to them when and as they should respectively attain such age. At the date of the will, and of the testator's death, the oldest son was married and had four children. The other sons were unmarried. The Master of the Rolls held that each of the sons was entitled to a fifth for life only, remainder to his issue, to be paid to them at twenty-one. This judgment was reversed by the House of Lords, by whom it was decided, that this was 'an absolute gift to the testator's five sons, to be paid at the time, and in the manner specified, to the testator's sons living at the time of his decease; but if any of the said sons was at that time dead, then to go to the issue of that son, such issue to take as the *stirpes* would, and not on a division *per capita*.' The Lord Chancellor, in proposing that decision, relied on the case of Butler *v.* Ommaney, 4 Russ. 70; and he observed that there was no making sense of the will, unless it was so construed; and it was evident that, in the hurry of the last day of the sittings, the attention of the Master of the Rolls had not been fully drawn to the terms of the will. (Pearson *v.* Stephens, 2 Dow. & Cl. 328.)

"It is not stated in the report in what way his lordship showed that this construction was required by the terms of the will, but it may be remarked, that it appears from the words of the decision, as above cited, that the word 'them' was considered as referring to the sons, being connected with the word 'sons,' though the word 'sons' was not the next antecedent, by the word 'their;' and hence the will was to be construed as directing the trustees to pay over the *corpus* of the fund to the sons who should then have attained twenty-one. Now if the trustees were to pay over the *corpus* of the fund to the sons who should have attained twenty-one, it would be utterly repugnant to suppose that the sons so receiving the capital, and not merely the interest from the trustees, should only have been intended to take for life, with remainder over to their issue." Smith Ex. Int., § 128–136.

"Any number of alternative interests may be limited in succession, so that each more remote limitation may be simply a substitute for the next preceding one." Smith's Ex. Int., § 136*a*, Laffer *v.* Edwards, 3 Mad. 210.

1. For definition see *supra*, this title, § II, 2.
2. See *supra*, this title, § II, 2, note, § II, 4, *a*.
3. See *supra*, this title, § II, 5, *d*.
4. See *supra*, this title, § I, 4.
5. For definition, see *supra*, this title, § II, 2.
6. See *supra*, this title, § I, 3, *c*.
7. See *supra*, this title, § I, 4.

the first of the limitations in substitution of which it is to take effect, or of a conditional limitation which arises in derogation of the estate created by such next preceding limitation upon an event, which can only take place in case all the events, upon which the limitations in substitution of which it is to arise fail to take effect.[1] Of course, if the next preceding interest is vested, the ulterior interest cannot be alternative, but will be, if limited after a fee, a springing interest or conditional limitation; if after

1. "The same limitation may be at once an alternative limitation in regard to the next preceding limitation and a conditional limitation with respect to another preceding limitation. (See Fearne, 514, note (1)); or a remainder, in relation to the next preceding limitation; an alternative limitation, in regard to another limitation; and a conditional limitation, with respect to a still earlier limitation. For, since a remainder usually has the effect of an alternative limitation, if the preceding interest never takes effect at all, where the preceding interest is an alternative limitation, which does not carry a fee simple or qualified, and which is a substitute for a prior limitation in fee, and neither the prior limitation in fee, nor the intervening alternative limitation so substituted for it, take any effect at all, the remainder, operating in this case for the intervening alternative limitation, must be a substitute as a substitute for a substitute, that is, for the prior limitation in fee; and hence, the remainder, at the time of its creation, is capable of operating either as a remainder, or as an alternative limitation, as regards the intervening alternative limitation, and also as a simple alternative limitation in respect to the prior limitation in fee. And where a clause takes effect, by way of alternative limitation, as a substitute for a conditional limitation, it must be itself a conditional limitation, with respect to the interest to be defeated by the conditional limitation for which it is a substitute.

To illustrate the truth of these positions, let us suppose that lands are devised to the use of A and his heirs; and if he shall leave no child of his body living at his decease, to the first son of B who shall attain the age of twenty-one and his heirs; and if B shall have no such son, to all the daughters of B who shall attain the age of twenty-one or marry, and the heirs of their bodies, etc., remainder to C, and his heirs. In this case, if A leaves no child living at his decease, and B has no son who attains twenty-one, but the estate vests in the daughters of B, and there is afterwards a failure of issue of their bodies, the limitation to C will operate as a remainder in relation to the limitation to the daughters of B. But if A leaves no child of his body living at his decease, and B has no son who attains twenty-one, nor any daughter who attains that age or is married, the limitation to C, instead of operating as a remainder, takes effect as a substitue for the intervening alternative limitation to the daughters of B, which is a substitute for the prior limitation to the son of B; and thus the limitation to C is mediately and virtually a substitute for the prior limitation to the son of B, or, in other words, an alternative limitation in regard to the gift to the son of B. And, in such case, it is also a conditional limitation as respects the limitation to A; inasmuch as the gift to the son of B, for which it is mediately and virtually an alternative or substitute, is a conditional limitation, as regards the limitation to A. If A has no child for his body living at his decease, the fee is to pass from him, and whatever limitation may happen to be the one which attracts and transfers the fee from him to another person on that event, is a conditional limitation, as regards the limitation to A; so, that if A leaves no child living as aforesaid, and B has no child who becomes capable of taking, the limitation to C will take effect on the death of A; and by transferring the fee from A to C, will operate as an alternative limitation, as regards the conditional limitations to the sons and daughters of B, and thus, standing in their place, will also operate as a conditional limitation, as respects the limitation to A, in the same manner as the limitation to the sons of B

a less estate, a contingent remainder.[1] Contingent executory interests limited after an estate tail can be barred by common recovery, suffered by the tenant in tail, and hence are not subject to the objection of remoteness.[2]

f. LIMITATIONS AFTER AN ABSOLUTE POWER OF DISPOSITION. DISTINGUISHED FROM LIMITATIONS ON DEFAULT OF APPOINTMENT.—If real or personal property is limited to such uses as a person shall appoint, and in default of appointment, to other uses, this is good as a power of appointment, with a limitation over in default of the exercise of the power.[3] But if either the legal or equitable fee in realty or the absolute interest in personalty be limited, instead of to uses to be appointed by the exercise of a power, directly to the devisee or legatee, a limitation over in default of the exercise of the general power of disposition incident to the interest conferred by the first limitation is void.[4] A life

would have operated, had it taken any effect.

And it would seem, that, in a similar manner, the same limitation may be an alternative limitation in regard to the next preceding contingent limitation and, at the same time as respects another preceding limitation, or the absence of any preceding vested limitation an augmentative limitation, or a limitation of a springing interest.

Every more remote limitation may be a remainder, as regards a prior limitation, though it is not limited next after such prior limitation, so long as it is to take effect, if at all, on the regular expiration of the interest created by such prior limitation. (Illustrated by Doe *v.* Selby, 2 B. & C. 926); Smith's Ex. Int. §§ 678–682*a*.

1. Fearne's Cont. Rem. 523.

2. Fearne's Cont. Rem. 522 note (m) by Butler.

3. Smith Ex. Int. § 667; 2 Wash. Real Prop. (5th ed.) 785; Tomlinson *v.* Dighton, 1 P. W. 171; Reid *v.* Shergold, 10 Ves. Jr. 370; Eaton *v.* Shaw, 18 N. H. 320; see Larned *v.* Bridge, 17 Pick. (Mass.) 339; Randolph *v.* Wright, 81 Va. 608; Rubey *v.* Barnett, 12 Mo. 1; Yarnall's Appeal, 70 Pa. St. 335; Johnson *v.* Citizen's Bank (Va.), 1 S. E. Rep. 705. See Hill *v.* Hill, 4 Barb. (N. Y.) 419.

A will contained the following clause: "I give and bequeath to my beloved wife, the use and benefit of all my estate, real and personal, and should the income prove insufficient for her comfortable support, she to dispose of so much thereof as shall be necessary for that purpose; and at her decease, I order the remainder to be equally divided to and among my children;" and the wife was appointed executrix. It was held that this provision was not in the nature of a legacy, but that it vested in the wife an estate for life, both in the real and personal property, with a naked power to sell, depending upon the contingency of the income proving insufficient for her support, superadded; that such power must be executed by the wife personally, and not as executrix, and would not, on the renunciation of the office of executrix, devolve on the administrator with the will annexed; and that a license obtained by such administrator, after the death of the wife, from the Court of Probate, authorizing him to sell such real estate, in order to defray expenses incurred in the maintenance of the wife, was invalid. Larned *v.* Bridge, 17 Pick. (Mass.) 339. *Compare* Eaton *v.* Shaw, 18 N. H. 320.

4. Smith Ex. Int., § 667; 2 Wash. Real Prop. (5th ed.) 787; Ross *v.* Ross, 1 Jac. & W. 158; Attorney-Gen'l *v.* Hall, Fitzg. 314. See Bull *v.* Kingston, 1 Me. 314; Brian *v.* Cawsons, 2 Leon. 68; Flanders *v.* Clark, 1 Ves. 9; 3 Atk. 509; Bland *v.* Bland, 2 Cox 349; Prec. in Ch. (Finch ed.) 201 note; Le Matre *v.* Bannister, Prec. in Ch. (Finch ed.) 201 note; Wyne *v.* Hawkins, 1 Bro. C. C. 179; Strange *v.* Barnard, 2 Bro. C. C. 586; Pusman *v.* Filliter, 3 Ves. 7; *In re* Wilcocks, L. R., 1 Ch. D. 229; Cuthbert *v.* Purrier, Jac. 415; Stinger's Estate, L. R., 6 Ch. D. 1; Holmes *v.* Godon, 8 D. M. & G. 152; Gulliver *v.* Vaux, 8 D. M. & G. 167;

Shaw *v.* Ford, L. R., 7 Ch. D. 669; Nowland *v.* Welsh, 4 DeG. & Sm. 584; Maxwell's Will, 24 Beav. 246; Bourn *v.* Gibbs, 1 Russ. & M. 614.

The principle has been generally recognized by the American decisions; Howard *v.* Carusi, 109 U. S. 725; Ramsdell *v.* Ramsdell, 21 Me. 288; Pickering *v.* Langdon, 22 Me. 413; Jones *v.* Bacon, 68 Me. 34; Stewart *v.* Walker, 72 Me. 148; Burleigh *v.* Clough, 52 N. H. 267; Ide *v.* Ide, 5 Mass. 500; Burbank *v.* Whitney, 24 Pick. (Mass.) 146; Kelly *v.* Meins, 135 Mass. 231; McKenzie's Appeal, 41 Conn. 607; Jackson *v.* Bull, 10 Johns. (N. Y.) 18; Jackson *v.* DeLaney, 11 Johns. (N. Y.) 365; 13 Johns. (N. Y.) 537; Jackson *v.* Robins, 15 Johns. (N. Y.) 169; 16 Johns. (N. Y.) 537; Hill *v.* Hill, 4 Barb. (N. Y.) 419; Hoxsey *v.* Hoxsey, 37 N. J. Eq. 21; Wilson *v.* Wilson (N. J.), 19 Atl. Rep. 132; Combs *v.* Combs, 67 Mo. 11; Wilson *v.* Cooper, 4 Leigh (Va.) 408; Rivick *v.* Cohoon, 4 Rand. (Va.) 547; Hall *v.* Robinson, 3 Jones Eq. (N. Car.) 348; Newland *v.* Newland, 1 Jones Eq. (N. Car.) 463; Cook *v.* Walker, 15 Ga. 459; McRee *v.* Means, 34 Ala. 349, 362; Flinn *v.* Davis, 18 Ala. 132; Williams *v.* Jones, 2 Swan (Tenn.) 620; Davis *v.* Richardson, 10 Yerg. (Tenn.) 290; Rona *v.* Meier, 47 Iowa 607; Mitchell *v.* Morse, 1 East Rep. 603; Weed *v.* Gray, 78 Mo. 59.

In Ross *v.* Ross, 1 Jac. & W. 153, the leading case on the subject there was a bequest of a legacy to A, to be paid at twenty-five, or between twenty-one and twenty-five, if the executors should think proper; and maintenance in the meantime, with a limitation over, in case A should not receive, or dispose of it by will or otherwise, in his lifetime. *Held*, that the limitation over was void, Sir T. Plumer, M. R., saying: "This differs from a power, and a remainder over in default of its exercise; the right of disposing of the legacy is given him, not *in terminis*, but as a consequence of property. How does he acquire the power? It is not given as a power, but follows from the property being his. The testator assumes that he would have a right to it at twenty-five; therefore, if he should have received it, and not have disposed of it, the capital *in solido* being his property, and remaining in his hands, was to go over to another. But if you give absolute property to a person, you cannot subject it for his life to a proviso, that if he does not spend it, his interest shall cease. One of the consequences would be, that if he had not spent it, and were to die indebted to any amount, his creditors would be excluded from it. It is quite a novel attempt to separate the devolution of property from the property itself."

In Attorney-Genl. *v.* Hall, Fitzg. 9, 314, the testator gave to his son and the heirs of his body, all his real and personal estate, to his and their own use; and in case his son should die leaving no heirs of his body living, he gave all and so much of his estate as his son should be actually possessed of at the time of his death to the Goldsmith's Company, for certain charitable uses; and he directed them not to give his son any trouble during his life concerning his estate. The son suffered a common recovery of the real estate, and it was held by Lord Chancellor King, Sir J. Jekyll, M. R., and Reynolds, C. B., that as to the personal property, the limitation over was void, as the absolute ownership was given to Francis Hall, the son; "for it is to him and the heirs of his body, and the Company are to have no more than he shall have left unspent, and therefore he had a power to dispose of the whole, which power was not expressly given him, but it resulted from his interest."

Wilcock's Settlement, L. R., 1 Ch. D. 229, is a very strong case, and illustrates the application of the principle to trust estates. A fund was settled in trust for W, the illegitimate daughter of the settlor, for life, and in the event (which happened) of her not at her death being under coverture, for her absolutely; with a proviso that if any estate, interest, or benefit should, under the powers and provisions of the settlement, be undisposed of, or in the events which should happen would, but for the proviso, be held in trust for the crown, or belong beneficially to the crown, then and in every such case the estate, interest or benefit should belong to and be held in trust for her father for life, and after his death for her mother. W having died intestate, the crown claimed the fund. Sir G. Jessel, M. R., held that the fund vested absolutely in W at her death, and that the gift over was repugnant and void; and consequently the crown was entitled to the fund, saying: "It is an absolute gift, in a particular event, to a lady who happened to be illegitimate. The event happened, she died a spinster, and conse-

quently was absolutely entitled to the property at her death. Immediately following the absolute gift there is this singular proviso (stated above): It is a clause purporting to deal with property of Miss Wilcock's, which would, but for the proviso, be held in trust for the crown, or belong beneficially to the crown. But it is not the case that the fund would be held in trust for the crown but for that proviso. It was the lady's absolute property, and could only be held in trust for the crown in case she happened to die intestate. This proviso, therefore, amounts to this—that the fund is limited over in the event of her dying intestate. The question I have to decide is whether such a limitation can be supported. I think it cannot. The law of *England* has from the earliest times prohibited the introduction of new modes of devolution of property by operation of law. Of course a man can direct his property to go according to any series of limitations that he pleases, but he cannot create a new mode of devolution by operation of law. If there be a gift in fee, for instance, the donor cannot say that in the event of the donor dying intestate, the estate shall descend not to his eldest but his youngest son. In Ross *v.* Ross (1 Jac. & W. 154), Sir Thomas Plumer said: 'The question, I think, is, whether this will vests the absolute property of the legacy in the legatee. If it do give the absolute property, the right of disposing of it, or its devolution upon his representatives, would follow as a matter of course. That is, if a man give the property itself, it must devolve according to law, if not disposed of by the donee in his lifetime.' "

The principle is akin to that which forbids restrictions on the power of alienation incident to a fee simple. Burnett, J., in Gulliver *v.* Vaux, 8 D. M. & G. 167, n., cited with approval by Turner, L. J., in Holmes *v.* Hodgson, 8 D. M. & G. 152, 164.

See Jauretche *v.* Proctor, 48 Pa. St. 466; Rona *v.* Meier, 47 Iowa 610.

The general power of disposition may be either express or implied; in the latter case it is sufficient if there is a gift over of such property as may remain or of such land as the prior devisee may die seised of. Kelley *v.* Meins, 135 Mass. 231; Van Horne *v.* Campbell, 100 N. Y. 287; Melsow *v.* Cooper, 4 Leigh (Va.) 408. Kelley *v.* Meins, 135 Mass. 231, contains many citations of leading authorities in the State, and is worthy of careful examination. But in Wilson *v.* Wilson (N. J.) 19 Atl. Rep. 132, it was held that the implication must be necessary, and that a gift of the remainder and residue was not sufficient. In Johnson *v.* Citizens' Bank (Va.), 1 S. E. Rep. 705, a gift over in case of death without a will or lawful issue was sustained as a gift in default of appointment after a limited power of disposition incident to a defeasible fee. So in Randolph *v.* Wright, 81 Va. 608.

The expression of a hope that the first taker will not diminish the principal does not affect him with a trust for the benefit of the ulterior devisee. Thus a devise of real estate and bequest of personal property "to my brother S C to be held, used, and enjoyed by him, his heirs, executors, administrators and assigns forever, with the hope and trust, however, that he will not diminish the same to a greater extent than may be necessary for his comfortable support and maintenance, and that, at his death, the same, or so much thereof as he shall not have disposed of by devise or sale, shall descend to my three beloved nieces P E C, G E C, and I E C, is, as to real estate, a devise to S C in fee simple, absolute. Howard *v.* Carusi, 109 U. S. 725. In the case just cited the court by Woods, J., said: "The words do not raise any trust in S. He is not made a trustee for any purpose, and no duty in respect to the disposition of the estate is imposed upon him. But even if the will had contained an express request that S should convey to the complainant so much of the estate as he did not dispose of by sale or devise, there would be no trust, for the will, as we have seen, gives S C the absolute power of disposal." See Second Ref. Pres. Church *v.* Disbrow, 52 Pa. St. 219.

But if the power of disposition is only implied from a gift over of what remains, and the words forbidding alienation are mandatory, they will have the effect of cutting down the prior absolute interest to an estate for life. Thus where the will read: "I do give and bequeath to my beloved wife, E, all my real and personal estate, she at no time to give or bequeath any portion of said estate out of my family, as at her decease I wish my estate which remains to go to my nephews and nieces, which may be living at that time." *Held*, that E took a life estate, and the nephews and nieces a remainder. Fox's Appeal, 99 Pa. St. 382.

estate in real or personal property is not enlarged by a subsequent general power of disposition, and a limitation over in case the property is not disposed of by the life tenant, is therefore not within the principle and may be sustained.[1] In determining

The principle applies equally to both real and personal property; and early cases holding it exclusively applicable to personalty have since been overruled. Holmes *v.* Godson, 8 D. M. & G. 182; Gulliver *v.* Vaux, 8 D. M. & G. 167, note; Fry, J, in Shaw *v.* Ford, L. R., 7 Ch. D. 669, 674; Jackson *v.* Robins, 16 Johns. (N. Y.) 537; Van Horne *v.* Campbell, 100 N. Y. 287.

Where First Devisee Dies Before Testator.—If the first devisee dies before the testator, the better opinion would seem to be that as the will speaks from the death, the first devise is to be stricken out, and the gift over accelerated, even though had he survived the testator the gift over would have been void, because limited after an absolute interest. Of this opinion seems to have been James, L. J., in Stringer's Estate, L. R., 6 Ch. D. 1, 15, although he did not decide the case on that ground. There are, however, two earlier decisions by Romilly, M. R., holding that the death of the first taker does not affect the construction. Hughes *v.* Ellis, 20 Beav. 193; Greated *v.* Greated, 26 Beav. 621.

Wills Under New York Revised Statutes.—In Greystone *v.* Clark, 41 Hun (N. Y.) 130, it was held that the thirty-second section (1 *New York* Rev. Stat. 728, § 32, 3 R. S. (7th ed.) 2178, § 32) which provides for not defeating or barring expectant estates, and the thirty-third section (1 *New York* Rev. Stat. 725, § 33) which provides that the preceding section "shall not be construed to prevent an expectant estate from being defeated in any manner or by any act or means which the party creating such estate shall in the creation thereof have provided or authorized, nor shall an expectant estate thus liable to be defeated be on that ground adjudged void in its creation," have abrogated the common-law rule, so that since their adoption an executory limitation after a fee simple in realty or an absolute interest in personalty, to take effect in default of the non-exercise of a general power of disposition is good as an "expectant" estate within the meaning of the aforesaid sections. So also in Leggett *v.* Firth, 53 Hun (N. Y.) 152. See also Wells *v.* Seeley, 47 Hun (N. Y.) 109.

How far this would be sustained by the court of appeals is perhaps doubtful. That it does not apply to wills made before the Revised Statutes were adopted is clear. Van Horne *v.* Campbell, 100 N. Y. 287, 310. *Compare* Terry *v.* Wiggins, 47 N. Y. 578.

South Carolina.—In this State a gift over of whatever remains after a limitation of an absolute interest, has been sustained. Andrews *v.* Roye, 12 Rich. (S. Car.) 536.

1. Nannock *v.* Horton, 7 Ves. 392; Pennock *v.* Pennock, L. R. 13 Eq. 144; Hausen *v.* Miller, 14 Sim. 22; Anderson *v.* Dawson, 15 Ves. Jr. 532; Surman *v.* Surman, 5 Madd. 123; Hall *v.* Otis, 71 Me. 326; Burleigh *v.* Clough, 52 N. H. 267; State *v.* Smith, 52 Conn. 557; Kelley *v.* Meins, 135 Mass. 231-234; Brant *v.* Virginia Coal & Iron Co., 93 U. S. 326-333; Terry *v.* Wiggins, 47 N. Y. 512; Mitchell *v.* Knapp, 8 N. Y. Supp. 40; Sperien *v.* Stait, 38 Hun (N. Y.) 228; Wells *v.* Seeley, 47 Hun (N. Y.) 109; Van Axte *v.* Fisher, 117 N. Y. 401; Boyd *v.* Stratton, 36 Ill. 355; Scofield *v.* Olcot, 120 Ill. 362; Fox's Appeal, 99 Pa. St. 382; German *v.* German, 27 Pa. St. 118; Girard L. Ins. Co. *v.* Chambers, 46 Pa. St. 490; Edward *v.* Gibbs, 39 Miss. 166-174; Rubey *v.* Barnett, 12 Mo. 1; Anderson *v.* Hall, 80 Ky. 91. *Compare* Upwell *v.* Halsey, 1 P. W. 652; Yarmall's Appeal, 70 Pa. St. 335-342. Under such a limitation, the ulterior legatee cannot require security. German *v.* German, 27 Pa. St. 116.

A testator gave to his wife the use and income for life of all his property, and provided that if the income in her judgment should be insufficient for any purpose for which she might wish to spend money, she might spend the proceeds from the sale of any of the estate, and gave her power to sell any of it, and to convey in her own name for the above named purposes, or for investment or reinvestment; and gave one-half of the residue remaining at his wife's death to his sister. The testator's sister died, before his wife, who sold none of the estate. *Held*,

whether or not a fee simple in realty or an absolute interest in personalty has been conferred upon the first taker as distinguished from an estate for life with a general power of disposition, great difficulty is often experienced.[1] If the power of disposition is only partial, applying to income rather than *corpus*, the first taker cannot dispose of the property to the detriment of the ulterior

that the wife took a life estate coupled with a power; and that the limitation to the sister was valid, and passed to her representatives. Welsh *v.* Woodbury, 144 Mass. 542. In the case just cited the court by Holmes, J., said: "The ground of Kelley *v.* Meins (135 Mass. 321), and that class of cases, whether concerning personal or real estate, is that the limitation over is an attempt to take away one of the incidents of ownership, and to say that, if the owner does not dispose of his property in his life or at his death, it shall devolve otherwise than as the law has provided. This objection does not apply to a remainder after a life estate, even when the life estate is coupled with a power. The objection to the uncertainty of what will be the subject of the limitation over, which was once thought to be a further ground for the doctrine of Kelley *v.* Meins, as applied to personal property, seems to be discredited by the later English decisions cited in that case, and never has been applied to a life estate coupled with a power." See Surman *v.* Surman, 5 Madd. 123; *In re* Thomson's estate, 13 Ch. D. 144; Burleigh *v.* Clough, 52 N. H. 267. See Ross *v.* Ross, 1 Jac. & W. 154–158; Cuthbert *v.* Purrier, Jac. 415–417; Green *v.* Harvey, 1 Hare 428–432.

1. Kelley *v.* Meins, 135 Mass. 231. In Pennock *v.* Pennock, L. R. 13 Eq. 144; Hauson *v.* Miller, 14 Sim. 22; Anderson *v.* Dawson, 15 Ves. Jr. 532; Girard F. Ins. Co. *v.* Chambers, 46 Pa. St. 685.

The better opinion would seem to be that the whole instrument should be construed together, and that words importing an absolute interest may be restrained to a life interest by subsequent clauses, and words importing only a life interest may be enlarged in the same way, but that the presence of the gift over does not *ipso facto* restrain an absolute interest conferred by a previous clause to an estate for life, nor does the presence of a general power of disposition *ipso facto* enlarge a life estate created by a previous clause into an absolute interest. Or in other words it would seem on principle that if the doctrine in the text is to be sustained, no inference as to the intention can be drawn from the presence of the general power of disposition or the gift over, although all other parts of the instrument are to be taken into consideration. Thus in Pennock *v.* Pennock, 13 Eq. 144, where a testatrix having a power under a marriage settlement to appoint certain shares of real estate made an appointment to her husband "in trust to stand possessed thereof, and to enjoy the rents, profits, and income arising, and to arise therefrom for his own absolute use and benefit, for, and during the term of his natural life, with power to take and apply the whole or any part of the capital arising therefrom to and for his own benefit, and from and after the decease of my said husband," over, Malins, V. C., held that the life interest was not enlarged by the general power of disposition. So even in the absence of an express power of disposition the better opinion is that no inference of an intent to cut down the preceding absolute interest can be drawn from the presence of the limitation over. Van Horne *v.* Campbell, 100 N. Y. 287; Kelley *v.* Meins, 135 Mass. 231. *Compare* Fox's Appeal, 99 Pa. St. 382.

On the other hand, if there is anything in the instrument, other than the general power of disposition, to indicate an intent to confer the absolute interest upon the first taker, it should be considered with a view to arriving at the general intent. A testator devised thirteen houses to his four sons, share and share alike, to hold subject to certain conditions. First, it was his will that none of the houses be disposed of, either by division, assignment, transfer, or sale, without the written consent of each and every of his four sons, their heirs, assigns, or representatives. Secondly, it was his will that, until the before-mentioned distribution of the property was made, the rents should come into one common fund, and be

divided equally among his four sons. Furthermore, it was his will that, if there should be no lawful distribution of the property during the life or lives of his four sons, it should then devolve to the children of his four sons. *Held*, that the four sons took the houses as tenants in common in fee, and that the executory devise over to their children was void. "The expression of the testator's desire that none of the houses be disposed of either 'by division, assignment, transfer, or sale, without the written consent of each and every of the four sons, their heirs, assigns, or representatives,' shows that the testator considered the heirs of the four sons as having an estate in the property, which they could only have in the event of its being a fee simple estate." Fry, J., in Shaw *v.* Ford, L. R. 7 Ch. D. 669, 672.

So words which would create a fee simple in realty or an absolute interest in personalty may be restrained by subsequent expressions, other than the mere fact that there is a limitation over. It even seems that the presence of the limitation over will tend to give subsequent expressions a more restrictive meaning than they would otherwise have; but the gift over, standing alone, without the aid of such subsequent expressions cannot be allowed to restrict the preceding absolute limitation; otherwise every absolute interest followed by a gift over would be restrained to a life estate with a general power of disposition and the principle itself would be at an end. A testator devised "unto my brother John Stringer all my real and personal estate and effects whatsoever and wheresoever, with full power and authority for him to give, sell and dispose thereof, or of any part thereof, to such person or persons and for such purposes as he shall think fit by any deed or deeds, or writings, or by his last will or testament in writing already executed or hereafter to be executed by him, or otherwise; and I do hereby name and appoint him the sole executor of this, my will; but provided he shall not dispose of my said real and personal estate, or any part thereof as aforesaid, then, and not otherwise, I do hereby give, devise, and bequeath my said real and personal estate, or such part or parts thereof, as he shall not so dispose of," to J S for life with remainders over. The testator made various dispositions with special reference to the alternative of the survivorship of himself or J S. The latter died in the testator's life time. Sir G. Jessel, M. R. held that the gift of the real and personal estate to J S was an absolute gift, and that all the gifts over were void; and that consequently J S having predeceased the testator, there was an intestacy. *Held* on appeal by the Lords Justices reversing the M. R. that taking into consideration the whole will, the gift to J S must be read as a gift to him for life with an absolute power of appointment and with a gift over if J S should die before the testator, or if he should survive but not dispose of the estate; and that in the event which had happened the gift over was valid. "Now there can be no question upon the words of the gift, taken *per se*, that they give an estate of inheritance in the freehold property and real estate and an absolute interest in the personal property. So also as regards the power conferred. If we stop with the power so conferred it is merely conferring on the devisee and legatee a power of doing that which would have been incidental to the estate previously given to him. But when we come to take into consideration the gift over in default of the power being exercised, then the fact of the power having been previously given becomes of some importance, and it is the duty of the court to reconcile, as far as it can, all the various provisions contained in the will, so as to give effect to a reasonable construction of the whole will. We find the gift over is in the following terms, 'provided he' (that is, his brother) 'shall not dispose of any said real and personal estate, or any part thereof as aforesaid,' and then there is another disposition of the property. Now I quite agree that if that proviso was only to take effect in the event of the brother surviving the testator, and not disposing of the property pursuant to the power previously given to him, the proviso would be repugnant, and might be rejected on that account. But I am of opinion that it was the intention of the testator to provide by his will as well for the case of his brother dying in his lifetime, and therefore never having an opportunity of exercising the power of appointment, as for the case of his brother surviving him, and thereby only exercising it to a partial extent." Baggallay, L. J. Stringer's Est., L. R., 6 Ch. D. 1, 17, 18.

See further, for somewhat similar construction upon the whole will,

interest,[1] and where a power of disposition accompanies a bequest or devise of a life estate, the power is limited to such disposition as a tenant for life can make, unless there are other words clearly indicating that a larger power was intended.[2]

Fox's Appeal, 99 Pa. St. 382; Anderson *v.* Hall, 80 Ky. 91; Richardson *v.* Paige, 54 Vt. 373.

On the other hand it seems to have been held in Smith *v.* Bell, 6 Pet. (U. S.) 68, that the gift over alone is sufficient to restrain a bequest of personalty to and for the legatee's "own use and disposal absolutely" to a life interest with a power of disposition over the income only. The court by Marshall, C. J., said: "The first part of the clause which gives the personal estate to the wife, would undoubtedly, if standing alone, give it to her absolutely. But all the cases admit that a remainder limited on such a bequest would be valid, and that the wife would take only for life. The difficulty is produced by the subsequent words. They are 'which personal estates I give and bequeath unto my said wife, Elizabeth Goodwin, to and for her own use and benefit, and disposal absolutely.' The operation of these words, when standing alone, cannot be questioned. But suppose the testator had added the words 'during her life.' These words would have restrained those which preceded them; and have limited the use and benefit, and the absolute disposal given by the prior words, to the use and benefit and to a disposal for the life of the wife. 13 Ves. 444. The words then are susceptible of such limitation. It may be imposed on them by other words. Even the words 'disposal absolutely' may have their absolute character qualified by restraining words, connected with, and explaining them to mean, such absolute disposal as a tenant for life may make. If this would be true, provided the restraining words 'for her life' had been added, why may not other equivalent words, others which equally manifest the intent to restrain the estate of the wife to her life, be allowed the same operation. The words 'the remainder of said estate, after her decease, to be for the use of the said Jesse Goodwin,' are, we think, equivalent. They manifest with equal clearness the intent to limit the estate given to her, to her life, and ought to have the same effect. They are totally inconsistent with an estate in the wife, which is to endure beyond her life."

This construction it is submitted, would if consistently followed, entirely abrogate the principle itself. This case differs from the preceding English cases in that there seems to have been nothing except the gift over from which an intent to cut down the absolute interest could be inferred. It has, however, been cited with approval by Woods, J., in Giles *v.* Little, 104 U. S. 296; and in Branch *v.* Virginia Coal & Min. Co., 93 U. S. 334. See also Baxter *v.* Bowyer, 19 Ohio St. 490; Richardson *v.* Paige, 54 Ohio St. 373.

But in Howard *v.* Carusi, 109 U. S. 725, the decision was distinctly placed on the ground that under the principle of the English cases, the gift over after a devise of the fee coupled with an express or implied power of disposition was void, although there would seem to be no reason why the same inference as to the testator's intent might not have been drawn from the presence of the limitation over as in the case of bequests of personalty.

In some cases the general power of disposition has been considered sufficient to enlarge an estate for life, into an absolute interest and defeat the gift over. Rona *v.* Meier, 47 Iowa 610; Bacon *v.* Woodward, 12 Gray (Mass.) 381. But *compare* Kelley *v.* Meins, 135 Mass. 231.

1. Bradley *v.* West, 13 Ves. 445; Smith *v.* Bell, 6 Pet. (U. S.) 68; Kelley *v.* Meins, 135 Mass. 234; Brant *v.* Virginia Iron Co., 93 U. S. 326; Boyd *v.* Strahan, 36 Ill. 355; Siegwald *v.* Siegwald, 37 Ill. 430; Gregory *v.* Cowgill, 19 Mo. 415. So, if the *jus disponendi* is conditional. Hill *v.* Hill, 4 Barb. (N. Y.) 419.

Where the power of disposition is partial only the principle is not subject to attachment by life tenants' creditors. Richardson *v.* Paige, 54 Vt. 373.

2. Brant *v.* Virginia Coal and Iron Co., 93 U. S. 334; Smith *v.* Bell, 6 Pet. (U. S.) 68; Boyd *v.* Strahan, 36 Ill.

g. LIMITATIONS CHANGING THE DEVOLUTION OF PRIOR ESTATES IN FEE AT MOMENT OF DEVOLUTION.—Any executory limitation defeating or abridging an estate in fee by altering the course of devolution which is to take effect at the moment of devolution and at no other time, is bad.[1]

h. DESTRUCTION OF EXECUTORY INTERESTS.—ESTATES PUR AUTER VIE.—Executory interests engrafted upon an estate tail, might, at common law, be destroyed by a common recovery suffered by the tenant in tail before the event happened upon which they were to arise, because the effect of a common recovery was to bar the estate tail and all conditions and collateral limitations

355. See Bradley *v.* Westcott, 13 Ves. 445; Richardson *v.* Paige, 54 Vt. 373.

Thus where a testator made a bequest to his wife of all his estate, real and personal, "to have and to hold during her life, and to do with as she sees proper before her death," it was held the wife took a life estate in the property, with only such power as a life tenant can have, and her conveyance of the real property passed no greater interest. Brant *v.* Virginia Coal & Iron Co., 93 U. S. 333.

In the case just cited the court by Field, J., said: "The interest conveyed by the devise to the widow was only a life estate. The language used admits of no other conclusion; and the accompanying words, 'to do with as she sees proper before her death,' only conferred power to deal with the property in such manner as she might choose, consistently with that estate, and, perhaps, without liability for waste committed. These words, used in connection with a conveyance of a leasehold estate, would never be understood as conferring a power to sell the property so as to pass a greater estate. Whatever power of disposal the words confer is limited by the estate with which they are connected." See Boyd *v.* Strahan, 36 Ill. 355.

1. Shaw *v.* Ford, L. R., 7 Ch. D. 669, 673, *citing* Gulliver *v.* Vaux, 8 D. M. & G. 167, note; Holmes *v.* Godson, 8 D. M. & G. 152; Ware *v.* Cann, 10 B. & C. 433.

The reason alleged for this is "the contradiction or contrariety between the principle of law which regulates the devolution of the estate and the executory devise which is to take effect only at the moment of devolution and to alter its course." Fry, J., in Shaw *v.* Ford, L. R., 7 Ch. D. 669, 673.

In this case a testator devised thirteen houses to his four sons, share and share alike, to hold subject to certain conditions: First, it was his will that none of the houses be disposed of either by division, assignment, transfer, or sale, without the written consent of each and every of his four sons, their heirs assigns or representatives. Secondly, until the before-mentioned distribution of the property was made, the rents should come into a common fund and be divided equally among his four sons. Furthermore, if there should be no lawful distribution of the property during the life or lives of his four sons, it should then devolve to the children of his four sons. And in case any of them should die without issue, the share of the rents possessed by them or him should devolve to the widow or widows of such deceased son or sons, to be by them received during their widowhood, and afterwards it should devolve to the survivor or survivors of his other sons, that is to say, to his grandchildren, and to their heirs and assigns, to be divided equally among them. *Held*, that the four sons took the houses as tenants in common in fee, and that the executory devise over to their children was void, Fry, J., saying: "Although the period during which the contingency is to be determined is that of the joint lives of the four sons, the time at which the devise over is to take effect is the death of each of the sons; that is the moment when the estate devolves. It takes effect at the moment of devolution, but at no other time: and altering, as every executory devise must alter, the course of devolution, it is bad upon that ground."

The principle, though laid down with special reference to executory devises, seems equally applicable to limitations by way of use.

annexed thereto.[1] But since such interests arise independently of the preceding estate, they cannot be destroyed or prevented from taking effect by any alteration whatever in that estate, and hence the owner of a preceding estate in fee simple can do nothing to bar or affect the subsequent executory interest.[2] Where

1. Smith Ex. Int., § 789; Fearne's Cont. Rem. 424, 522, note (l), per Butler; Wilson's Uses, 63, 65; Sand. Uses 153; Gilb. Uses (Sugd. ed.) 157, n.; Hale, C. J., 1 Eden's Ch. Cas. 27; Page *v.* Hayward, 2 Salk. 570.

"A common recovery suffered by the tenant in tail, before the time shall arrive, and, of course, while his estate is continuing, will bar this executory interest, because the effect of a common recovery is to bar the estate tail, and also all conditions and collateral limitations annexed to the estate tail; and, as a consequence, it will bar this executory devise as a collateral limitation.

The like observation, *mutatis mutandis*, is applicable to estates tail which are subject to collateral limitations by way of shifting use.

Also, if there be an estate tail with the reversion in fee, and this reversion in fee is disposed of by way of executory devise, the interest under the executory devise will not be protected. It may be barred by the common recovery of the tenant in tail; for, as he may bar the reversion in fee, he may, as a consequence, bar all estates and interests derived out of the reversion." 2 Prest. Abst. 121.

2. Smith Ex. Int., § 790; Fearne's Cont. Rem. 418, 421, 422; Jarm. Wills (5th ed.) *873; 2 Prest. Abst. *120; 2 Wash. Real Prop. (5th ed.) 678, 757; Wilson's Uses 48; Cornish's Uses, 98, 99; Gilb. Uses (Sugd. ed.) 287, 290, note; 4 Kent Com. 241; 2 Cruise's Dig. 281; Pells *v.* Brown, Cro. Jac. 590; Lee *v.* Lee, Mood. 268; *stated* Fearne's Cont. Rem. 422; Archer's Case, 1 Rep. 67; Chudleigh's Case, 1 Rep. 120; Couch *v.* Gorham, 1 Com. 36; Moffat *v.* Strong, 10 Johns. (N. Y.) 12; Jackson *v.* Bull, 10 Johns. (N. Y.) 19. See Downing *v.* Wherrin, 19 N. H. 9; Andrews *v.* Roye, 12 Rich. (S. Car.) 544; Ford *v.* Ford, 70 Wis. 19; Myar *v.* Snow, 49 Ark. 125; Randall *v.* Josselyn, 59 Vt. 557; Smith *v.* Hunter, 23 Ind. 580; Den d. Southerland *v.* Cox, 3 Dev. (N. Car.) 394; Myers *v.* Craig, 1 Busb. (N. Car.) 2, 169; Smith *v.* Hunter, 23 Ind. 580.

"By the introduction of executory limitations, and the consequent emancipation of the limitation of legal estates from the rules of the common law, the obstacles opposed by the common law to the creation of what are somewhat vaguely styled perpetuities, were made nugatory in practice. Moreover, the machinery of common recoveries, laboriously built up by the courts to promote freedom of alienation in fraud of the statute *De Donis*, was found to have lost part of its efficacy. For, though it was never doubted that an executory limitation in defeasance of a fee tail might be barred by a common recovery, it was held by three judges of the court of King's Bench, against the opinion of Doderidge, that an executory limitation in defeasance of a fee simple could not be so barred without the concurrence of the person entitled to the benefit of the executory limitation. (Pells *v.* Brown, Cro. Jac. 590.) If such person had been vouched, and had entered into the warranty, it was agreed that the executory limitation would be barred; but this proceeding would merely have effected by matter of record what might equally well have been effected by release between the parties.

The same doctrine is also applicable to estates *pur auter vie*. The opinion was expressed by Preston, that an executory limitation annexed to an estate *pur auter vie*, limited to a grantee and his heirs general cannot be barred by the first taker, and this has recently been affirmed by judicial decision. (1 Prest. Abst. 438; *In re* Barber's Settled Estates, 18 Ch. D. 624.) Thus it will be seen that, by means of executory limitations, there emerged into practice a new method of interposing an obstacle to the alienation of property. A claim arising under such an executory interest was as much within the language of the Statutes of Fines as any other kind of claim; and therefore it could equally be bound by non-claim on a fine levied with proclamations under those statutes. (1 Cruiso's Fines and Rec. 313.) But for this purpose it was necessary that there should be a non-claim of five years' duration after

a defeasible fee and an executory fee limited upon it, vest in the same person, the latter is not merged or extinguished in the former, the two interests being successive and not concurrent.[1] In the case of executory limitations of chattels real or personal, the interest of the ulterior devisees or legatees will be protected against any attempted disposition on the part of the devisees or legatees of the prior interests.[2] In the case of a devise of a term

the claim under the executory limitation had become enforceable, that is, had vested in possession; and thus the practical effect of a fine, in this respect, was merely to shorten the ordinary period for the limitation of actions to five years. This restricted power of barring executory limitations, other than executory limitations subsequent to an estate tail, was lost upon the abolition of fines by the Fines and Recoveries Act. It requires carefully to be distinguished from methods of barring executory limitations subsequent to an estate tail, or to a *quasi* estate tail carved out of an estate *pur auter vie*. These took effect immediately, and without the expiration of any period of limitation." Challis' Real Prop. 143, 144.

But where testator's daughter was given a fee determinable by her death without issue then living, with a limitation over to testator's heirs, and she was his sole heir at time of his death and died without issue, her conveyance vested a perfect title to her grantee. Stokes *v.* Van Wyck, 83 Va. 724.

A sale of the land under an execution against the first devisee does not affect the second devisee's right. Brattle Square Church *v.* Grant, 3 Gray (Mass.) 146.

1. Jarm. on Wills (5th ed.) *878; Goodtitle d. Vincent *v.* White, 15 East 174; 2 B. & P. (N. R.) 383; Doe d. Andrew *v.* Hutton, 3 B. & P. 643; Goodright d. Larmer *v.* Searle, Wils. 29; Goodtitle *v.* White, 2 New Rep. 383; 15 East 174; Barnitz *v.* Casey, 7 Cranch (U. S.) 456.

Thus in Goodtitle d. Vincent *v.* White, 15 East 174, a testator devised all his estate to his wife, in case his daughter (who became his heir) died under the age of twenty-one years. The wife died intestate; so that the daughter to whom the estate had descended from her father, subject to the executory devise, became also entitled, by descent from her mother, to the executory interest so created. The daughter died a minor, upon which the heir *ex parte materna* claimed the property under the executory limitation, which claim was resisted by the heir *ex parte paterna*, on the ground that the executory fee had been extinguished by the union of both interests in the person of the daughter. But it was held, that no extinguishment had taken place, and that the maternal heir was entitled. Lord Ellenborough saying: "This is not the case of a limited fee and a reversionary fee co-existing in the same person, as would be the case if a fee simple conditional at common law and the reversionary interest of the person who granted it were to vest in the same person, which would create a merger. (4 Mod. 5, and 5 Term. Rep. 109, 110.) It is not the union of two concurrent co-existing fees, but it is the case of one limited and determinable fee, and of another fee not concurrent, but created *de novo* by a mode unknown in early times, to commence *in futuro* upon the ending of the limited fee, and until such limited fee ceases, it has no existence, nor anything beyond the chance of future existence. The second fee is not the old reversion waiting upon the limited fee, and constantly *in esse* whilst that limited fee continues, but it is a new fee which will never be *in esse* until the limited fee ceases. No act done by the owner of the limited fee during the continuance of such limited fee will enable the person in whom the chance to the second is vested to interfere. If the limited fee were to end if J S should die without leaving issue at his death by J N, and J N were dead without issue, so that that commencement of the second fee upon the death of J S was become matter of certainty, yet the person to whom the second fee was limited would, in legal contemplation, have nothing but a possibility till J S's death. This is a case, therefore, of successive, not of concurrent, co-existing fees; and in the case of successive fees of this description, what authorities there are, are all against the plaintiff."

2. Fearne's Cont. Rem. 418, 421; Wilson on Springing Uses 62; Manning's

of years to one for life with a limitation over of the residue to another, the subsequent union of the freehold or inheritance with the interest given the first devisee or a feoffment or other act of forfeiture by such first devisee will not extinguish or affect the interest of the ulterior devisee.[1] So where the limitation is *inter vivos* by way of trust, the union of the term with the inheritance by surrender to or any act done by a person having notice of the trust, will not in equity be allowed to defeat executory limitations.[2]

i. EXECUTORY DEVISEE MAY RESTRAIN WASTE.—On proper application by the executory devisee, equity will restrain the prior devisee from committing waste.[3]

j. CURTESY AND DOWER.—Dower and curtesy having once attached, exist in a fee simple defeasible subject to an executory limitation, although the estate is defeated by the happening of the event on which the limitation over is to take effect,[4] unless

Case, 8 Co. Rep. 96*a;* Lampet's Case, 10 Co. Rep. 47*b;* Wright *v.* Cartwright, 1 Bur. 282; Cadogan *v.* Kennett, Cowp. 432. See *supra*, this title, § II, 4, *d;* also LEGACIES AND DEVISES, vol. 13, p. 150 *et seq.*

1. Fearne's Cont. Rem. 421; Lee *v.* Lee, Mood. 268; Hanning *v.* Radyard, *cited* Lampete's Case, 10 Rep. 52*a.* Otherwise the ulterior interest might be destroyed by collusion between the first devisee and the reversioner. Fearne's Cont. Rem. 421.

2. Wilson on Springing Uses, 63.

Thus in the Duke of Norfolk's Case, the trustee, after the death of the eldest son without issue, merged the term of two hundred years by a surrender to the second son, who was seised of the reversion. Lord Nottingham, in reference to that circumstance observed, "this point is not worth speaking to, for whether the law be so or not, it is not material, because the trust of the term, if well limited unto Charles, whatsoever had been done to break in upon this trust and to defeat it, by them who had notice of the trust, and were privy to it, though it be never so good in law, yet it ought to be set aside in equity, and in this we all agree in opinion." Duke of Norfolk's Case, 3 Cas. Ch. 14; 2 Rep. in Chan. 121; Pollex 223; 2 Swan. 354; *stated* Wilsons' Uses 63.

Estates pur auter vie.—"Certain limitations of subsisting leases for life, neither have the effect of regular limitations of estates of inheritance, nor yet operate as executory devises. If a person seised of an estate *pur auter vie*, devise it to one (indefinitely or for life), and to the heirs of his body, or in general to one in such manner as would give them an estate tail in lands of inheritance, the limitations in these instances, make no estate tail properly so called, nor are such limitations executory devises, but the limitation to the heirs of the body carries the estate to them, and a remainder over will take effect, if the person entitled by virtue of the limitation in tail makes no disposition of the estate. But the person entitled under the limitation in tail, may dispose of the whole, and bar as well the remainders over as his own issue, by deed, surrender, or even articles.

In Blake *v.* Blake, mentioned by Mr. Cox, 3 P. Wms. 10, note 1, the Court of Exchequer held, that the mere renewal of a lease for lives, by the first taker in tail of it, even without the concurrence of the trustees, acquired to him the absolute ownership of the lease." Fearne's Cont. Rem. 495, note (d) per Butler. See Wilson on Springing Uses 131; Blake *v.* Lexton, 6 D. & E. 289; Norton *v.* Frecker, 1 Atk. 524; Wastneys *v.* Chappell, 1 Bro. Par. Cas. 457; Grafton *v.* Euston, 3 P. W. 266 note; Forster *v.* Forster, 2 Atk. 259.

3. Robinson *v.* Litton, 3 Atk. 209. See Clapp *v.* Fogleman, 1 Dev. & B. Eq. (N. Car.) 466. Contingent interests are within the protection of the court. Fearne's Cont. Rem. 562. But see Mathews *v.* Hudson (Ga.), 7 S. E. Rep. 286. See WASTE.

4. Jarm. on Wills (5th ed.) *878, *879; 6 Cruise Dig. 374; 2 Wash. Real Prop. (5th ed.) 735; Buckworth *v.* Thirkell, 3 B. & P. 652 n.; Moody *v.* King, 2 Bing. 447; Goodenough *v.* Goodenough, 3 Prest. Abst. 372. But see Ray *v.* Pung, 5 B. & Ald. 651.

The first case on the subject was

the event upon which the estate is to shift is the birth of children who but for such limitation over would have inherited the parent's estate, and the fact that the limitation over is in favor of the children themselves does not affect the question, since in any case they would not take by inheritance but by purchase.[1] The

Buckworth *v.* Thirkell, 3 B. & P. 652 n., where a testator devised lands to trustees and their heirs, in trust for his granddaughter M until she arrived at the age of twenty-one, or was married; and after she attained her age of twenty-one, or was married, then he gave the lands to M. and her heirs and assigns, forever; but in case M should die before the age of twenty-one years, and without leaving lawful issue of her body then over. M died under age, without issue living at her decease, but having had a child born alive; and it was held, that the husband (the father of such child) was entitled to an estate for life as tenant by the curtesy.

This case has been severely criticised. Co. Litt. 241*a*, note by Butler, Park on Dower, 177–179, 185. But was followed in Moody *v.* King, 2 Bing. 447, in which it was definitely settled that the wife is entitled to dower out of a fee simple subject to an executory limitation; although the event upon which the estate is to shift, has actually taken place. In this case, the estate was to go over on death of first devisee without children, and the decision was expressly placed upon the ground that as children of the marriage surviving the first devisee would have taken a fee simple, indefeasible, dower attached under the principle laid down by Littleton § 53, "When the husband is seised of such an estate in tenements etc., so as by possibility it may happen that the wife may have issue by her husband, and that the same issue may by possibility inherit the same tenements of such an estate as the husband hath, as heir to the husband of such tenements she shall have her dower; otherwise not."

Preston on the other hand says that as the wife's title is derivative the rule *cessante statu primitivo, cessat atque derivativus* would ordinarily apply but "that cases of dower, of estates determined by executory devise and springing use, owe their existence to the circumstance, that these limitations are not governed by common law principles; and when the limitation over was allowed to be valid against the former donee, it was on the terms that the limitation over should not impeach the title of dower of the wife of that donee." 3 Preston's Abstr. 373.

The ground upon which Preston sustains the wife's right to dower is probably the more correct, for the ground upon which Moody *v.* King was decided would seem to be equally applicable to all base and determinable fees and would seem to be an unwarranted extension of the principle. Wash. Real Prop. *135. See DOWER, vol. 5, p. 892; 3 Prest. Abst. 372–374. And of this view was Gibson, C. J., in Evans *v.* Evans, 9 Pa. St. 190.

In Smith *v.* Spencer, 2 Jur. N. S. 778, Stuart, V. C., applied the principle of Moody *v.* King, to an equitable fee subject to an executory devise, and on appeal, the decision was affirmed by the Lord Chancellor. 6 D. M. & G. 631, although it should be observed that on the appeal, no question as to dower was expressly raised.

In *America* the weight of authority sustains the text. Hatfield *v.* Sneden, 54 N. Y. 280 *overruling* Weller *v.* Weller, 28 Barb. (N. Y.) 588, and Hatfield *v.* Sneden, 42 Barb. (N.Y.) 622. See Evans *v.* Evans, 9 Pa. St. 190; Thornton *v.* Krepps, 37 Pa. St. 391; Jones *v.* Hughes, 27 Gratt. (Va.) 560; Medley *v.* Medley, 27 Gratt. (Va.) 568; Taliaferro *v.* Barnwell, 4 Call (Va.) 321; Pollard *v.* Slaughter, 92 N. Car. 72; Wright *v.* Herron, 6 Rich. Eq. (S. Car.) 406; Milledge *v.* Lamar, 4 Desaus. (S. Car.) 617; Northcut *v.* Whipp. 12 B. Mon. (Ky.) 65; Daniel *v.* McManarna, 1 Bush (Ky.) 544.

In Edwards *v.* Bibb, 34 Ala. 475, dower was held to be defeated by the happening of the event upon which the gift over was to take effect. But this is said to be the only case to that effect in any court of last resort, here or in *England.* 1 Wash. Real Prop. (5th ed.) 276, note (1).

1. Sumner *v.* Partridge, 2 Atk. 47; Barker *v.* Barker, 2 Sim. 249; Adams *v.* Beekman, 1 Paige (N. Y.) 631. Jarman on Wills (5th ed.) *879. It is essential to the validity of a claim to curtesy or dower that the lands should

right to dower and curtesy exists whether the limitation be by way of use or devise, but not if the limitation be by a conveyance at common law.[1]

k. DEVOLUTION OF RENTS AND PROFITS WHERE THE EXECUTORY LIMITATION IS TO TAKE EFFECT IN FUTURO.—Where there is an executory devise of real estate, to commence *in futuro*, or where the freehold between the death of the testator or the determination of a preceding estate and the vesting of an executory devise is not disposed of, the freehold and inheritance descend to the heir at law;[2] if the limitation be by way of use, under similar circumstances, a resulting use arises for the benefit of the grantor or settlor.[3] The profits of personalty otherwise undisposed of accruing before the vesting of an executory interest, whether limited by will or by way of trust, or between the determination of the first limitation and the vesting of a subsequent one, will accumulate for the benefit of the person next to take

be such as the issue of the marriage could by possibility inherit. Litt. § 53.

See CURTESY, vol. 4, p. 958; DOWER, vol. 5, p. 884.

1. 1 Wash. Real Prop. 135; Sammes & Payne's Case, 1 Leo. 167; Hatfield *v.* Heron, 54 N. Y. 285; Evans *v.* Evans, 9 Pa. St. 190. "If, therefore, the estate of the wife be an estate of inheritance, determinable by a limitation which operates to defeat her estate at common law, the right of curtesy, it would seem, is gone. But if the limitation over be by way of springing use or executory devise which takes effect at her decease, thereby defeating or determining her original estate before its natural expiration, and substituting a new one in its place, which could not be done at common law, the seisin and estate which she had of the fee simple or tail will give the husband curtesy." 1 Wash. Real Prop. 135, par. 21 (5th ed.), approved by Johnson, C., in Hatfield *v.* Heron, 54 N. Y. 285. See further upon the subject, 1 Roper's Husband and Wife, 36–42; 1 Scribner's Dower (2nd ed.) 297, *et seq;* 1 Wash. Real Prop. 134, 135, 216–217.

2. Smith Ex. Int., § 739; Fearne's Cont. Rem. 536, 537. See Pay's Case, Cro. Eliz. 878; Duffield *v.* Duffield, 1 Dow. & Cl. 268; Clark *v.* Smith, 1 Lutw. 1798; Bullock *v.* Stones, 2 Ves. 521; Gore *v.* Gore, 2 P. W. 28; Hayward *v.* Stillingfleet, 1 Atk. 422; Hopkins *v.* Hopkins, Cas. temp. Talb. 44; Doe d. Pratt *v.* Tinins, 1 B. & Ald. 530; Chambers *v.* Wilson, 2 Watts (Pa.) 495; Morton *v.* Funk, 6 Pa. St. 483; Miller *v.* Chittenden, 4 Iowa 252.

"Thus where the testator devised lands to A for five years from Michaelmas then next, remainder to B in fee and died before Michaelmas, it was held that the freehold and fee simple descended to the heir-at-law till Michaelmas. So where A seised in fee, devises to B in fee, to commence six months after A's death, during those six months the estate descends and continues in the heir-at-law. And where a testator seised in fee devised to trustees for five hundred years, remainder to the first and other sons of B in tail (and B had no son born at the testator's death), remainder over in fee, it was held that the freehold descended to the heir-at-law till the birth of a son to B, or till his death without having had a son.' Fearne's Cont. Rem. 538–542; Pay's Case, Cro. Eliz. 878; Clarke *v.* Smith, 1 Lutw. 798; Gore *v.* Gore, 2 P. W. 28.

3. Wilson's Springing Uses 150; Woodliff *v.* Drury, Cro. Eliz. 489; Sir Edw. Cleve's Case, 6 Co. Rep. 17*b*.

But where there is no contingency in the limitation of the future use except as to the time of taking effect in possession, there seems to be ground for contending that so much only of the use as is undisposed of results to the grantor. See Wilson on Springing Uses 151; Weale *v.* Lower, Poll. 65; Penhay *v.* Hurrell, 2 Vern. 370; Wills *v.* Palmer, 5 B. & W. 2615; 2 Black Rep. 687; Rawley *v.* Holland, 2 Eq. Ca. Ab. 753; Holcroft's Case, Moore 487.

under the limitation.[1] If, however, the limitation be by will, and the will contain a residuary clause, the intermediate income of both real and personal estate, otherwise undisposed of, will pass thereunder.[2]

l. TRANSMISSIBILITY AND ASSIGNABILITY OF EXECUTORY INTERESTS.—At common law, an executory interest in real or personal property, whether vested or contingent, was only a possibility, and therefore not assignable *inter vivos*,[3] though as a pos-

1. Wilson's Springing Uses 156; Fearne's Cont. Rem. 546; Smith's Ex. Int., § 740; Chambers *v.* Braisford, 18 Ves. 368; 2 Mer. 25; Atkinson *v.* Turner, Barnardist Ch. Rep. 74; Studholme *v.* Hodgson, 3 P. W. 300; Glanvil *v.* Glanvil, 2 Mer. 38; Wyndham *v.* Wyndham, 3 Bro. Ch. 58; Shaw *v.* Cunliffe, 4 Bro. Ch. 144. See Blanchard *v.* Maynard, 103 Ill. 60.

"But where the intermediate income of personal estate is partially disposed of for the benefit of the person to whom the executory bequest is made, the rest of the intermediate income will fall into the residue; for it is a maxim that *expressum facit cessare tacitum.* Thus, where a testator gave a sum of money in trust for unborn children, and directed that until their shares should become payable, the interest should be applied in their maintenance, Lord Eldon, C., held that the interest before the birth of a child fell into the residue." Smith Ex. Int., § 740*a;* Harris *v.* Lloyd, T. R. 310.

The principle in the text requires particular attention, "when personal estate is made a provision for children, and it is intended, that, during the suspense of its vesting, the income of it should be applied for their maintenance. If the trustees are directed to stand possessed of the fund in trust for the children in equal shares, with the usual proviso, that if any one or more of them, being a son or sons, shall die under the age of twenty-one years, or, being a daughter or daughters, shall die under that age, without being or having been married, as well the original share or shares of the child or children so dying, as the share or shares which shall have survived or accrued to him, her, or them, shall accrue to the other or others of them—in that case the shares will become vested in the children as they severally come into existence, subject to the executory proviso's divesting it from them, on the event of their respective deceases within the time prescribed; and during this intermediate time they will be entitled to the income attending their respective shares of the fund; but if the trust be declared for the children, who, being a son or sons, shall attain the age of twenty-one years, or who, being a daughter or daughters, shall attain that age or marry, in that case the rights of the children to the provision intended for them will be contingent, as they will depend for their vesting on their attaining the age or time prescribed; and, therefore, according to the doctrine in the text, the children will not be entitled to the income, but it will belong to the person ultimately becoming entitled to the fund or to the portion of the fund from which it shall have proceeded. It is, therefore, necessary in the latter case to provide that, during the suspense of the vesting of the portions, the income of the presumptive portion of each child, or a competent part of it, shall be applied for his or her maintenance, and the residue accumulated for the benefit of the person ultimately becoming entitled to the capital." Fearne's Cont. Rem. 546, note (*c*), per Butler.

2. LEGACIES AND DEVISES, vol. 13, p. 45, 52.

This, of course, does not include intermediate income accruing upon residuary real estate prior to its vesting in possession where the residuary devise itself is contingent. LEGACIES AND DEVISES, vol. 13, p. 52.

3. 2 Prest. Abst. 119; Smith Ex. Int., § 754; Challis' Real Prop. 58, 142, 143; 2 Wash. Real Prop. *291, *367; 16 Vin. Abr. 462, tit. Possibility, B, pl. 5; Thomas *v.* Freeman, 2 Vern. 563.

Thus, if a term for years be bequeathed to A for life, and after his death to B for the residue of the term, B has only an executory interest during the life of A, and this interest, while executory, may be assigned in equity; is transmissible to the executors or administrators; may pass by will and assent to a legatee, or be re-leased, but

sibility coupled with an interest,[1] it was transmissible[2] and devisable,[3] unless contingent on account of the person,[4] or determinable by the death of the devisee or legatee;[5] and an executory interest in real estate might be bound by estoppel as by feoffment, fine, common recovery or indenture of lease, or released to the terre-tenant or owner having the seisin, though not to a stranger.[6] In equity, assignments for either good or valuable consideration will be sustained,[7] and in *England* and

it cannot be transferred at law. 2 Prest. Abst. *119; Manning's Case, 8 Rep. 95; Lampet's Case, 10 Rep. 48; Hall *v.* Chaffee, 14 N. H. 225.

1. "The word possibility has been obscured by its confused usage. But three kinds can be distinguished.

"1. **Possibilities Coupled with an Interest**; as contingent remainders and executory interests; which, so soon as the person in whom they will vest, if they do vest, is ascertained, are both descendible and devisable.

"2. **Bare Possibilities**; as the possibility of reverter on the breach of a condition, and the possibility of reverter upon a common-law fee other than a fee simple; these, at common law, are descendible but not devisable.

"3. **Absolutely Bare Possibilities**, or mere expectations of possible benefits, not founded upon the dispositions or provisions of any operative assurance. These, at common law, are neither descendible nor devisable; though the succession of children by representation in heirship often did, so far as the expectations of heirs are concerned, amount practically to the same thing. But, in strictness, they did not succeed to the expectation, but to the heirship upon which it is founded." Challis' Real Prop. 58.

2. Smith Ex. Int., §§ 747, 748; Challis' Real Prop. 142; Wilson's Springing Uses 169; Watk. Desc. 13; Fearne on Remainders 552. See Wood's Case, 1 Rep. 99*a;* Pinbury *v.* Elkin, 1 P. W. 563; King *v.* Withers, Cas. temp. Talb. 117; Gurnel *v.* Wood, 8 Vin., p. 112, ca. 38; Chauncy *v.* Graydon, 2 Atk. 616; Peck *v.* Parrot, 1 Ves. Sen. 236; Goodright *v.* Searle, 2 Wils. 29; Barnitz *v.* Casey, 7 Cranch (U. S.) 456; Den d. Manners *v.* Manners, 2 N. J. L. 142; Doe *v.* Hoffecker, 2 Harr. (Del.) 103; Hall *v.* Robinson, 3 Jones (N. Car.) 348; Lewis *v.* Smith, 1 Ired. (N. Car.) 145; Medley *v.* Medley, 81 Va. 265; Payne *v.* Rosser, 53 Ga. 662; Ackless *v.* Seekright, 1 Ill. 76.

3. Wilson's Springing Uses 156; Challis' Real Prop. 142. Roe *v.* Jones, 1 H. Bl. 30; Jones *v.* Roe, 3 T. R. 88. See Lord Mansfield's statement in Roe *v.* Griffiths, 1 Black. 605; Jackson *v.* Waldron, 13 Wend. (N. Y.) 178.

In *England* they are expressly made devisable by the Wills Act, 7 Will. IV & 1 Vict., ch. 26, § 3.

4. Smith Ex. Int., § 747; 4 Kent. Com. 261; Wood's Case, 1 Rep. 99*a;* Pinbury *v.* Elkin, 1 P. W. 563; King *v.* Withers, Cas. temp. Talb. 117; Goodright *v.* Searles, 2 Wils. 29; Peck *v.* Parrot, 1 Ves. Sr. 236; Chauncy *v.* Graydon, 2 Atk. 616; Gurnel *v.* Wood, 8 Vin., p. 112, cas. 38; Stover *v.* Eyleshimer, 46 Barb. (N. Y.) 87.

"Of course, if there never happens to be a person answering the given description, whether he is directly or indirectly required to be living at a certain time, or whatever else the qualification directly or indirectly may be, the executory interest never attaches in any one, and therefore it can never be transmitted, but fails altogether." Smith Ex. Int. 748; Moorhouse *v.* Wainhouse, 1 Black. Rep. 638.

5. Challis' Real Prop. 142.

6. 2 Prest. Abst. 284; Smith Ex. Int., §§ 751, 754; Fearne on Remainders 551; Pells *v.* Brown, Cro. Jac. 590; Thomas *v.* Freeman, 2 Vern. 562. Lord Hardwicke in Wright *v.* Wright, 1 Ves. Sr. 409, 411. *Compare* Wilson's Springing Uses, 161; 4 Jarm. Conv. 124; Wilson *v.* Wilson, 32 Barb. (N. Y.) 328; Edwards *v.* Variek, 5 Den. (N. Y.) 564; Stowe *v.* Wyse, 7 Conn. 214.

So as to contingent remainders. Doe d. Christmas *v.* Oliver, 10 B. & C. 101.

7. Smith Ex. Int., § 549; Fearne's Cont. Rem. 549; Wilson's Uses 156, 169; Challis' Real Prop. 143; Purefoy *v.* Rogers, 2 Wms. Saunds. 388*k;* Wright *v.* Wright, 1 Ves. Sr. 409; Cofts *v.* Middleton, 8 D. M. & G. 192; Hobson

many of the *United States*, statutes now exist under which all contingent and executory interests may be transferred by deed.[1]

v. Trevor, 2 P. W. 191; Helps *v.* Hereford, 2 B. & Ald. 242; Edwards *v.* Variek, 5 Den. (N. Y.) 682.

Except as against *bona fide* creditors, assignment of executory interests will be sustained in equity, although only supported by a good, as distinguished from a valuable consideration. Smith Ex. Int., § 749. Thus where one having a contingent executory devise in fee, conveyed all his "right, title, claim, and demand," to his younger son without other consideration than that arising from a desire to provide for him, Lord Hardwicke sustained the transfer as against the heir. Wright *v.* Wright, 1 Ves. Sr. 409. See Bayley *v.* Com., 40 Pa. St. 37.

When it is said that executory interests are assignable in equity, what is meant is, that an assignment of them is treated by a court of equity as a contract or agreement of which it will decree specific performance. Smith Ex. Int., § 751; Fearne's Cont. Rem., § 551; Bayley *v.* Com., 40 Pa. St. 37.

Assignments Before the Person to Take Is Ascertained.—The weight of authority sustains the position that if the person who is to take is not ascertained, the interest is neither assignable nor devisable. 2 Wash. Real Prop. *368; 2 Prest. Conv. 269, 270; 6 Cruise Dig. 27 note; Smith's Real Prop. 248. See Pope *v.* Whitcombe, 3 Russ. 124; Doe *v.* Tomkinson, 2 Man. & S. 165; Bristol *v.* Atwater, 50 Conn. 402. Proprietors Brattle Sq. Church *v.* Grant, 3 Gray (Mass.) 161.

But in Higden *v.* Williamson, 3 P. W. 132, such an assignment was sustained by Lord Keeper King, and Smith and Tiedeman are of opinion that this view is to be preferred. Smith Ex. Int., § 750; Tiedeman's Real Prop. § 530, note.

This view also receives some countenance from the case of Buckley *v.* Newland, 2 P. W. 182, in which the court enforced an agreement between two husbands, that all legacies which should be given to either of them by the will of T whose presumptive coheirs they had married, should be divided between them, their respective executors and administrators: and from Hobson *v.* Trevor, 2 P. W. 191, in which an agreement by A on the marriage of his daughter, to settle one third part of all such real estate as should descend to him on the death of his father, was carried into execution. See also Helps *v.* Hereford, 2 B. & Ald. 242; 1 Prest. Est. 75; 2 Prest. Abst. 95; Harris *v.* McElroy, 45 Pa. St. 220; Grayson *v.* Tyler, 80 Ky. 358; Robertson *v.* Erlson, 38 N. H. 48; Wilcox *v.* Daniel (R. I.), 2 N. E. Rep. 501; Stover *v.* Eycleshimer, 46 Barb. (N. Y.) 84; Putnam *v.* Story, 132 Mass. 211. *Compare* Jackson *v.* Waldron, 13 Wend. (N. Y.) 178; Loring *v.* Arnold, 15 R. I. 428; Taylor *v.* Stewart, 18 Atl. Rep. 456; Dana *v.* Murray, 26 N. E. Rep. 25; Watson *v.* Watson, 3 Jones Eq. (N. Car.) 400; Young *v.* Young, 97 N. Car. 132.

1. Stat. 8 & 9 Vict. ch. 106, § 6.

In *New York*, *Michigan*, *Wisconsin* and *Minnesota* expectant interests of every kind are descendible, devisable and alienable in the same manner as estates in possession. *New York* Rev. Stat. pt. 2, ch. 1, tit. 2, § 35; *Michigan* Ann. Stat., § 5551; *Wisconsin* Rev. Stat. 1878, § 2059; *Minnesota* Gen. Stat. 1878, ch. 45 § 35.

In *Maine* and *Massachusetts* when any contingent remainder, executory devise or other estate in expectancy, is so granted or limited to any person that in case of his death before the happening of the contingency, the estate would descend to his heirs in fee simple, such person may, before the happening of the contingency, sell, assign or devise the premises subject to the contingency. *Maine* Rev. Stat. 1883, ch. 73, § 3; *Massachusetts* Pub. Stat. 1882, ch. 126, § 2.

For analogous legislation see *New Jersey* Rev. Stat. 187, tit. Conveyances 82; *Louisiana* Rev. Code, 1875, § 2454; *California* Civ. Code, § 6045; *Dakota* Civ. Code, § 602; *Kentucky* Gen. Stat., ch. 63, art. 1, § 6; *Idaho* Rev. Stat. 1887, § 2834.

As to construction of *New Jersey* Statute see Taylor *v.* Stewart, 14 Atl. Rep. 456.

As to *Kentucky* Statute see White *v.* White, 7 S. W. Rep. 26.

A devise to one in fee, if he survives his wife, or has a child that lives to the age of twenty-one, but failing these contingencies, then over to another, gives the remainder-man an expectant estate within 1 *New York* Rev. Stat.

REMAND.—(See also REMOVAL OF CAUSES).—1. When, after a partial hearing before a magistrate, an accused person is recommitted to jail to await further proceedings in his case the magistrate is said to remand him. The order of recommitment is also called a remand.

2. When a cause has been removed from one court to another, as from a State court to the circuit court of the *United States*, and is found by the latter to be improperly before it, the order sending it back to the court from which it had been removed is called a remand.

REMARKABLE.—See MOST REMARKABLE PLACES, vol. 15, p. 886.

REMATE.—See note 1.

REMEDY, in a large sense, is the means employed to enforce a right or redress an injury.[2] In a narrower and more technical

pt. 2, ch. 1, tit. 2, § 8, defining it to be one "where the right to possession is postponed to a future period," which, by section 35 of the same chapter, he may alienate by deed or otherwise. Griffin *v.* Shepard, 26 N. E. Rep. 339; *affirming* 40 Hun (N. Y.) 355. See Pond *v.* Zeigle, 10 Paige (N. Y.) 140.

1. **Remate Judgment.**—According to the law of *Spain* a person in whose favor documents of a certain class have been executed an commence "executive" proceedings in which the defendant can only plead defenses not disputing the original right of action, and the plaintiff, if successful, obtains a "*remate*" judgment, which is an order for execution to issue for a sum of money and costs. A "*remate*" judgment does not preclude either party from taking "plenary" or "ordinary" proceedings as to the same subject-matter, and in such ordinary proceedings all defenses are open, and neither party can set up the "*remate*" judgment as a *res judicata*, *In re* Henderson, 35 Ch. Div. 704, or even as giving him a *prima facie* case, and the rights of the parties are not affected by it. The plaintiff can, however, on giving security, enforce the "*remate*" judgment, though plenary proceedings are pending. So it has been held, that a "*remate*" judgment, as it does not, according to the law of *Spain*, decide the rights of parties, is not a final and conclusive judgment which could be sued upon in *England*, and does not enable the plaintiff to maintain a suit there for administration of the estate of the defendant in the executive proceedings, who has since died. *In re* Henderson, L. R. 37 Ch. Div. 244.

2. *In re* Cooper, 22 N. Y. 67; *quoting* Bouv. L. Dict.

"Remedy" has been Held to Include the Power and Duty of the Legislature to Provide Means to Pay, and to Pay State Debts.—By an amendment to the Constitution of April 15, 1858, the people of Minnesota provided for a loan to certain railroad companies of bonds of the State to be denominated "Minnesota State Railroad Bonds" to the amount of $5,000,000. The faith and credit of the State were, in express terms, pledged for the payment of the interest, and the redemption of the principal thereof. In 1860, after default of the railroad companies to perform the conditions imposed upon them by the amendment of 1858, the people of the State adopted two amendments to the Constitution, one of them expunging from the Constitution the former amendment of 1858, and the other providing that no law "levying a tax or making other provisions for the payment of interest, or principal of the bonds, denominated 'Minnesota State Railroad Bonds,' shall take effect or be enforced, until such law shall have been submitted to the vote of the people of the State, and adopted by a majority of the electors." In 1881 the legislature passed an act, the general purpose of which was to adjust with the consent of the holders, the outstanding bonds, by taking them up, and issuing in lieu of them, new bonds of the State for 50%

of the amount, which appeared by their terms to be due upon them. Section 4 of this act proposed the issue of the new bonds without submission to a vote of the people, it being left to the judges of the supreme court, or, in case they should refuse to act, to a certain number of judges of the district courts, to determine whether the legislature had power, without submitting it to the people, to make the contemplated adjustment; and, if the judges should determine that the legislature had not such power, section 5 of the act provided that it should be submitted to a vote of the people, the bonds to be issued only on their approval. The judges of the supreme court declined to act, and the governor appointed certain judges of the district court to act in their stead. The attorney-general on behalf of the State applied to the supreme court for a writ of prohibition to restrain the district judges from proceeding in the matter, basing the application upon the ground that the act of 1881 was unconstitutional. First, because it was contrary to the amendment of 1860 to the effect that no law levying a tax, or making other provisions for the payment of the bonds, should take effect till approved by a vote of the electors of the State; and second, because it was an attempt to delegate to the judges legislative power. In answer to the first of these positions the respondents urged that the amendment of 1860 referred to was itself void, because repugnant to the Constitution of the United States as impairing the obligations of contracts. It was held that the respondent's position was well taken, and that the amendment of 1860 was void. The court, by Gilpman, C. J., said: "The objection made to the amendment of 1860 is that it impairs the obligation of these contracts; and it is claimed that the power and duty of the legislature to provide by levy of taxes, or by the appropriation of other funds, vested in and imposed on the legislature when the bonds were issued, was the remedy upon them, and the amendment impairs their obligation by destroying the remedy; that the exercise of such power and duty by the legislature having been contemplated by the parties—the State on one side and those who received the bonds on the other—as the means, and only means, through which they could and would be paid, and as the bonds were received with the understanding that such means should be employed, it became a part of the contracts—as much as though expressly stipulated therein—that the legislature should have and exercise that power; and that the amendment annuls that condition of the contracts, and so impairs their obligation. The consideration of these propositions involves, as preliminary to them, these questions: Can the power and duty of appropriation, and levy of taxes to provide the funds needed for appropriation, be regarded in law as a remedy upon State obligations? And can the State irrevocably bind itself by contract to employ its sovereign power of taxation?

It has been insisted on the part of the relator that the only legal remedy there can be to enforce a contract is the judicial remedy; that is the enforcement of it through proceedings in a court of justice. That is the usual remedy, and the exceptions are so rare that, in speaking of the remedy the judicial remedy is usually intended. But there may be other remedies than judicial ones. One of the remedies by act of the party aggrieved, enumerated by Blackstone, book 2, ch. 1, is that of distress for rent, which existed at the common law and was regulated by statute, by which the landlord might seize and sell the tenant's property to enforce the payment of the rent. Another non-judicial remedy is the right of a pledgee to sell the property pledged for payment of the debt for which it is pledged. Another is the power of sale contained in mortgages or trust deeds, where they are permitted by the law of the State. This power of sale is not the principal contract. The principal contract in such case is the agreement creating the debt and the security. The power of sale is given only to enforce the debt against the property constituting the security. And, in general, we may say that any means in the hands of the party aggrieved, or any other person, though not a court, for enforcing performance of a contract,—any mode of enforcing it agreed on by the parties, if recognized and permitted by the law,—*is a* legal remedy; and where the *power of* administering a remedy is lodged by law with any person or body, especially if the duty to administer it is also imposed, that constitutes a legal remedy. This would include the legislative power and duty to provide means to pay and to pay State or municipal debts."

It was also argued, that to denominate the power and duty, vested in and

sense, a remedy is a "judicial means of enforcing a right or redressing a wrong."[1]

imposed on the legislature to provide for payment of a State debt, a remedy, was inconsistent with the proper definition of a remedy, "which implies compulsion on the defaulting party; that there can be no such thing as compulsion by a party upon himself," but the court held that though this argument was sound when applied to an individual, it was not so when applied to the case of a complex body, like a State. As it is admitted that there are cases where there is a complete, direct judicial remedy against the State, and as the judiciary is but one branch of the State government, if judicial action in favor of a creditor is a remedy, because it is compulsive, legislative action for the same purpose, is also, for the same reason, a remedy. The court also said of a judicial remedy: "Thus far we have assumed a judicial remedy upon a contract to imply only a direct judicial proceeding against the party to compel him to perform its stipulations. But the term in its larger sense comprehends something more than this. It compromises also judicial protection against invasion by others of the right vested by the contract." The act of 1881 was held unconstitutional, however, on the second ground mentioned, *i. e.*, as an attempt to delegate to the judges legislative power. State *v.* Young, 29 Minn. 474. See also CONSTITUTIONAL LAW, vol. 3, p. 74, *et seq.*

1. Stratton *v.* European, etc., R. Co., 74 Me. 428; Abb. L. Dict.

"The remedy for every species of wrong is," says Judge Blackstone, "the being put in possession of that right whereof the party injured is deprived. The instruments whereby this remedy is obtained are a diversity of suits and actions." Cohens *v.* Virginia, 6 Wheat. (U. S.) 407.

Application for Admission to the Bar.—By section 1 of the *New York* Code, remedies in courts of justice were divided into actions and special proceedings. *In re* Cooper, 22 N. Y. 67, which was an appeal from an order of the supreme court denying the application of the appellant for admission to the bar, the court by Selden, J., said: "What then is a remedy? The only judicial exposition of the subject appears to be that contained in a remark of Johnson, J., in Belknap *v.* Waters, 11 N. Y. 477. He says: 'The code unfortunately has not furnished us a definition of a remedy, except in so far as one can be drawn from its distribution of all remedies into actions and special proceedings. It seems to regard every original application to a court of justice for a judgment or an order, as a remedy.' According to this interpretation, which I deem just, the application of the appellant to the supreme court was clearly a remedy."

An Obligation to Guaranty a Right or Indemnify Against a Wrong, is not a "Remedy."—In U. S. *v.* Lyman, 1 Mason (U. S.) 482, an action of debt was brought by the *United States* against the defendant for duty due upon goods imported. It was contended by the defendant that the action of debt at common law would not lie in this case as there was a specific remedy for the government provided by statute. The court by Story, J., said: "The argument of the defendant's counsel is that by the revenue act of 1799, ch. 128, the duties were required to be paid, or secured by bond to be paid, before they were permitted to be unladen; and that this security by bond constitutes the exclusive remedy for the government for the recovery of the duties. I cannot yield the slightest assent to this argument. In the first place, the bond, if given, is not strictly and accurately speaking, a statute remedy, but a statute security for the debt. A remedy, as understood in legal phraseology, is a mode prescribed by law to enforce a duty or redress a wrong, and not an obligation to guaranty a right, or to indemnify against a wrong. The remedy for the duties when a bond is given and remains unpaid, is not, technically speaking, the bond itself, but a suit to enforce the payment of the bond. The technical rule, therefore, that where a statute remedy is given, it excludes the common-law remedy by action of debt, does not apply, for the statute prescribed no such remedy." See also State *v.* Poulterer, 16 Cal. 528.

See *infra* this note, *Specific and Cumulative Remedies.*

A Mechanics' Lien is not a "Remedy." "A mechanics' lien is a statutory security to which the term 'remedy' would be as misapplied as it would be in re-

REMEMBRANCE.—See note 1.

REMISE.—See RELEASE.

REMISSNESS.—See note 2.

spect to a mortgage." Atkins *v.* Little, 17 Minn. 342.

Adequate Remedy.—In U. S. *v.* New Orleans, 17 Fed. Rep. 491, the words "adequate remedy" (as used in the Constitution of *Louisiana*, art. II, providing that "all courts shall be open, and every person for injury done him in his rights, lands, goods, person, or reputation, shall have adequate remedy by due process of law") were held to mean "complete satisfaction of the judgment without restriction."

A Right Distinguished from a Remedy.—In view of the provision of the *United States* Constitution which forbids the States passing any laws impairing the obligations of contracts, it becomes important to distinguish between a right which must not be impaired, and a remedy which may be modified.

In Johnson *v.* Fletcher, 54 Miss. 631, 28 Am. Rep. 388, the court by Chalmers, J., thus distinguishes them: "The word 'remedy' pertains more properly to those modes of procedure and pleading which lead up to and end in the judgment. As the Supreme Court of *Louisiana* said: 'Statutes pertaining to the remedy are merely such as relate to the course and form of proceedings, but do not affect the substance of a judgment when pronounced.' Morton *v.* Valentine, 15 La. Ann. 153. The means provided after judgment for making it effective are also parts of the remedy, and may be modified at pleasure; but the withdrawal of property from the operation of the judgment, the denial of all remedy for its enforcement, either as to the whole or a portion of the debtor's property, strikes directly at the right, and impairs the obligation of the contract. The issuance of execution and a sale under it are parts of the remedy. Suppose that these be preserved, but that the law provides that no property shall pass under them, or, in other words, that all property shall be exempt, such a law would be valid as to debts thereafter contracted, and invalid as to those already incurred. Must not the result be the same when a portion only of the property is withdrawn from liability to the judgment? It is difficult to see how a law which exonerates from liability can be said to relate to the remedy alone. The remedies are those modes of procedure by which the liability of property to satisfaction of the debt is enforced. An exemption, whether great or small, is an exoneration of property from all liability. It strikes at the right by denying a remedy." See also CONSTITUTIONAL LAW, vol. 3, p. 74, *et seq.*

Specific and Cumulative Remedies.—The former are those which can alone be applied to restore a right or punish a crime, *e. g.*, where a statute makes unlawful what was lawful before, and gives a particular remedy, that is specific and must be pursued, and no other. Bouv. L. Dict.; Wetmore *v.* Tracy, 14 Wend. (N. Y.) 250; 28 Am. Dec. 525; App *v.* Dreisbach, 2 Rawle (Pa.) 287; 21 Am. Dec. 447; Lang *v.* Scott, 1 Blackf. (Ind.) 405; 12 Am. Dec. 257.

Remedies are cumulative when more than one can be applied to restore the same right, or punish the same crime *e. g.*, where there is a pre-existing right, and the statute gives a new remedy, or inflicts a new penalty,—the remedies or penalties are cumulative. Lang *v.* Scott, 1 Blackf. (Ind.) 405; 12 Am. Dec. 257; Methodist Church *v.* Remington, 1 Watts (Pa.) 218; 26 Am. Dec. 61. See also PENALTIES, vol. 18, p. 271.

1. A testator appointed his "friend" P as executor, and gave him a legacy "as a rememberance." It was held that the words "as a remembrance" imported that the legacy was given to P in his character as the testator's friend, and not in his character as executor; and, that he was entitled to the legacy notwithstanding the fact that he had never acted as executor. Bubb *v.* Yelverton, L. R., 13 Eq. 131; 1 Moak's Eng. Rep. 619.

2. "Remissness," in sending or delivering a message, implies that it was actually sent or delivered, but in a tardy, negligent, and careless manner. Baldwin *v.* U. S. Tel. Co., 6 Abb. Pr. N. S. (N. Y.) 423, *reversed* in 45 N. Y. 744; 6 Am. Rep. 165. And accordingly it was held in that case that the failure to deliver a message by a telegraph company did not fall within the clause of a contract exempting the com-

REMITTER.—The law of remitter is a very curious and entertaining branch of learning, but it probably has now no practical importance. Remitter might be defined as the opposite of discontinuance, being an act or operation of law whereby a right of entry or a right of action might be turned to an actual estate without the necessity for making an entry or bringing an action, in fact. This occurred whenever the actual seisin, existing under a tortious title, accrued to a person having also in himself a rightful title in the shape of a right of entry or a right of action, such a person not being implicated in the tort under which the tortious seisin has arisen, or otherwise estopped from asserting and maintaining his rightful title, and not having assented to the vesting of the tortious seisin in himself. Remitter gave to the person who was said to be remitted his rightful estate, or rather, the estate under his rightful title, to the same extent as he might have gained it by making an entry or bringing a real action, as the case might require.[1]

REMITTITUR—(See also DAMAGES, vol. 5, p. 62; JUSTICE OF THE PEACE, vol. 12, p. 428; NEW TRIAL, vol. 16, p. 593).—1. Relinquishment of a part of the damages found by a jury.

2. (See also ERROR, WRIT OF, vol. 6, p. 835; RECORDS).—Returning a record from the court of review to the lower court for proceedings as specified, as, for execution, or a new trial.[2]

REMOTE DAMAGE—(See also DAMAGES, vol. 5, p. 5; PROXIMATE AND REMOTE CAUSE).—The term remote damage is a relative one and signifies damage that is remote from the alleged cause; it is the effect of a remote cause, and one can never recover for remote damages since it is the result of a cause "too minute for the law's notice."[3]

pany from liability for "delay, error, or remissness."

1. Challis' Real Prop., p. 69.

Thus, where one is in possession by a wrongful title, as by a disseisin, and the true property in the freehold of the lands is cast upon him by act of the law, as by descent, or at least is acquired without his immediate participation, he is remitted to his true and better title. For being himself in possession of the freehold, whatever better title exists must be asserted against him, which cannot be done by action, for he is himself the owner of that better title, and he cannot sue himself. The law, therefore, by its own act remits him to his superior title and holds him to be in possession in pursuance, not of his wrongful title, but of that better and surer estate. 4 Minor's Inst. 155.

2. And. L. Dict.

3. In Sweet's Law Dict. the following definition of Remote Damages is found: Damage is said to be too remote to be actionable when it is not the legal and natural consequence of the act complained of: thus, if a master discharge his servant on account of slanderous words spoken of him, the damage caused by the dismissal is too remote to entitle the servant to damages in respect of it against the person guilty of the slander, because it is not the legal and natural consequence of the slander. Vicars *v.* Willcock, 8 East 1; Smith's Lead. Cas. II, 534. So damage caused by failure to transmit a telegraphic message is too remote. Sanders *v.* Stuart, 1 C. P. D. 326; 17 Moak's Eng. Rep. 286. In that case, defendant, who business it was to collect and transmit telegraphic messages, was entrusted by the plaintiffs with a message in cipher, unintelligible to him, for transmission to America, which he negligently omitted to send.

REMOVAL OF CAUSES—(See also CERTIORARI, vol. 3, p. 60; CHANGE OF VENUE, vol. 3, p. 90).

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I. **DEFINITION.**—By the removal of a cause is meant its transfer from the court in which it was commenced into another court in such manner that it thereafter proceeds in the latter court as if originally commenced there.[1]

II. **REMOVAL FROM STATE TO FEDERAL COURTS—1. Comparison of the Principal Removal Acts**—*a.* ACT OF SEPTEMBER 24, 1789.—This act, commonly called the Judiciary Act, which established the Federal courts and defined their jurisdiction, provided for the removal of causes from State to Federal courts in certain cases. Under the 12th section, a suit commenced in a State court against an alien, or by a citizen of the State in which the suit was brought against a citizen of another State, in which the matter in dispute exceeded the sum or value of $500, exclusive of costs, to be made to appear to the satisfaction of the court, might be removed for trial into the next circuit court of the United States to be held in the district where the suit was pending, by the defendant; and a suit concerning the title to land, the parties to which were citizens of the same State, might be removed into the next circuit court of the United States to be held in the district by a party claiming title under a grant from a State other than that in which the suit was pending, if it appeared that the adverse

1. The jurisdiction of the court to which an action is removed is not appellate, but is rather a substituted jurisdiction. Bushnell *v.* Kennedy, 9 Wall. (U. S.) 387; Dennistoun *v.* Draper, 5 Blatchf. (U. S.) 336; the action being simply carried on there from the point which had been reached

party claimed title under a grant from the State in which the suit was pending.[1] Under this act a suit in which there were several plaintiffs or defendants could not be removed unless all the necessary defendants were aliens, or unless all the necessary plaintiffs were citizens of the State where the suit was brought and all the necessary defendants were citizens of some other State or States; and all the defendants, except those who were merely nominal parties, were required to join in the petition for removal.[2]

in the court of original jurisdiction at the time of removal. Duncan *v.* Gegan, 101 U. S. 810.

1. The 12th section of the Judiciary Act was constitutional. Mayor etc. of Nashville *v.* Cooper, 6 Wall. (U. S.) 247; Chicago etc. R. Co. *v.* Whitton, 13 Wall. (U. S.) 270; Home L. Ins. Co. *v.* Dunn, 19 Wall. (U. S.) 214 Gaines *v.* Fuentes, 92 U. S. 10; Baltimore etc. R. Co. *v.* Cary, 28 Ohio St. 208; *contra*, Moseley *v.* Chamberlain, 18 Wis. 700. And authorized the removal of a suit into the circuit court which could not have been originally commenced there for the reason that the defendant could not be found in the district to be served with process. Sayles *v.* Northwestern Ins. Co., 2 Curt. (U. S.) 212; Bliven *v.* New England Screw Co., 3 Blatchf. (U. S.) 111; Barney *v.* Globe Bank, 5 Blatchf. (U. S.) 107; Wimans *v.* McKean R. etc. Co., 6 Blatchf. (U. S.) 215.

The restriction upon the jurisdiction of the circuit courts, contained in the 11th section of the Judiciary Act, relating to suits brought in favor of an assignee, to recover the contents of a promissory note or other chose in action did not apply to cases removed from State courts under the 12th section of that act, or under the acts of 1866 and 1867; nor does the similar restriction in the 1st section of the act of 1875 apply to cases removed from State courts under the 2nd section. Green *v.* Custard, 23 How. (U. S.) 484; Bushnell *v.* Kennedy, 9 Wall. (U. S.) 387; Lexington *v.* Butler, 14 Wall. (U. S.) 282; Claflin *v.* Commonwealth Ins. Co., 110 U. S. 81; Delaware Co. *v.* Diebold Safe etc. Co., 133 U. S. 473; Barclay *v.* Levee Com'rs, 1 Woods (U. S.) 254; Waterbury *v.* Laredo, 3 Woods (U. S.) 371; Rosenblatt *v.* Reliance Lumber Co., 18 Fed. Rep. 705; Bell *v.* Noonan, 19 Fed. Rep. 225; Neale *v.* Foster, 31 Fed. Rep. 53; Leutze *v.* Butterfield, 7 Daly (N. Y.) 24. *Contra*, Berger *v.* Douglass Co., 2 McCrary (U. S.) 483; Hardin *v.* Olson, 14 Fed. Rep. 705; Ferry *v.* Merrimack, 18 Fed. Rep. 657; Ferry *v.* Westfield, 19 Fed. Rep. 155; Ayers *v.* Western R. Co., 48 Barb. (N. Y.) 132; Colcord *v.* Wall, 2 Miles (Pa.) 459.

A party claiming title to land under a grant from the State in which the suit is brought cannot remove the suit because the other party claims under a grant from another State. Shepherd *v.* Young, 1 T. B. Mon. (Ky.) 203.

A suit in which the defendant claimed title to land under a grant from New Hampshire, made at a time when it included what afterwards became the State of Vermont, and the plaintiff claimed under a grant from Vermont made since Vermont became a State, was held to be removable in Pawlet *v.* Clark, 9 Cranch (U. S.) 292.

2. Grover etc. Sewing Machine Co. *v.* Florence Sewing Machine Co., 18 Wall. (U. S.) 553; 110 Mass. 70; Smith *v.* Rines, 2 Sumn. (U. S.) 338; Ward *v.* Arredondo, Paine (U. S.) 410; Hubbard *v.* Northern R. Co., 3 Blatchf. (U. S.) 84; 25 Vt. 715; Beardsley *v.* Torrey, 4 Wash. (U. S.) 286; *Ex parte* Turner, 3 Wall. Jr. (C. C.) 258; *Ex parte* Girard, 3 Wall. Jr. (C. C.) 263; Girardey *v.* Moore, 3 Woods (U. S.) 397; Wilson *v.* Blodget, 4 McLean (U. S.) 363; Field *v.* Lownsdale, Deady (U. S.) 288; Calderwood *v.* Hager, 20 Cal. 167; Bryan *v.* Ponder, 23 Ga. 480; Goodrich *v.* Hunton, 29 La. Ann. 372; North River Steamboat Co. *v.* Hoffman, 5 Johns. Ch. (N. Y.) 300; Shelby *v.* Hoffman, 7 Ohio St. 450; Hazard *v.* Durant, 9 R. I. 602.

But if one of two non-resident defendants is not served with process, the other may remove the suit alone. Fullis *v.* McArthur, 1 Bond (U. S.) 100; Vandevoort *v.* Palmer, 4 Duer (N. Y.) 677.

b. ACT OF JULY 27, 1866.—This act provided that when a suit was brought in a State court against an alien and a citizen of the State where the suit was brought, or by a citizen of the State where the suit was brought against a citizen of that State and a citizen of another State, the matter in dispute exceeding the sum or value of $500, exclusive of costs, such alien or citizen of another State might remove the suit as against him into the next circuit court of the United States to be held in the district where the suit was pending, if the suit was instituted for the purpose of restraining or enjoining him, or if it was such a suit that there might be a final determination of the controversy, so far as it concerned him, without the presence of the other defendants as parties. Such removal, however, was not to prejudice the right of the planitiff to proceed at the same time with the suit in the State court as against the other defendants. This act applied only to cases where one of the defendants was a citizen of the State where the suit was brought,[1] and only to cases where the controversy between the plaintiff and the non resident defendants could be determined without the presence of the resident defendants.[2] Only the separate controversy which concerned the petitioning defendant could be removed,[3] and all the non-resident defendants interested in that controversy must join in the petition for removal.[4]

c. ACT OF MARCH 2, 1867.—This act provided that a suit brought in a State court in which there was a controversy between a citizen of the State in which the suit was brought and a citizen of another State, the matter in dispute exceeding the sum or value of $500, exclusive of costs, might be removed by such citizen of another State, whether plaintiff or defendant, if, before or at the time of filing his petition for removal, he would make and file in the State court an affidavit stating that he had reason to believe, and did believe, that from prejudice or local influence he would not be able to obtain justice in such State court.[5] This act, which grew out of the condition of

1. Davis *v.* Cook, 9 Nev. 134.

2. Gardner *v.* Brown, 21 Wall. (U. S.) 36; Bixby *v.* Couse, 8 Blatchf. (U. S.) 73; Allen *v.* Ryerson, 2 Dill. (U. S.) 501; McGinnity *v.* White, 3 Dill. (U. S.) 350; Field *v.* Lownsdale, Deady (U. S.) 288; Fields *v.* Lamb, Deady (U. S.) 430; Cape Girardeau etc. R. Co. *v.* Winston, 4 Cent. L. J. 127; *Ex parte* Andrews, 40 Ala. 639; Stewart *v.* Mordecai, 40 Ga. 1; 2 Am. Rep. 555; Peters *v.* Peters, 41 Ga. 242; Darst *v.* Bates, 51 Ill. 439; Weeks *v.* Billings, 55 N. H. 371; Merwin *v.* Wexel, 49 How. Pr. (N. Y.) 115.

3. Brooks *v.* Clark, 119 U. S. 502. *Contra*, Burch *v.* Davenport etc. R. Co., 46 Iowa 449; 26 Am. Rep. 150.

4. George *v.* Pilcher, 28 Gratt. (Va.) 199.

In Dart *v.* Walker, 4 Daly (N. Y.) 188, it was held that a joint application for removal by two defendants, only one of whom brings himself within the terms of the act of July 27, 1866, might be granted as to that one and refused as to the other.

5. The act of March 2, 1867, was constitutional. Chicago etc. R. Co. *v.* Whitton, 13 Wall. (U. S.) 271; Home L. Ins. Co. *v.* Dunn, 19 Wall. (U. S.) 214; Gaines *v.* Fuentes, 92 U. S. 10; Johnson *v.* Monell, Woolw. (U. S.) 390; Galpin *v.* Critchlow, 112 Mass. 339; 17 Am. Rep. 176; Meadow Valley Min. Co. *v.* Dodds, 7 Nev. 143.

affairs prevailing in the South after the close of the Civil War,[1] did not repeal either of the earlier statutes, but simply added a new class of removable cases.[2] Like the act of 1789, and unlike that of 1866, it contemplated the removal of the entire suit,[3] and for the first time the right of removal was given to the plaintiff.[4] No suit could be removed under its provisions unless all the parties on the side seeking removal joined in the petition and were citizens of some State or States other than that in which the suit was brought, and all the adverse parties were citizens of that state, excepting in both cases, merely nominal parties.[5]

d. ACT OF MARCH 3, 1875.—This act was practically an extension of the right of removal, in favor of either party, to all cases of which the circuit courts of the United States and the State courts had concurrent jurisdiction. The first clause of the 2nd section provided that any suit of a civil nature, at law or in equity, brought in any State court, the matter in dispute exceeding the sum or value of $500, which arose under the Constitution or laws of the United States, or treaties made under their authority,[6] or in which the United States should be plaintiff or petitioner, or in which there was a controversy between citizens of different States, or a controversy between citizens of the same State claiming land under grants of different States, or a controversy between citizens of a State and foreign States, citizens, or subjects, might be removed by either party into the circuit court of the United States for the proper district.[7] And the second

1. Gaines *v.* Fuentes, 92 U. S. 10.

2. Fields *v.* Lamb, Deady (U. S.) 430; Butterfield *v.* Home Ins. Co., 14 Minn. 410; Washington etc. R. Co. *v.* Alexandria etc. R. Co., 19 Gratt. (Va.) 592; 100 Am. Dec. 710.

3. Waggener *v.* Cheek, 2 Dill. (U. S.) 560.

4. Sands *v.* Smith, 1 Dill. (U. S.) 290.

5. Grover etc. Sewing Machine Co. *v.* Florence Sewing Machine Co., 18 Wall. (U. S.) 553; 110 Mass. 70; Vannevar *v.* Bryant, 21 Wall. (U. S.) 41; Hurst *v.* Western etc. R. Co., 93 U. S. 71; American Bible Soc. *v.* Grove, 101 U. S. 610; Myers *v.* Swann, 107 U. S. 546; American Bible Soc. *v.* Price, 110 U. S 61; Jefferson *v.* Driver, 117 U. S. 272; Cambria Iron Co. *v.* Ashburn, 118 U. S 54; Hancock *v.* Holbrook, 119 U. S. 586; Young *v.* Parker, 132 U. S. 267; Bixby *v.* Couse, 8 Blatchf. (U. S.) 73; Case *v.* Douglas, 1 Dill. (U. S.) 299; Fisk *v.* Henarie, 32 Fed. Rep. 417; Whelan *v.* New York etc. R. Co., 35 Fed. Rep. 849; Thouron *v.* East Tenn. etc. R. Co., 38 Fed. Rep. 673; *Ex parte* Andrews, 40 Ala. 639; Bliss *v.* Rawson, 43 Ga. 181; 9 Am. Rep. 164; Burch *v.* Davenport etc. R. Co., 46 Iowa 449; 26 Am. Rep. 150; Cooke *v.* State Nat. Bank, 52 N. Y. 96; 11 Am. Rep. 667; Merwin *v.* Wexel, 49 How. Pr. (N. Y.) 115; Bryant *v.* Scott, 67 N. Car. 391; Hagard *v.* Durant, 9 R. I. 602; Washington etc. R. Co. *v.* Alexandria etc. R. Co., 19 Gratt. (Va.) 592; 100 Am. Dec. 710; Bury *v.* Irick, 22 Gratt. (Va.) 484; George *v.* Pilcher, 28 Gratt. (Va.) 299. But see Sands *v.* Smith, 1 Dill. (U. S.) 290; Burnham *v.* Chicago etc. R. Co., 4 Dill. (U. S.) 503.

Under the act of March 2, 1867, a suit could not be removed on the petition of an alien. Grover etc. Sewing Machine Co. *v.* Florence Sewing Machine Co., 18 Wall. (U. S.) 553; Crane *v.* Reeder, 28 Mich. 527; 15 Am. Rep. 223; Davis *v.* Cook, 9 Nev. 134.

6. See *infra*, this title, *Federal Question*.

7. The "proper district" is the district in which the suit is pending at the time the petition for removal is filed. Hess *v.* Reynolds, 113 U. S. 73; Knowlton *v.* Congress Spring Co., 13 Blatchf. (U. S.) 170.

clause further provided that when in any suit mentioned in this section there should be a controversy wholly between citizens of different States which could be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy might remove said suit into the circuit court of the United States for the proper district.[1]

A suit could not be removed under the first clause of § 2 of the act of 1875, on the ground of diverse citizenship, unless all the parties on one side of the controversy were citizens of different States from any on the other side,[2] and unless all the parties on one side joined in the petition for removal.[3]

But the parties should be arranged according to their actual interest in the controversy. In the language of the supreme court of the United States, "When the controversy about which a suit in the State court is brought is between citizens of one or more States on one side, and citizens of other States on the other side, either party to the controversy may remove the suit to the circuit court, without regard to the positions they occupy in the

1. The 10th section of the act of 1875 expressly repealed all conflicting acts and parts of acts. Under this provision it has been repeatedly decided that the act of 1875 repealed the 12th section of the judiciary act. Baltimore etc. R. Co. *v.* Bates, 119 U. S. 464; La Mothe Mfg. Co. *v.* National Tube Works Co., 15 Blatchf. (U. S.) 432; Norris *v.* Mineral Point Tunnel Co., 19 Blatchf. (U. S.) 201; Cook *v.* Ford, 2 Flip. (U. S.) 22. And the act of July 27, 1866. Hyde *v.* Suble, 104 U. S. 407; King *v.* Cornell, 106 U. S. 395; Ayers *v.* Watson, 113 U. S. 594; Baltimore etc. R. Co. *v.* Bates, 119 U. S. 464; Mayor of N. Y. *v.* Independent Steamboat Co., 21 Fed. Rep. 593; Tuedt *v.* Carson, 4 McCrary (U. S.) 426; Cook *v.* Ford, 2 Flipp. (U. S.) 22; Hollister *v.* Bell, 8 Sawy. (U. S.) 349; Clark *v.* Chicago etc. R. Co., 11 Fed. Rep. 355; Kelley *v.* Houghton, 23 Fed. Rep. 417; Mairer *v.* Olmstead, 24 Fed. Rep. 193.

Contra, Wormser *v.* Dahlman, 16 Blatchf. (U. S.) 319; Girardy *v.* Moore, 3 Woods (U. S.) 397; Arapahoe Co. *v.* Kansas Pac. R. Co., 4 Dill. (U. S.) 277. But not the act of March 2, 1867. Hess *v.* Reynolds, 113 U. S. 73; Baltimore etc. R. Co. *v.* Bates, 119 U. S. 464; Sims *v.* Sims, 17 Blatchf. (U. S.) 369; Melendy *v.* Currier, 22 Blatchf. (U. S.) 503; Dennis *v.* Alachua Co., 3 Woods (U.S.) 686; Cook *v.* Ford, 2 Flip. (U. S.) 22; Miller *v.* Chicago etc. R. Co., 3 McCrary (U. S.) 460; Arapahoe Co. *v.* Kansas Pac. R. Co., 4 Dill. (U. S.) 277; Whitehouse *v.* Continental F. Ins. Co., 2 Fed. Rep. 498; Bell *v.* Noonan, 19 Fed. Rep. 225; Hammond *v.* Buchanan, 68 Ga. 728; Stone *v.* Sargent, 129 Mass. 503; Lang *v.* Lynch, 63 N. H. 243; Nye *v.* Northern Cent. R. Co., 24 Hun (N. Y.) 556; Wickham *v.* Wickham, 20 Hun (N. Y.) 239.

The last clause of § 639 of the revised statutes, providing that "the copies of pleadings shall have the same force and effect in every respect and for every purpose as the original pleadings would have had by the laws and practice of the courts of such State, etc., was held to be repealed by the act of March 3, 1875, in Whittenton Mfg. Co. *v.* Memphis etc. Packet Co., 19 Fed. Rep. 273.

2. Blake *v.* McKim, 103 U. S. 336; Shainwald *v.* Lewis, 108 U. S. 158; Petterson *v.* Chapman, 13 Blatchf. (U. S.) 395; Van Brunt *v.* Corbin, 14 Blatchf. (U. S.) 496; Chicago etc. R. Co. *v.* McComb, 17 Blatchf. (U. S.) 371; Mutual L. Ins. Co. *v.* Champlin, 21 Fed. Rep. 85; Ballin *v.* Lehr, 24 Fed. Rep. 193; *In re* Fraser, 7 Cent. L. J. 227; New Orleans *v.* Seixas, 35 La. Ann. 36. But see Girardey *v.* Moore, 3 Woods (U. S.) 397.

3. Chicago etc. R. Co. *v.* McComb, 17 Blatchf. (U S.) 371; Osgood *v.* Chicago etc. R. Co., 6 Biss. (U. S.) 330; Sheldon *v.* Keokuk Northern Line Packet Co., 9 Biss. (U. S.) 307; Ruck-

pleadings as plaintiffs or defendants. For the purpose of a removal, the matter in dispute may be ascertained, and the parties to the suit arranged on opposite sides of that dispute. If in such an arrangement it appears that those on one side are all citizens of different States from those on the other, the suit may be removed."[1]

In order that a suit might be removable under the second clause of § 2, of the act of March 3, 1875, it "must be one capable of separation into parts so that in one of the parts a controversy will be presented with citizens of one or more States on one side, and citizens of other States on the other, which can be fully determined without the presence of any of the other parties to the suit as it has been begun."[2] But the whole suit, and not simply the separable controversy, must be removed,[3] and it is no objection to the removal of the whole suit

man *v.* Ruckman, 1 Fed. Rep. 587; Mutual L. Ins. Co. *v.* Champlin, 21 Fed. Rep. 85; Mayor of N. Y. *v.* Independent Steamboat Co., 21 Fed. Rep. 593; Connell *v.* Utica etc. R. Co., 14 Reporter 548. *Contra*, Carswell *v.* Schley, 59 Ga. 17.

1. Waite, C. J., in The Removal Cases, 100 U. S. 457. See also Ayres *v.* Chicago, 101 U. S. 184; Harter *v.* Kernochan, 103 U. S. 562; Brown *v* Trousdale, 138 U. S. 389; Chicago etc. R. Co. *v.* McComb, 17 Blatchf. (U. S.) 371; Arapahoe *v.* Kansas Pac. R. Co., 4 Dill. (U. S.) 277; Burke *v.* Flood, 1 Fed. Rep. 541; Sayer *v.* La Salle etc. Gas Light etc. Co., 14 Fed. Rep. 69; Pollok *v.* Louchheim, 19 Fed. Rep. 465; New Orleans *v.* Seixas, 35 La. Ann. 36.

A suit in which there was a controversy between citizens of different States might be removed by either party. Barney *v.* Latham, 103 U. S. 205; Mosher *v.* St. Louis etc. R. Co., 19 Fed. Rep. 849; Gillespie *v.* Jamieson, 12 Phila. (Pa.) 176. Even though the petitioner were a citizen of the State where the suit was brought. Osgood *v.* Chicago etc. R. Co., 6 Biss. (U. S.) 330.

Under the first clause of § 2, a suit brought in *Nevada* by a citizen of *California* against an English subject might be removed by the plaintiff. Eureka Consolidated Mining Co. *v.* Richmond Consolidated Mining Co., 6 Sawy. (U. S.) 471.

So a suit in which the plaintiff was an alien and all the necessary defendants were citizens of various States, and the only controversy was between the alien plaintiff and such defendants, might be removed by the latter. Cooke *v.* Seligman, 17 Blatchf. (U. S.) 452; Houser *v.* Clayton, 3 Woods (U. S.) 273.

2. Fraser *v.* Jennison, 106 U. S. 191. See also Barney *v.* Latham, 103 U. S. 205; Blake *v.* McKim, 103 U. S. 336; Hyde *v.* Ruble, 104 U. S. 407; Brown *v.* Trousdale, 138 U. S. 389; Boyd *v.* Gill, 21 Blatchf. (U. S.) 543; Snow *v.* Smith, 4 Hughes (U. S.) 204; Corbin *v.* Boies, 18 Fed. Rep. 3; New Jersey Zinc etc. Co. *v.* Trotter, 18 Fed. Rep. 337; Gudger *v.* Western N. Car. R. Co., 87 N. Car. 325; Blum *v.* Thomas, 60 Tex. 158.

3. Barney *v.* Latham, 103 U. S. 205; Brooks *v.* Clark, 119 U. S. 502; Atlantic etc. Fertilizing Co. *v.* Carter, 4 Hughes (U. S.) 216; Girardey *v.* Moore, 3 Woods (U. S.) 397; Osgood *v.* Chicago etc. R. Co., 6 Biss. (U. S.) 330; Chicago *v.* Sage, 6 Biss. (U. S.) 467; Carrahn *v.* Brennan, 7 Biss. (U. S.) 497; Arapahoe Co. *v.* Kansas Pac. R. Co., 4 Dill. (U. S.) 277; Chambers *v.* Holland, 3 McCrary (U. S.) 538; Tuedt *v.* Carson, 4 McCrary (U. S.) 426; Donohoe *v.* Mariposa Land etc. Co., 5 Sawy. (U. S.) 163; Corbin *v.* Boies, 18 Fed. Rep. 3; Northern Pac. Terminal Co. *v.* Lowenberg, 18 Fed. Rep. 339; Wabash etc. R. Co. *v.* Central Trust Company, 23 Fed. Rep. 513; Burch *v.* Davenport etc. R. Co., 46 Iowa 449; 26 Am. Rep. 150; *contra*, Ellerman *v.* New Orleans etc. R. Co., 2 Woods (U. S.) 120; Mutual L. Ins. Co. *v.* Allen, 134 Mass. 389; Simmons *v.* Taylor, 83 N. Car. 148; 35 Am. Rep. 56.

that it may draw into the United States court a controversy wholly between citizens of the same State.[1]

e. ACT OF MARCH 3, 1887.—This act (the enrollment of which was corrected by act of Aug. 13, 1888,) reversed the tendency of previous legislation and greatly restricted the right of removal. The first section defines the jurisdiction of the circuit courts of the United States, raising the jurisdictional amount from $500 to $2,000.

The second section makes the following provisions for the removal of suits from the State courts into the circuit courts of the United States for the proper districts:

First. Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made under their authority, of which the circuit courts are given original jurisdiction by the preceding section, may be removed by the defendant or defendants therein.

Second. Any other suit of a civil nature, at law or in equity, of which the circuit courts are given jurisdiction by the preceding section, may be removed by the defendant or defendants therein, being non-residents of the State in which the suit is brought.[2]

Third. When in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove the suit.[3]

1. Sheldon *v.* Keokuk Northern Line Packet Co., 9 Biss. (U. S.) 307; Corbin *v.* Boies, 18 Fed. Rep. 3; Wabash etc. R. Co. *v.* Cent. Trust Co., 23 Fed. Rep. 513. But see Girardey *v.* Moore, 3 Woods (U. S.) 397; Carraher *v.* Brennan, 7 Biss. (U. S.) 497.

Any one or more of the plaintiffs actually interested in the separable controversy could remove the entire suit. Barney *v.* Latham, 103 U. S. 205; Greene *v.* Klinger, 10 Fed. Rep. 689. See also Ellis *v.* Sisson, 11 Fed. Rep. 353.

But the controversy must be between citizens of different States and not between citizens of a State and an alien. Deakin *v.* Lea, 13 Reporter 772.

Therefore if a citizen of one of the United States brought a suit against a citizen of the same State and an alien, the latter could not remove it under this act. King *v.* Cornell, 106 U. S. 395; Sawyer *v.* Switzerland Marine Ins. Co., 14 Blatchf. (U. S.) 451; Hervey *v.* Illinois Midland R. Co., 7 Biss. (U. S.) 103.

Where a party petitioned for removal under the act of Mar. 2, 1867, but stated facts showing a right to removal under the act of Mar. 3, 1875, it was held that the reference to the former statute did not prejudice his right to removal under the latter in Canal etc. R. Co. *v.* Hart, 114 U. S. 654; Stanley *v.* Chicago etc. R. Co., 62 Mo. 508. See also Norris *v.* Mineral Point Tunnel Co., 19 Blatchf. (U. S.) 201.

2. Under the second clause of this section a suit can be removed only by non-resident defendants, and only if all the defendants are non-residents. Western Union Tel. Co. *v.* Brown, 32 Fed. Rep. 337; Anderson *v.* Appleton, 32 Fed. Rep. 855; Weller *v.* J. B. Pace Tobacco Co., 32 Fed. Rep. 860; Arkansas Valley Smelting Co. *v.* Conenhoven, 41 Fed. Rep. 450; Mills *v.* Newell, 41 Fed. Rep. 529. And an alien sued in the State of his residence cannot remove under this or any other clause of the section. Cudahy *v.* McGeoch, 37 Fed. Rep. 1; Walker *v.* O'Neill, 38 Fed. Rep. 374.

3. Under the third clause of this section a defendant sued in one of the

Fourth. Any suit in a State court in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State may be removed by any defendant, being such citizen of another State, at any time before the trial thereof, upon its being made to appear to the circuit court that from prejudice or local influence he will not be able to obtain justice in such State court or in any other State court to which he may under the laws of the State, have the right on account of such prejudice or local influence to remove said cause; provided that if it further appears that the suit can be fully and justly determined as to the other defendants in the State court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, the circuit court may direct the suit to be remanded to the State court, so far as relates to such other defendants.[1]

The fifth clause makes provision for the remanding of cases pending in the circuit court which had been removed there on the affidavit of the plaintiff under the act of 1867 (U. S. Rev. St., § 639, cl. 3) if, on examining into the truth of the affidavit, it does not appear to the court that such party will not be able to obtain justice in the State court.[2] In the third section provision is made for the removal of suits involving the title to land, between citizens of the same State claiming under grants from different States, substantially like that in the judiciary act, except that the matter in dispute must exceed $2,000 instead of $500.[3]

courts of his own State cannot remove the suit. Cudahy *v.* McGeoch, 37 Fed. Rep. 1; Schofield *v.* Demorest, 40 Fed. Rep. 273. *Contra*, Stanbrough *v.* Cook, 38 Fed. Rep. 369.

The act of 1887 does not give the right to remove a separable controversy to an alien defendant as the act of July 27, 1866, did. Woodrum *v.* Clay, 33 Fed. Rep. 897.

1. See *infra*, this title, *Prejudice and Local Influence.*

2. Fisk *v.* Henarie, 32 Fed. Rep. 417; Birdseye *v.* Schaeffer, 37 Fed. Rep. 821. But see Hills *v.* Richmond etc. R. Co., 33 Fed. Rep. 81.

This provision is constitutional. Birdseye *v.* Schaeffer, 37 Fed. Rep. 821.

3. The act of March 3, 1887, provides for the removal of such causes only as are included on the original jurisdiction conferred on the circuit courts by the first section of the act. Reed *v.* Reed, 31 Fed. Rep. 49; Dey *v.* Chicago etc. R. Co., 45 Fed. Rep. 82.

Soon after the passage of the act it was held in Yuba Co. *v.* Pioneer Gold Min. Co., 32 Fed. Rep. 183, that, under the first section, the circuit court could not take cognizance of a suit brought against a party in a district of which he was not an inhabitant, and that therefore the second section did not authorize the removal of a suit brought in a State court against a party not an inhabitant of the district in which such court was held; but, in Wilson *v.* Western Union Tel. Co., 34 Fed. Rep. 561, it was held otherwise, and it is now well settled that when the jurisdiction of the Federal court is founded only on the diverse citizenship of the parties, the suit may be brought in the district of the residence of either the plaintiff or the defendant, and that a suit brought in a State court by a resident plaintiff against a non-resident defendant may be removed by the latter. Gavin *v.* Vance, 33 Fed. Rep. 84; Rawley *v.* Southern Pac. R. Co., 33 Fed. Rep. 305; Loomis *v.* New York etc. Gas. Coal Co., 33 Fed. Rep. 353; St. Louis etc. R. Co. *v.* Terre Haute etc. R. Co., 33 Fed. Rep. 385; Pitkin Co. Min. Co. *v.* Markell, 33 Fed. Rep. 286; Bank of Winona *v.* Avery, 34 Fed. Rep.

The act of March 3, 1887, expressly repeals § 640 of the Revised Statutes, the last paragraph of § 5 of the act of March 3, 1875, and all laws and parts of laws in conflict with its provisions, and it is expressly provided that it shall not be deemed to repeal §§ 641, 642, 643 and 722, or Title XXIV of the Revised Statutes, or § 8 of the act of March 3, 1875.[1] It repeals by implication the act of March 2, 1867.[2]

2. Nature of Suit.—The Removal Acts of 1875 and 1887 expressly limit the right of removal to suits of a civil nature,[3] and although the language of the acts of 1789, 1866 and 1867 is not so definite, they also were undoubtedly intended to cover only

81; Short *v.* Chicago etc. R. Co., 34 Fed. Rep. 225; Tiffany *v.* Wilce, 34 Fed. Rep. 230; Swayne *v.* Boylston Ins. Co., 35 Fed. Rep. 1; First Nat. Bank *v.* Merchants' Bank, 37 Fed. Rep. 657.

Several cases have gone further and held that the restrictions in the first section regarding the district in which suit could be brought by original process in the circuit court do not apply to suits removed from the State courts, and that, therefore, a defendant may remove a suit in which neither party is a resident of the district. Fales *v.* Chicago etc. R. Co., 32 Fed. Rep. 673; Vinal *v.* Continental Construction etc. Co., 34 Fed. Rep. 228; Amsinck *v.* Balderston, 41 Fed. Rep. 641; Craven *v.* Turner, 82 Me. 383; American Finance Co. *v.* Bostwick, 151 Mass. 19.

Exemption from suit in a district other than that of which he is an inhabitant is a privilege which may be waived by the defendant. Cooley *v.* McArthur, 35 Fed. Rep. 372; Burck *v.* Taylor, 39 Fed. Rep. 581; Uhle *v.* Burnham, 42 Fed. Rep. 1. See also Winans *v.* McKean R. etc. Co., 6 Blatchf. (U. S.) 215; and an application for removal by a non-resident defendant was held to be a waiver in Kansas City etc. R. Co. *v.* Interstate Lumber Co., 37 Fed. Rep. 3 (*overruling* Harold *v.* Min. Co., 33 Fed. Rep. 529).

1. See §§ 5, 6, act of March 3, 1887.

2. Short *v.* Chicago etc. R. Co., 33 Fed. Rep. 114; Whelan *v.* New York etc. R. Co., 35 Fed. Rep. 849; Southworth *v.* Reid, 36 Fed. Rep. 451; Minnick *v.* Union Ins. Co., 40 Fed. Rep. 369. But see Fisk *v.* Henarie, 32 Fed. Rep. 417; Hills *v.* Richmond etc. R. Co., 33 Fed. Rep. 81.

3. New Hampshire *v.* Grand Trunk R. Co., 11 Reporter 80. When a statute imposes a penalty to be recovered by the State for any violation of its provisions, although it states that the penalty is to be recovered in a civil action, the action is essentially criminal and cannot be removed. Iowa *v.* Chicago etc. R. Co., 37 Fed. Rep. 497; Ferguson *v.* Ross, 38 Fed. Rep. 161; State *v.* Day Land & Cattle Co., 41 Fed. Rep. 228.

Mandamus.—A proceeding by mandamus to compel a corporation to register a transfer of stock is a suit of a civil nature which may be removed under the act of 1875. Washington Improvement Co. *v.* Kansas Pac. R. Co., 5 Dill. (U. S.) 489. See also People *v.* Colorado Central R. Co., 42 Fed. Rep. 638. But see Rosenbaum *v.* Bauer, 120 U. S. 450; 28 Fed. Rep. 223; Rosenbaum *v.* Board of Supervisors, 28 Fed. Rep. 223.

But a mandamus suit which raises the issue of a title to office is not removable. State *v.* Johnson, 29 La. Ann. 399.

Quo Warranto.—An information in the nature of *quo warranto*, under the *Illinois* statutes, against a railroad company for exercising possessory rights over land without authority of law, though in form a criminal proceeding, is essentially a civil action and removable under the act of 1887. Illinois *v.* Illinois Cent. R. Co., 33 Fed. Rep. 721; and under a *Kansas* statute which has substituted a remedy by action for the writ of *quo warranto* and information in the nature of *quo warranto*, the action is a suit of a civil nature within the meaning of the removal acts. Ames *v.* Kansas, 111 U. S. 449; Kansas Pac. R. Co. *v.* Kansas, 111 U. S. 449.

Eminent Domain. — Proceedings for the taking of land by eminent domain, when the only question remaining to be determined is that of the value of the

civil suits at law and in equity. Suits begun by attachment may be removed,[1] and so may actions of ejectment,[2] and replevin suits.[3]

The United States courts have no probate jurisdiction,[4] and, as a general rule, probate proceedings cannot be removed from the State courts into the United States courts.[5] The mere filing of a bill or petition, without the issuing of process or service

land, may be removed. Mississippi etc. Boom Co. *v.* Patterson, 98 U. S. 403; 3 Dill. (U. S.) 465; Searl *v.* School District No. 2, 124 U. S. 197; Warren *v.* Wisconsin Valley R. Co., 6 Biss. (U. S.) 425; Mineral Range R. Co. *v.* Detroit etc. Copper Co., 25 Fed. Rep. 515; Colorado Midland R. Co. *v.* Jones, 29 Fed. Rep. 193; Kansas City etc. R. Co. *v.* Interstate Lumber Co., 37 Fed. Rep. 3.

A proceeding before the mayor of a city and a jury to take land for widening a street, to ascertain the value thereof, and to assess the cost on the property benefited, is not a suit within the act of 1875, but becomes so when transferred to the State circuit court on appeal. Pacific R. Removal Cases, 115 U. S. 1.

A special proceeding authorized by State statute for the confirmation by a State court of sales of land made by sheriffs or other public officers was held to be removable in Parker *v.* Overman, 18 How. (U. S.) 137.

But an appeal, under State law, from an assessment of taxes to a county court, which in respect to such proceeding has no judicial powers, but merely determines questions of quantity, proportion and value, is not a suit which can be removed into the Federal court. Upshur Co. *v.* Rich, 135 U. S. 467.

1. Sayles *v.* Northwestern Ins. Co., 2 Curtis (U. S.) 212; Barney *v.* Globe Bank, 5 Blatchf. (U. S.) 107.

A controversy between citizens of different States as to the validity of an attachment involving more than $500 was removable under U. S. Rev. St., § 639; Keith *v.* Levi, 2 Fed. Rep. 743.

But a suit begun by foreign attachment in which there was no personal service on the defendant who was a non-resident, cannot be removed under the act of 1887. Perkins *v.* Hendryx, 40 Fed. Rep. 657.

2. Torrey *v.* Beardsley, 4 Wash. (U. S.) 242; *Ex parte* Girard, 3 Wall. Jr. (C. C.) 263.

3. Dennistoun *v.* Draper, 5 Blatchf. (U. S.) 336; Beecher *v.* Gillett, 1 Dill. (U. S.) 308.

4. Fouvergne *v.* New Orleans, 18 How. (U. S.) 470; Southworth *v.* Adams, 4 Fed. Rep. 1. See also Ellis *v.* Davis, 109 U. S. 485.

A suit against an assignee for the benefit of creditors under a State statute regulating the mode of administering assignments in trust for the benefit of creditors, brought to decide the allowance or disallowance of a claim is "a suit of a civil nature" within the meaning of the act of 1875. Claflin *v.* Robbins, 1 Flipp. (U. S.) 603.

5. An application for the probate of a will is not a suit which can be removed into the United States courts. *In re* Fraser, 7 Cent. L. J. 227; 18 Alb. L. J. 353; Tibbatts *v.* Berry, 10 B. Mon. (Ky.) 473. But under a *Georgia* statute which provides for probating a will in solemn form by a proceeding *inter partes*, which is conclusive as against those contesting the will, such a proceeding was held to be a suit within the meaning of the removal acts in Brodhead *v.* Shoemaker, 44 Fed. Rep. 518.

A proceeding to remove an executor or administrator is merely auxiliary to the settlement of the estate and cannot be removed. Burnside's Succession, 34 La. Ann. 728.

A claim against the insolvent estate of a deceased person pending in the superior court on appeal from the decision of commissioners appointed by the probate court, was held not to be removable under the act of 1867 in Du Vivier *v.* Hopkins, 116 Mass. 125. See also Burts *v.* Loyd, 45 Ga. 104; 12 Am. Rep. 574. But a suit commenced in a State court to establish a claim against the administrator of a deceased person is a "suit" within the meaning of the removal acts, and a State statute giving the State courts exclusive jurisdiction of the settlement of claims against estates of deceased persons will not prevent its removal.

of notice, if there is no appearance entered by the adverse party, does not constitute a "suit" within the meaning of the several removal acts.[1] Nor are auxiliary proceedings growing out of an original suit removable;[2] but the fact that an original proceeding is connected with or grows out of other proceedings in the State court will not prevent its removal.[3] A suit which comes within

lless *v.* Reynolds, 113 U. S. 73; Clark *v.* Bever, 139 U. S. 96.

A suit to annul a will as a muniment of title and to restrain the enforcement of a decree admitting it to probate is removable, being essentially a suit in equity. Jaines *v.* Fuentes, 92 U. S. 10.

And an action to establish a lost will which under the State statutes could be brought in courts of general jurisdiction was held to be removable in Southworth *v.* Adams, 4 Fed. Rep. 1.

A suit in which there is a controversy in regard to the distribution of the estate of a deceased person may be removed. Craigie *v.* McArthur, 4 Dill. (U. S.) 474.

A claim for a right of way pending before county commissioners is not a suit within the meaning of the removal acts. Fuller *v.* Colfax Co., 14 Fed. Rep. 177.

A suit on a recognizance for good behavior could not be removed under the act of 1789. Respublica *v.* Cobbet, 3 Dall. (Pa.) 467.

1. "A suit removable from a State court must be a suit regularly commenced by a citizen of the State in which the suit is brought, by process served upon a defendant who is a citizen of another State, and who, if he does not elect to remove, is bound to submit to the jurisdiction of the State court. Chase, C. J., in West *v.* Aurora City, 6 Wall. (U. S.) 139. See also *in re* Iowa etc. Constr. Co., 2 McCrary (U. S.) 178.

2. First Nat. Bank *v.* Turnbull, 16 Wall. (U. S.) 190; Barrow *v.* Hunlin, 99 U. S. 80; Chapman *v.* Barger, 4 Dill. (U. S.) 557; Flash *v.* Dillon, 22 Fed. Rep. 1; Walcott *v.* Aspen Min. etc. Co., 34 Fed. Rep. 821; Hochstadter *v.* Harrison, 71 Ga. 21; Goodrich *v.* Hunton, 29 La. Ann. 372; Watson *v.* Bondurant, 30 La. Ann. 1; Calhoun *v.* Levy, 33 La. Ann. 1296. See also Ellis *v.* Sisson, 11 Biss. (U. S.) 187.

A supplemental bill filed to bring before the court newly discovered property of the defendant, cannot be removed. Smith *v.* St. Louis Mut. L. Ins. Co., 3 Tenn. Ch. 350.

Nor can an issue between the plaintiff and a garnishee, the plaintiff having already obtained judgment against the defendant. Pratt *v.* Albright, 10 Biss. (U. S.) 511; Buford *v.* Strother, 3 McCrary (U. S.) 253; Poole *v.* Watcherdeft, 19 Fed. Rep. 49; Weeks *v.* Billings, 55 N. H. 371.

Nor an issue between the plaintiff and an intervening claimant of property levied on as property of the defendant. First Nat. Bank *v.* Turnbull, 16 Wall. (U. S.) 190.

A motion, authorized by State statute, for execution against a stockholder of a corporation, upon a return of *nulla bona* on an execution against the corporation, cannot be removed to the Federal courts. Webber *v.* Humphreys, 5 Dill. (U. S.) 223.

Nor can a writ of review. Jackson *v.* Gould, 74 Me. 564.

Nor an action to annul a judgment. Goodrich *v.* Hunton, 29 La. Ann. 372; Ranlett *v.* Collier White Lead Co., 30 La Ann. 56.

A suit brought to enjoin the execution of a judgment obtained in a State court is not removable, because the Federal courts are forbidden by statute to grant such injunctions. Lawrence *v.* Morgan's R. etc. Co., 121 U. S. 634; Edwards Mfg. Co. *v.* Sprague, 76 Me. 53. See also Haines *v.* Carpenter, 91 U. S. 254; Deal *v.* Reynolds, 96 U. S. 340.

But the fact that such an injunction has been granted by the State court will not prevent the removal of the suit. Bondurant *v.* Watson, 103 U. S. 281; 2 Woods (U. S.) 166; Hunt *v.* Fisher, 29 Fed. Rep. 801.

3. Bondurant *v.* Watson, 103 U. S. 281; Pettus *v.* Georgia R. etc. Co., 3 Woods (U. S.) 620; Hatch *v.* Preston, 1 Biss. (U. S.) 19: Stackhouse *v.* Zunts, 15 Fed. Rep. 481; Tiler *v.* Levy, 17 Fed. Rep. 609; Fuller *v.* Wright, 23 Fed. Rep. 833; Lockhart *v.* Morey, 31 Fed. Rep. 497; Kalamazoo Wagon Co. *v.* Snavely, 34 Fed. Rep. 823.

the terms of the Removal Acts in force at the time may be removed into the circuit court of the United States, although it could not have been originally commenced there.[1]

3. **Parties**—*a.* NOMINAL PARTIES.—It is well settled that the right of removal can be neither secured nor defeated by the joinder of nominal parties who are not necessary to the determination of the real controversy involved in the suit.[2] But the question whether certain parties are nominal or not is often a difficult one. Trustees or executors suing or defending a suit for the benefit of others are not nominal parties.[3] They are actually interested as parties in the determination of the controversy, though in a representative capacity. But if no judgment or decree for or against them is sought they are merely nominal parties and their presence will not affect the right of removal.[4]

A suit in equity to reform an insurance policy and to prevent the defendant from setting up certain defenses to a pending action at law on the policy, is an original suit, and may be removed. Charter Oak F. Ins. Co. *v.* Star Ins. Co., 6 Blatchf. (U. S.) 208.

And a suit brought against a corporation by holders of its bonds under a deed of trust which is paramount to the rights of stockholders, may be removed, although the State court has already appointed a receiver in a suit brought by stockholders. Scott *v.* Clinton etc. R. Co., 6 Biss. (U. S.) 529.

When a plaintiff, having an unsatisfied judgment against a corporation, brings an action against the stockholders under a State statute, the suit may be removed. Buford *v.* Strother, 3 McCrary (U. S.) 253.

1. Gaines *v.* Fuentes, 92 U. S. 10; Warner *v.* Pennsylvania R. Co., 13 Blatchf. (U. S.) 231; People *v.* Colorado Cent. R. Co., 42 Fed. Rep. 638.

Contra, Hazard *v.* Durant, 9 R. I. 602; Beery *v.* Irick, 22 Gratt. (Va.) 484.

See also Smith *v.* Rines, 2 Sumn. (U. S.) 338.

2. Carneal *v.* Banks, 10 Wheat. (U. S.) 181; Walden *v.* Skinner, 101 U. S. 577; Barney *v.* Latham, 103 U. S. 205; Relfe *v.* Rundle, 103 U. S. 222; Hatch *v.* Chicago etc. R. Co., 6 Blatchf. (U. S.) 105; Girardy *v.* Moore, 3 Woods (U. S.) 397; Hervey *v.* Illinois Midland R. Co., 7 Biss. (U. S.) 103; State *v.* Lewis, 12 Fed. Rep. 1; Deford *v.* Mehaffy, 14 Fed. Rep. 181; Hazard *v.* Robinson, 21 Fed. Rep. 193; Collins *v.* Wellington, 31 Fed. Rep. 244.

Nelson *v.* Hennessey, 33 Fed. Rep. 113; Seddlon *v.* Virginia etc. Steele etc. Co., 36 Fed. Rep. 6; Henderson *v.* Cabell, 43 Fed. Rep. 257; Brown *v.* Murray, 43 Fed. Rep. 614; Chattanooga etc. R. Co. *v.* Cincinnati etc. R. Co., 44 Fed. Rep. 456; Wortsman *v.* Wade, 77 Ga. 651; Steiner *v.* Matthewson, 77 Ga. 657; Danvers Sav. Bank *v.* Thompson, 133 Mass. 182; Livingston *v.* Gibbons, 4 Johns. Ch. (N. Y.) 94; Calloway *v.* Oreknot Copper Co., 74 N. Car. 200; Gudger *v.* Western N. Car. R. Co., 87 N. Car. 315; Hadley *v.* Dunlap, 10 Ohio St. 1. But see Wilson *v.* Blodget, 4 McLean (U. S.) 363.

3. Childress *v.* Emory, 8 Wheat. (U. S.) 642; Bonnafee *v.* Williams, 3 How. (U. S.) 574; Susquehanna Coal Co. *v.* Blatchford, 11 Wall. (U. S.) 172; Knapp *v.* Troy etc. R. Co., 20 Wall. (U. S.) 117; Gardner *v.* Brown, 21 Wall. (U. S.) 36; Blake *v.* McKim, 103 U. S. 336; Myers *v.* Swann, 107 U. S. 546; American Bible Soc. *v.* Price, 110 U. S. 61; Thayer *v.* Life Assoc. of America, 112 U. S. 717; Peper *v.* Fordyce, 119 U. S. 469; Evans *v.* Faxson, 11 Biss. (U. S.) 175; Mitchell *v.* Tillotson, 11 Biss. (U. S.) 325; Goodnow *v.* Litchfield, 4 McCrary (U. S.) 215; McElmurray *v.* Loomis, 31 Fed. Rep. 395.

4. Wormley *v.* Wormley, 8 Wheat. (U. S.) 421; Bacon *v.* Rives, 106 U. S. 99; Chester *v.* Wellford, 2 Flipp. (U. S.) 347; Bates *v.* New Orleans etc. R. Co., 16 Fed. Rep. 294; Hack *v.* Chicago etc. R. Co., 23 Fed. Rep. 356.

An officer who brought suit on a bond made payable to him for the benefit of others was held to be a nominal party

So officers of a defendant corporation, if no relief is sought against them individually, are held to be nominal parties.[1]

Garnishees are not necessary parties to the controversy between the plaintiff and the principal defendant,[2] nor are agents or attorneys who are made co-defendants with their principals or clients merely because they hold personal property for them.[3]

in Wortsman *v.* Wade, 77 Ga. 651. See also McNutt *v.* Bland, 2 How. (U. S.) 9.

1. Hatch *v.* Chicago etc. R. Co., 6 Blatchf. (U. S.) 165; Arapahoe Co. *v.* Kansas Pac. R. Co., 4 Dill. (U. S.) 277; Pond *v.* Sibley, 19 Blatchf. (U. S.) 189; National Bank *v.* Wells River Mfg. Co., 7 Fed. Rep. 750; Mayor etc. of Macon *v.* Cummins, 47 Ga. 321.

So also State and county officers authorized to levy, collect and disburse taxes for the payment of bonds are not necessary parties to a controversy as to the validity of the bonds. Aroma *v.* Auditor of Public Accounts, 2 Fed. Rep. 33.

2. Bacon *v.* Rives, 106 U. S. 99; Cook *v.* Whitney, 3 Woods (U. S.) 715; Deford *v.* Mehaffy, 14 Fed. Rep. 181.

3. Wood *v.* Davis, 18 How. (U. S.) 467; Myers *v.* Murray, 43 Fed. Rep. 695; Overman Wheel Co. *v.* Pope Mfg. Co., 46 Fed. Rep. 577.

Necessary Parties.—In an equity suit no party is nominal if a decree against him is essential to the relief sought or if he is entitled to a decree in his favor upon the face of the bill. Ward *v.* Arredondo, Paine (U. S) 410; James *v.* Thurston, 6 R. I. 428.

A mortgagor is a necessary party to a foreclosure suit in which it is sought to charge him with a deficiency, even though he has conveyed the mortgaged property to a third party. Ayres *v.* Wiswall, 112 U. S. 187; Poney *v.* Michell, 116 U. S. 227.

In an action where the plaintiff claims to be the rightful owner of shares of stock in a corporation which stand in the name of a non-resident stockholder, the corporation is a necessary party. St. Louis etc. R. Co. *v.* Wilson, 114 U. S. 60; Crump *v.* Thurber, 115 U. S. 56; Rogers *v.* Van Nortwick, 45 Fed. Rep. 513.

A bill for the assignment of dower alleged that one of the defendants acted as trustee and agent for another defendant and held the legal title to the joint use of himself and that other defendant. *Held*, that the latter was a necessary party. Rand *v.* Walker, 117 U. S. 340.

A lessee when made a party to a suit to set aside his lessor's title as fraudulent, is an interested party and his presence will prevent a removal if he is a citizen of the same State with the plaintiff. Miller *v.* Sharp, 37 Fed. Rep. 161.

In a suit by an assignee for the benefit of creditors against a creditor who had obtained an execution and the officer to whom it was committed to enjoin the sale of property levied on by the execution, the officer is a necessary party. Nye *v.* Nightingale, 6 R. I. 439.

Judgment was recovered by a bank against a school district, and the latter issued orders for the payment thereof which the bank assigned to a third person who claimed to be the owner of the judgment. *Held*, that the bank as well as the third person was a proper party defendant to a bill to cancel the judgment, and being a citizen of the same State with the plaintiff, the cause was not removable. Independent District of Rock Rapids *v.* Bank of Rock Rapids, 48 Fed. Rep. 2.

Where a landlord is allowed to join as a defendant in an ejectment suit brought by a third party against his tenant, the tenant is a necessary party and the landlord, though a non-resident, cannot remove the suit if the tenant is a citizen of the same State with the plaintiff. *Ex parte* Turner, 3 Wall. Jr. (C. C.) 258; Allin *v.* Robinson, 1 Dill. (U. S) 119.

But where a new defendant is substituted for the original defendant, and the suit discontinued as to the latter, the citizenship of the original defendant is immaterial. Beecher *v.* Gillett, 1 Dill. (U. S.) 308. Texas *v.* Lewis, 12 Fed. Rep. 1.

A suit was originally brought by a citizen of Georgia and a citizen of New York against a citizen of Georgia. The Georgia plaintiff was then stricken from the bill on plaintiff's motion. *Held*, that the suit might be removed and that the State court would not decide the

Under the acts of 1875 and 1887 the parties are arranged as plaintiffs or defendants according to their actual interest in the controversy[1] and the fact that parties who refuse to join as plaintiffs are made defendants in a suit will not prevent other defendants who possess the requisite citizenship from removing the suit,[2] nor will the fact that defendants who have not been served with process and have not appeared are citizens of the same State with the plaintiff, prevent a removal by the other defendants who are citizens of other States.[3]

b. COLLUSIVE PARTIES.—If parties are collusively made or joined for the purpose of effecting a removal, the petition for removal should be refused,[4] and if the suit has already been removed the circuit court should of its own motion remand or dismiss it;[5] but, on the other hand, if a colorable assignment of the cause of action is made to a citizen of the same State with the defendant for the purpose of preventing a removal, the defendant cannot entitle himself to a removal by showing this fact.[6]

c. INTERVENING AND SUBSTITUTED PARTIES.—The removal acts apply to all *bona fide* litigants in the State courts, whether

question whether the Georgia plaintiff was a necessary party to the suit. Cuyler *v.* Smith, 78 Ga. 662.

In an action of replevin the person from whom the defendant purchased the property, who intervenes to protect defendant's title, is not a necessary party. Bronson *v.* St. Croix Lumber Co., 35 Fed. Rep. 634.

For special cases in which parties have been held to be necessary, see Central R. Co. *v.* Mills, 113 U. S. 249; Sully *v.* Drenan, 113 U. S. 287; Chicago etc. R. Co. *v.* Crane, 113 U. S. 425; Peper *v.* Fordyce, 119 U. S. 469; Vinal *v.* Continental Construction etc. Co., 35 Fed. Rep. 673; Douglas *v.* Richmond etc. R. Co., 106 N. Car. 65.

And for special cases in which parties have been held to be unnecessary or nominal, see Laidly *v.* Huntington, 121 U. S. 179; Bailey *v.* New York Sav. Bank, 18 Blatchf. (U. S.) 77; Judah *v.* Iowa Barb-wire Co., 32 Fed. Rep. 561. Taylor Co. Ct. *v.* Baltimore etc. R. Co., 35 Fed. Rep. 161; May *v.* St. John, 38 Fed. Rep. 770.

1. Harter *v.* Kernochan, 103 U. S. 562; Woodrum *v.* Clay, 33 Fed. Rep. 897; Anderson *v.* Bowers, 40 Fed. Rep. 708.

2. Edgarton *v.* Gilpin, 3 Woods (U. S.) 277. See also Swann *v.* Myers, 79 N. Car. 101.

3. *Ex parte* Girard, 3 Wall. Jr. (C. C.) 263; Davis *v.* Cook, 9 Nev. 134; Norton *v.* Hayes, 4 Den. (N. Y.) 245.

4. Act of Mar. 3, 1875, § 5; Cashman *v.* Amidor etc. Canal Co., 118 U. S. 58; Coffin *v.* Haggin, 7 Sawy. (U. S.) 509; Sachse *v.* Citizens Bank, 37 La. Ann. 364. See also Lanier *v.* Nash, 121 U. S. 404.

But if a party actually conveys his interest to another the fact that it was done for the purpose of effecting a removal is immaterial.

Hoyt *v.* Wright, 1 McCrary (U. S.) 130. The transfer of an overdue note and mortgage for a valuable consideration to a *bona fide* purchaser is not a collusive transaction within the meaning of § 5 of the act of Mar. 3, 1875, though one of the purposes of the transfer was to make a case which could be tried in the Federal court. Cross *v.* Allen, 141 U. S. 528.

5. Williams *v.* Nottowa, 104 U. S. 209; Farmington *v.* Pillsbury, 114 U. S. 138; Little *v.* Giles, 118 U. S. 596. But the circuit court should not dismiss a suit on this ground unless the fact shown on the record create a legal certainty of the conclusion that the controversy is not within the jurisdiction of that court. Deputron *v.* Young, 134 U. S. 241.

6. Provident Sav. L. Assur. Soc. *v.* Ford, 114 U. S. 635; Oakley *v.* Goodnow, 118 U. S. 43; Leather Manufacturers' Nat. Bank *v.* Cooper, 120 U. S. 778; Vimont *v.* Chicago etc. R. Co., 64 Iowa 513. But see Goodnow *v.* Litchfield, 47 Fed. Rep. 753.

originally made parties or not,[1] and parties having a statutory right to intervene, even though it be refused by the State court, may remove the cause.[2]

Substituted parties succeed to the rights of those whose places they take, and are subject to all their disabilities, so far as concerns the right of removal.[3]

4. Value of the Matter in Dispute.—The Removal Acts of 1789, 1866, 1867, and 1875, limited the right of removal to suits in which the matter in dispute exceeded the sum or value of $500, exclusive of costs,[4] and the act of March 3, 1887, to suits in which it exceeded $2,000, exclusive of interest and costs. No suit could be removed under any of these acts, however important it might be, unless it involved a right or claim capable of pecuniary estimation.[5] It is not sufficient that the value of the matter in dispute should be exactly $500 or $2,000; it must exceed the sum named in the statute,[6] and that it does so must appear

1. Burdick *v.* Peterson, 2 McCrary (U. S.) 135.

2. Snow *v.* Texas Trunk R. Co., 16 Fed. Rep. 1; Hack *v.* Chicago etc. R. Co., 23 Fed. Rep. 356. *Contra*, Williams *v.* Williams, 24 La. Ann. 55. A party brought in to interplead on motion of the original defendant may remove the suit. Healy *v.* Prevost, 8 Reporter 103.

3. Cable *v.* Ellis, 110 U. S. 389; Houston etc. R. Co. *v.* Shirley, 111 U. S. 358; Jefferson *v.* Driver, 117 U. S. 272; Goodnow *v.* Dolliver, 26 Fed. Rep. 469.

Where a railroad company by perpetual lease acquired the property of another company in regard to which an action of ejectment was pending, it was held that the lessee's right of removal was only such as existed in the lessor. Richmond etc. R. Co. *v.* Findlay, 32 Fed. Rep. 641.

A defendant cannot acquire a right of removal by buying the interests of his co-defendants. Temple *v.* Smith, 2 McCrary (U. S.) 226.

An application for removal by an intervening party is in time if made when he is admitted as a party. Burdick *v.* Peterson, 2 McCrary (U. S.) 135; Chicago *v.* Hutchinson, 15 Fed. Rep. 129; Jackson *v.* Stiles, 4 Johns. (N. Y.) 493.

4. Under these acts it was held that interest might be included in making up the jurisdictional amount, in cases where interest was claimed.

McGinnity *v.* White, 3 Dill. (U. S.) 350; Brayley *v.* Hedges, 53 Iowa 582. See also Bank of U. S. *v.* Daniel, 12 Pet. (U. S.) 32.

5. Gaines *v.* Fuentes, 92 U. S. 10; Kurtz *v.* Moffitt, 115 U. S. 487.

In the latter case a writ of *habeas corpus* was held not to be removable.

In Rush *v.* Cobbet, 2 Yeates (Pa.) 275, it was held that a libel suit against an alien could not be removed under the act of 1789, for the reason that the pecuniary value of the matter in dispute could not be estimated.

6. Walker *v.* U. S., 4 Wall. (U. S.) 163; Lazeusky *v.* Supreme Lodge Knights of Honor, 32 Fed. Rep. 417; Western Union Tel. Co. *v.* Levi, 47 Ind. 552.

But see Wright *v.* Wells, Pet. (C. C.) 220.

Numerous judgments at law were rendered in a State court in favor of the same party against the same defendant; in each case the judgment was for less than five hundred dollars, but the aggregate of all the judgments was over three thousand dollars. After the close of the term the defendant filed a petition in the same court for the annulment of the judgments on the ground that they were fraudulently obtained; the petitioner subsequently filed a petition for the removal of the case into the circuit court of the United States. *Held*, that the aggregate amount of all the judgments sought to be annulled was the value of the matter in dispute, and consequently that the cause was removable so far as the amount involved was concerned. Marshall *v.* Holmes, 141 U. S. 589.

affirmatively either in the pleadings or in the petition for removal.[1]

The amount in dispute is to be determined from the declaration, petition, or bill of complaint,[2] and, according to the weight of authority, when the action is for less than the jurisdictional amount, and the defendant files a counterclaim exceeding that amount, the suit is not removable.[3] On the other hand, after the

1. Pittsburgh etc. R. Co. *v.* Ramsey, 22 Wall. (U. S.) 322; Keith *v.* Levi, 2 Fed. Rep. 743; Langdon *v.* Hillside Coal etc. Co., 41 Fed. Rep. 609; Chambers *v.* McDougal, 42 Fed. Rep. 694; Reed *v.* Hardeman Co., 77 Tex. 165.

But in a case where the amount in dispute actually exceeded the amount required by the statute, and the objection that the record failed to show it was first made after a final hearing in the Federal court, the omission was supplied by filing an affidavit *nunc pro tunc* in Carr *v.* Fife, 45 Fed. Rep. 209.

An allegation that the amount in dispute exceeded $2,000 exclusive of costs (without mentioning interest) was held sufficient under the act of 1887 in a case where there was no claim for interest. Weber *v.* Travellers' Ins. Co., 45 Fed. Rep. 657.

2. Gordon *v.* Longest, 16 Pet. (U. S.) 97; Muns *v.* Dupont de Nemours, 2 Wash. (U. S.) 463; Healy *v.* Prevost, 8 Reporter 208; Western Union Tel. Co. *v.* Levi, 47 Ind. 552; People *v.* Judges of N. Y. C. P., 2 Den. (N. Y.) 197. See also Bennett *v.* Butterworth, 8 How. (U. S.) 124; Sherman *v.* Clark, 3 McLean (U. S.) 91.

In an action of tort the matter in dispute is the amount of damages claimed by the plaintiff. Hulsecamp *v.* Teel, 2 Dall. (U. S.) 358; Gordon *v.* Longest, 16 Pet. (U. S.) 97; Louisville etc. R. Co. *v.* Roehling, 11 Ill. App. 264; Western Union Tel. Co. *v.* Levi, 47 Ind. 552.

The jurisdictional amount may be made up of distinct demands, each of which is less than the sum named in the statute. Bernheim *v.* Birnbaum, 30 Fed. Rep. 885. See also Brown *v.* Trousdale, 138 U. S. 389; Massa *v.* Cutting, 30 Fed. Rep. 1; Platt *v.* Phœnix Assur. Co., 37 Fed. Rep. 730.

And in Anderson *v.* Gerding, 3 Woods (U. S.) 487, it was held that where three suits were brought by the same plaintiff against the same defendant on three notes arising from the same consideration, each for less than $500, a judgment in one case would be decisive of the others by estoppel, and that therefore the matter in dispute in each case exceeded $500.

The declaration must show not only a right to recover, but an actual claim for a sum exceeding that named in the statute. Lee *v.* Watson, 1 Wall. (U. S.) 337.

But by bringing a suit for more than the jurisdictional amount the plaintiff is estopped from opposing a removal on the ground that the matter in dispute is less than that amount. Henderson *v.* Cabell, 43 Fed. Rep. 257.

In a suit to restrain the maintenance of an awning over part of a street, the matter in dispute is the value of the right to maintain the awning and not the injury done to it by the plaintiff. Whitman *v.* Hubbell, 30 Fed. Rep. 81.

A tax payer tendered at the same time State coupons amounting to $940 in payment of State taxes and cash in payment of county taxes. The collector refused to take the coupons, but received the cash and applied part of it to the State taxes, leaving a balance due of less than $500. He then sued the tax payer for the balance and garnished a sum less than $500 belonging to him. *Held*, that the matter in dispute was the amount of the coupons, and not the balance. Green *v.* Brooks, 28 Fed. Rep. 215.

In a suit for divorce the fact that the plaintiff asks for alimony, and alleges that the defendant owns valuable real estate, and has an income of $10,000 per annum, does not make the matter in dispute exceed $2,000, the allowance of alimony being discretionary. Bowman *v.* Bowman, 30 Fed. Rep. 849.

3. Falls Wire Mfg. Co. *v.* Broderick, 2 McCrary (U. S.) 489; La Montague *v.* T. W. Harvey Lumber Co., 44 Fed. Rep. 645; Bennett *v.* Devine, 45 Fed. Rep. 705. See also Carrick *v.* Landman, 20 Fed. Rep. 209. *Contra*, Clarkson *v.* Manson, 18 Blatchf. (U. S.) 443; Carson etc. Lumber Co. *v.* Holtzclaw, 39 Fed. Rep. 578. See also McGinnity *v.* White, 3 Dill. (U. S.) 350.

right of removal has once become complete the plaintiff cannot defeat it by releasing any part of his claim, or by an amendment which reduces it below the jurisdictional amount.[1]

5. **Citizenship.**—When the right to remove a suit is claimed on the ground of citizenship, it is the personal citizenship of the parties to the record which is to be considered.[2] Under the act

If the jurisdiction of the State court is confined to cases involving less than the amount required to make a case removable, the filing of a counterclaim for more than that amount will not entitle the defendant to remove. New York etc. Co. *v.* Milburn Gin & Mach. Co., 35 Fed. Rep. 225. See also Hummel *v.* Moore, 25 Fed. Rep. 380.

1. Kanouse *v.* Martin, 15 How. (U. S.) 198; Ladd *v.* Tudor, 3 Woodb. & M. (U. S.) 325; Roberts *v.* Nelson, 8 Blatchf. (U. S.) 74; Wright *v.* Wells, Pet. (C. C.) 220; Jones *v.* Poreman, 66 Ga. 371; Louisville etc. R. Co. *v.* Rochling, 11 Ill. App. 264; Stanley *v.* Chicago etc. R. Co., 62 Mo. 508. *Contra* People *v.* Judges of N. Y. C. P., 2 Den. (N. Y.) 197.

An amendment may be allowed in the State court which increases the amount in dispute so as to make a case removable which was not so before. Austin *v.* Northern Pac. R. Co., 34 Minn. 473.

And in Huskins *v.* Cincinnati etc. R. Co., 37 Fed. Rep. 504, it was held that if this amendment was made after the time for filing the application for removal had expired, the time would be extended as if the suit had been commenced at the time of amendment.

2. Childress *v.* Emory, 8 Wheat. (U. S.) 642; Green *v.* Creighton, 23 How. (U. S.) 90; Coal Co. *v.* Blatchford, 11 Wall. (U. S.) 172; Amory *v.* Amory, 95 U. S. 186; Dodge *v.* Perkins, 4 Mason (U. S.) 435; Davies *v.* Lathrop, 20 Blatchf. (U. S.) 397; *In re* McClean, 26 Fed. Rep. 49; Dimmock *v.* Doolittle, 29 Fed. Rep. 545; Whitman *v.* Hubbell, 30 Fed. Rep. 81; Goodnow *v.* Litchfield, 67 Iowa 691; Geyer *v.* John Hancock Mut. L. Ins. Co., 40 N. H. 224; 9 Am. Rep. 185; Mead *v.* Walker, 15 Wis. 499.

The 14th Amendment to the Constitution defines citizenship as follows: "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside." The simple fact of residence is not enough to constitute citizenship. See Chicago etc. R. Co. *v.* Ohle, 117 U. S. 123; McDonald *v.* Salem Capital Flour Mills, 31 Fed. Rep. 577. But see Cooper *v.* Galbraith, 3 Wash. (U. S.) 546.

Resident foreigners who are not naturalized are aliens, and a State by conferring the right of suffrage cannot make them citizens within the meaning of the Removal Acts. Breedlove *v.* Nicolet, 7 Pet. (U. S.) 413; Lanz *v.* Randall, 4 Dill. (U. S.) 425.

But a foreigner who has been naturalized under the laws of the United States is a citizen of the State in which he resides. Gribble *v.* Pioneer Press Co., 5 McCrary (U. S.) 73.

A resident in a territory is not a citizen of a State within the meaning of the Removal Acts. Darst *v.* Peoria, 13 Fed. Rep. 561; Strasburger *v.* Beecher, 44 Fed. Rep. 209; Dauton *v.* Muth, 45 Fed. Rep. 390; Nickerson *v.* Crook, 45 Fed. Rep. 658; Carson *v.* Donaldson, 45 Fed. Rep. 821.

Nor is a resident in the District of Columbia. Cissel *v.* McDonald, 16 Blatchf. (U. S.) 150.

A State is not a citizen, and a suit between a State and a citizen of another State is therefore not a suit between citizens of different States. Stone *v.* South Carolina, 117 U. S. 430; State *v.* Wolffe, 18 Fed. Rep. 836; Ferguson *v.* Ross, 38 Fed. Rep. 161.

Such a suit can be removed only if it is one arising under the constitution or laws of the United States. Ames *v.* Kansas, 111 U. S. 449; Germania Ins. Co. *v.* Wisconsin, 119 U. S. 473; New Jersey *v.* Babcock, 4 Wash. (U. S.) 344; Grinnell *v.* Johnson, 28 Fed. Rep. 2.

Aliens.—An alien does not cease to be such by reason of having made a declaration of intention to become a citizen. Baird *v.* Byrne, 3 Wall. Jr. (C. C.) 1; Lanz *v.* Randall, 4 Dill. (U. S.) 425; Maloy *v.* Duden, 25 Fed. Rep. 673; Orosco *v.* Gagliardo, 22 Cal. 83.

The fact that an alien who is party to a suit becomes a citizen while the suit is pending will not prevent him from removing it on the ground of alienage. Housh *v.* Clayton, 3 Woods (U. S.) 273.

of 1789 it was early decided that the necessary citizenship must exist at the time the suit was commenced as well as at the time the petition for removal was filed,[1] and after considerable conflict of opinion the same rule was adopted under the later acts.[2]

The citizenship of the parties must appear in the pleadings or be distinctly alleged in the petition for removal; it is not enough to allege residence merely.[3] Corporations are treated, for pur-

In order to give the Federal courts jurisdiction under the act of September 24, 1787, it must be alleged not simply that a party is an alien but that he is a subject or citizen of some foreign State. Wilson *v.* City Bank, 3 Sumn. (U. S.) 422.

Indians resident in the United States are not citizens or subjects of foreign States. Karravoh *v.* Adams, 1 Dill. (U. S.) 366.

Under the act of 1789, if the plaintiff was an alien the defendant who was a citizen of a State other than that in which the suit was brought, the latter could not remove the suit. Galvin *v.* Boutwell, 9 Blatchf. (U. S.) 470.

1. Phœnix Ins. Co. *v.* Pechner, 95 U. S. 183; Holden *v.* Putnam F. Ins. Co., 46 N. Y. 1; 7 Am. Rep. 287; Phœnix L. Ins. Co. *v.* Saettel, 33 Ohio St. 278; People *v.* Superior Ct. of Chicago, 34 Ill. 356; Savings Bank *v.* Benton, 2 Metc. (Ky.) 240; Pechner *v.* Phœnix Ins. Co., 65 N. Y. 195.

2. Gibson *v.* Bruce, 108 U. S. 561; Houston etc. R. Co. *v.* Shirley, 111 U. S. 358; Mansfield etc. R. Co. *v.* Swan, 111 U. S. 379; Akers *v.* Akers, 117 U. S. 197; Stevens *v.* Nichols, 130 U. S. 230; Young *v.* Parker, 132 U. S. 267; La Confiance Compagnie d'Assurance contrèe Incendie *v.* Hall, 137 U. S. 61; Frelinghuysen *v.* Baldwin, 22 Blatchf. (U. S.) 1; Houser *v.* Clayton, 3 Woods (U. S.) 273; Rawle *v.* Phelps, 2 Flipp. (U. S.) 471; Kaeiser *v.* Illinois Cent. R. Co., 2 McCrary (U. S.) 187; Beede *v.* Cheeney, 5 Fed. Rep. 388; Brinkerhoff *v.* Morris Canal & Banking Co., 18 Fed. Rep. 97; Carrick *v.* Landman, 20 Fed. Rep. 209; Goodnow *v.* Dolliver, 26 Fed. Rep. 469; Schnadig *v.* Flescher, 29 Fed. Rep. 465; Seddon *v.* Virginia etc. Steel etc. Co., 36 Fed. Rep. 6; Camprelle *v.* Balbach, 46 Fed. Rep. 81; Weed Sewing Machine Co. *v.* Smith, 71 Ill. 204; Indianapolis etc. R. Co. *v.* Risley, 50 Ind. 60; Tapley *v.* Martin, 116 Mass. 275; Dart *v.* Walker, 4 Daly (N. Y.) 188; Blackwell *v.* Lynchburg etc. R. Co., 107 N. Car. 217; Herndon *v.* Lancashire Ins. Co., 107 N. Car. 191.

In Hone *v.* Dillon, 29 Fed. Rep. 465, the court held that the requisite citizenship must exist when the suit was commenced if the removal was under the act of 1875, but that it was not necessary under the act of 1867.

Contra, McLean *v.* St. Paul etc. R. Co., 16 Blatchf. (U. S.) 309; Wehl *v.* Wald, 17 Blatchf. (U. S.) 342; Chicago etc. R. Co. *v.* McComb, 17 Blatchf. (U. S.) 371; Cook *v.* Whitney, 3 Woods (U. S.) 715; Jackson *v.* Mutual L. Ins. Co., 3 Woods (U. S.) 413; 60 Ga. 423; Johnson *v.* Monell, Woolw. (U. S.) 390; Miller *v.* Chicago etc. R. Co., 3 McCrary (U. S.) 460; McGinnity *v.* White, 3 Dill. (U. S.) 350; Curtin *v.* Decker, 5 Fed. Rep. 385; Glover *v.* Shepperd, 15 Fed. Rep. 833; Hammond *v.* Buchanan, 68 Ga. 728; Nye *v.* Northern Cent. R. Co., 24 Hun (N. Y.) 556; Phœnix L. Ins. Co. *v.* Saettel, 33 Ohio St. 278.

If the plaintiff and defendant become citizens of the same State after the suit has been commenced, but before the petition for removal is filed, the suit cannot be removed. Goodnow *v.* Grayson, 15 Fed. Rep. 1; Laird *v.* Connecticut etc. R. Co., 55 N. H. 375; 20 Am. Rep. 215. *Contra*, Houser *v.* Clayton, 3 Woods (U. S.) 273.

3. Brown *v.* Keene, 8 Pet. (U. S.) 112; Parker *v.* Overman, 18 How. (U. S.) 137; Grace *v.* American Cent. Ins. Co., 109 U. S. 278; Mansfield etc. R. Co. *v.* Swan, 111 U. S. 379; Hancock *v.* Holbrook, 112 U. S. 229; Merchant's Nat. Bank *v.* Brown, 17 Fed. Rep. 161; Kelley *v.* Houghton, 23 Fed. Rep. 417; Welch *v.* Tennent, 4 Cal. 203; Brock *v.* Doyle, 18 Fla. 172; Carswell *v.* Schley, 59 Ga. 17; Pechner *v.* Phœnix Ins. Co., 65 N. Y. 195; Amory *v.* Amory, 36 N. Y. Sup. Ct. Rep. 520; Herndon *v.* Lancashire Ins. Co., 107 N. Car. 191; Blackwell *v.* Lynchburg etc. R. Co., 107 N. Car. 217; McMurdy *v.* Connecticut Gen'l L. Ins. Co., 4 W. N. C. (Pa.) 18. See also Robertson *v.* Cease, 97 U. S. 646. But see Brownell *v.* Gordon, 1 McAll. (U. S.) 207.

poses of removal, as citizens of the States under whose laws they are organized;[1] national banks are, for the same purposes, treated

If the necessary citizenship is shown by the record, it need not be alleged in the petition for removal. National Steamship Co. *v.* Tugman, 106 U. S. 118; Ruckman *v.* Ruckman, 1 Fed. Rep. 587; Chambers *v.* McDougal, 42 Fed. Rep. 694.

And in Ladd *v.* Tudor, 3 Woodb. & M. (U. S.) 325, it was held if citizenship was properly alleged in the petition, it need not appear in the pleadings.

It is not enough to allege citizenship on information and belief. Wolff *v.* Archibald, 14 Fed. Rep. 389.

Failure to allege that the requisite citizenship existed at the commencement of the suit is a defect which cannot be remedied by amendment in the Federal court. Crehore *v.* Ohio etc. R. Co., 131 U. S. 240; Jackson *v.* Allen, 132 U. S. 27.

Where a partnership is a party to a suit the citizenship of each partner must be shown. Adams *v.* May, 27 Fed. Rep. 907.

A petition for removal by the defendant, alleging that he is a citizen of a certain State and that none of the plaintiffs are citizens of that State, if it does not also allege that the plaintiffs are citizens of certain other States named in the petition, or foreign subjects or citizens, is insufficient. Cameron *v.* Hodges, 127 U. S. 322. See also Elliott *v.* Stocks, 67 Ala. 290.

1. Louisville etc. R. Co. *v.* Letson, 2 How. (U. S.) 497; Marshall *v.* Baltimore etc. R. Co., 16 How. (U. S.) 314; Covington Drawbridge Co. *v.* Shepherd, 20 How. (U. S.) 227; Ohio etc. R. Co. *v.* Wheeler, 1 Black (U. S.) 286; Baltimore etc. R. Co. *v.* Harris, 12 Wall. (U. S.) 65; Chicago etc. R. Co. *v.* Whitton, 13 Wall. (U. S.) 270; Barney *v.* Globe Bank, 5 Blatchf. (U. S.) 107; Williams *v.* Missouri etc. R. Co., 3 Dill. (U. S.) 267; Pacific R. Co. *v.* Missouri Pac. R. Co., 5 McCrary (U. S.) 373; Hobbs *v.* Manhattan Ins. Co., 56 Me. 417; 96 Am. Dec. 472; Quigley *v.* Central Pac. R. Co., 11 Nev. 350; 21 Am. Rep. 757; Shelby *v.* Hoffman, 7 Ohio St. 450; Baltimore etc. R. Co. *v.* Cary, 28 Ohio St. 208; Rathbone Oil Tract Co. *v.* Rauch, 5 W. Va. 79. The same rule applies to municipal as well as private corporations. Cowles *v.* Mercer Co., 7 Wall. (U. S.) 118; McCoy *v.* Washington Co., 3 Wall. Jr. (C. C.) 381; Barclay *v.* Levee Comr's, 1 Woods (U. S.) 254; and a State statute providing municipal or other corporations can be sued only in certain State courts, does not limit the right of removal. Cowles *v.* Mercer Co., 7 Wall. (U. S.) 118; Chicago etc. R. Co. *v.* Whitton, 13 Wall. (U. S.) 270.

Citizenship of Corporations. — The fact that a corporation has an office and carries on business in a State other than that in which it is chartered does not make it a citizen of that State. Hatch *v.* Chicago etc. R. Co., 6 Blatchf. (U. S.) 105; Guinn *v.* Iowa Cent. R. Co., 14 Fed. Rep. 323; Fales *v.* Chicago etc. R. Co., 32 Fed. Rep. 672; Purcell *v.* British Land Co., 42 Fed. Rep. 465; Henning *v.* Western Union Tel. Co., 43 Fed. Rep. 97; Overman Wheel Co. *v.* Pope Mfg. Co., 46 Fed. Rep. 577; Terre Haute etc. R. Co. *v.* Abend, 9 Ill. App. 304; Stevens *v.* Phœnix Ins. Co., 41 N. Y. 149; Holden *v.* Putnam F. Ins. Co., 46 N. Y. 1; 7 Am. Rep. 287; Kranshaar *v.* New Haven Steamboat Co., 7 Robt. (N. Y.) 356; Southern Pac. R. Co. *v.* Harrison, 73 Tex. 103. And an enabling act authorizing a corporation of another State to do business in a State does not make it a citizen of that State. Taylor Co. Ct. *v.* Baltimore etc. R. Co., 35 Fed. Rep. 161; Baltimore etc. R. Co. *v.* Ford, 35 Fed. Rep. 170. Nor does a State statute requiring foreign corporations to appoint an agent in the State upon whom process may be served. Owen *v.* New York L. Ins. Co., 1 Hughes (U. S.) 322; Chicago etc. R. Co. *v.* Minnesota etc. R. Co., 29 Fed. Rep. 337; Amsden *v.* Norwich Union F. Ins. Co., 44 Fed. Rep. 515; Western Union Tel. Co. *v.* Dickinson, 40 Ind. 444; 13 Am. Rep. 295; Grimault *v.* Louisville etc. R. Co., 42 La. Ann. 52; Morton *v.* Mutual L. Ins. Co., 105 Mass. 141; Hobbs *v.* Manhattan Ins. Co., 56 Me. 417; 96 Am. Dec. 472; Quimby *v.* Pennsylvania Ins. Co., 58 N. H. 494; Stevens *v.* Phœnix Ins. Co., 41 N. Y. 149; Holden *v.* Putnam F. Ins. Co., 46 N. Y. 1; 7 Am. Rep. 287; Newhall *v.* Atlantic F. & M. Ins. Co., 8 Phila. (Pa.) 106. *Contra*, Scott *v.* Texas Land & Cattle Co., 41 Fed. Rep. 225.

as citizens of the States in which they are located,[1] and corporations created by foreign countries as citizens of such countries.[2]

6. Separable Controversy.—The Removal Acts of 1875 and 1887 contain substantially the same provisions for the removal of any suit in which there is a controversy which is wholly between

See also Riddle *v.* New York etc. R. Co., 39 Fed. Rep. 290.

A railroad corporation does not become a citizen of a State by leasing and operating a railroad line therein or by accepting a franchise from the State. Baltimore etc. R. Co. *v.* Kountz, 104 U. S. 5; Williams *v.* Missouri etc. R Co., 3 Dill. (U. S.) 267; Wilkinson *v.* Delaware etc. R. Co, 22 Fed. Rep. 353; Baltimore etc. R. Co. *v.* Cary, 28 Ohio St. 208.

Contra, Baltimore etc. R. Co. *v.* Wightman, 29 Gratt. (Va.) 431; 26 Am. Rep. 384; Baltimore etc. R. Co. *v.* Noell, 32 Gratt. (Va.) 394.

The fact that a non-resident railroad company, having purchased all the roads in the State owned by a domestic corporation, establishes agencies in the State, and operates the roads under the laws thereof, does not make it a domestic corporation, so as to take away its right to remove a suit brought against it in a State court by a citizen of the State. Conn *v.* Chicago etc. R. Co., 48 Fed. Rep. 177.

Nor does the fact that it is under a perpetual lease to another railroad make it a citizen of the same State as the latter. Crane *v.* Chicago etc. R. Co., 20 Fed. Rep. 402.

A corporation formed by the consolidation of other corporations chartered in different States is presumed to be a citizen of each of those States. Chicago etc. R. Co. *v.* Lake Shore etc. R. Co., 10 Biss. (U. S.) 122; Pacific R. Co. *v.* Missouri Pac. R. Co., 5 McCrary (U. S.) 373; Cohn *v.* Louisville etc. R. Co., 39 Fed. Rep. 227; Fitzgerald *v.* Missouri Pac. R. Co., 45 Fed. Rep. 812. See also Paul *v.* Baltimore etc. R. Co., 44 Fed. Rep. 513.

A corporation sued in a State in which it is chartered cannot remove the suit as a citizen of another State because it is also chartered there. It will be treated as a citizen of each of the States in which it is chartered. Ohio etc. R. Co. *v.* Wheeler, 1 Black (U. S.) 286; Memphis etc. R. Co. *v.* Alabama, 107 U. S. 581; Horne *v.* Boston etc. R. Co., 18 Fed. Rep. 50; 62 N. H. 454; Colglazier *v.* Louisville etc. R. Co., 22 Fed. Rep. 568. See also Baltimore etc. R. Co. *v.* Gallahue, 12 Gratt. (Va.) 655; 65 Am. Dec. 254. But in a late case it has been held that where a corporation is chartered by the State of Missouri and afterwards is adopted as a corporation of Arkansas, it may when sued by a citizen of Arkansas in an Arkansas court, remove the cause as a citizen of Missouri. Stephens *v.* St. Louis etc. R. Co., 47 Fed. Rep. 530.

And when a suit is removed by a corporation on the ground of citizenship, the petition for removal or pleadings should show not only that the corporation is a citizen of another State, but that it is not a citizen of the State where the suit is brought. Hirschl *v.* J. I. Case Threshing Machine Co., 42 Fed. Rep. 803; Qverman Wheel Co. *v.* Pope Mfg. Co., 46 Fed. Rep. 577; Guinault *v.* Louisville etc. R. Co., 41 La. Ann. 571. *Contra*, Myers *v.* Murray, 43 Fed. Rep. 695.

In Waltz *v.* American Express Co., 3 Cent. L. J. 784, a joint stock company under *New York* law was treated as a corporation. *Contra*, Dinsmore *v.* Philadelphia etc. R. Co., 3 Cent. L. J. 157; Whitman *v.* Hubbell, 30 Fed. Rep. 81.

Receivers of national banks have no right as such to remove all suits brought against them into the Federal courts. Bird *v.* Cockrem, 2 Woods (U. S.) 32.

1. Manufacturer's National Bank *v.* Baack, 8 Blatchf. (U. S.) 137; Davis *v.* Cook, 9 Nev. 134; Cooke *v.* State Nat. Bank, 52 N. Y. 96; 11 Am. Rep. 667; Chatham Nat. Bank *v.* Merchants' Nat. Bank, 1 Hun (N. Y.) 702.

The fact that national banks were expressly exempted from the provisions of *New York* Rev. Stat., § 640 does not prevent them from removing suits under other acts. Chatham Nat. Bank *v.* Merchants' Nat. Bank, 1 Hun (N. Y.) 702.

2. National Steamship Co. *v.* Tugman, 106 U. S. 118; Terry *v.* Imperial F. Ins. Co., 3 Dill. (U. S.) 408; Barrowcliffe *v.* La Caisse Générale, 58 How. Pr. (N. Y.) 131.

citizens of different States and which can be fully determined as between them, except that under the former act "either one or more of the plaintiffs or defendants actually interested in such controversy" might remove the suit,[1] while under the latter the right is restricted to "one or more of the defendants actually interested in such controversy."[2] Therefore, decisions under the former statute as to what constitutes a separable controversy apply equally well to cases arising under the latter. The nature of the controversy must be determined from the declaration or bill of complaint; and where a joint action is brought against several defendants the fact that they file separate and different answers does not raise a separable controversy as to any of them,[3] even though the plaintiff might have sued each of them separately,[4] and even though in the joint action the plaintiff may have judgment against such of the defendants as may be found to be liable.[5] But if the plaintiff's bill asks for a joint and several accounting it may raise a separable controversy.[6] The fact that

1. Rand *v.* Walker, 117 U. S. 340.

2. Western Union Tel. Co. *v.* Brown, 32 Fed. Rep. 337.

3. Ayres *v.* Wiswall, 112 U. S. 187; Louisville etc. R. Co. *v.* Ide, 114 U. S. 52; Putnam *v.* Ingraham, 114 U. S. 57; St. Louis etc. R. Co. *v.* Wilson, 114 U. S. 60; Pirie *v.* Tvedt, 115 U. S. 41; Starin *v.* New York, 115 U. S. 248; Plymouth etc. Gold Min. Co. *v.* Amador etc. Canal Co., 118 U. S. 264; Little *v.* Giles, 118 U. S. 596; Hax *v.* Caspar, 31 Fed. Rep. 499; Patchin *v.* Hunter, 38 Fed. Rep. 51; Kaitel *v.* Wylie, 38 Fed. Rep. 865. See also *Ex parte* Andrews, 40 Ala. 639; O'Kelly *v.* Richmond etc. R. Co., 89 N. Car. 58; Chesapeake etc. R. Co. *v.* Hendricks, 88 Tenn. 710.

The same rule was applied to an action of trespass against two corporations in which one of the defendants alleged that the controversy between it and the plaintiff was separate, and that the other defendant was not in existence at the time of the alleged trespass. Louisville etc. R. Co. *v.* Waugelin, 132 U. S. 599.

The question whether there is a separable controversy or not is to be determined from the case made by the pleadings and not from the allegations contained in the petition for removal. Starin *v.* New York, 115 U. S. 248; Little *v.* Giles, 118 U. S. 596; Hazard *v.* Robinson, 21 Fed. Rep. 193.

A separable controversy cannot be raised by filing a counterclaim. Brande *v.* Gilchrist, 18 Fed. Rep. 465.

4. Pirie *v.* Tvedt, 115 U. S. 41; Sloane *v.* Anderson, 117 U. S. 275; Thorn Wire Hedge Co. *v.* Fuller, 122 U. S. 535; Tvedt *v.* Carson, 4 McCrary (U. S.) 426. But see Clark *v.* Chicago etc. R. Co., 11 Fed. Rep. 355; Kerling *v.* Cotzhausen, 16 Fed. Rep. 705; Spangler *v.* Atchison etc. R. Co., 42 Fed. Rep. 805; Simmons *v.* Taylor, 83 N. Car. 148; 35 Am. Rep. 56.

5. Louisville etc. R. Co. *v.* Ide, 114 U. S. 52; Putnam *v.* Ingraham, 114 U. S. 57; Pirie *v.* Tvedt, 115 U. S. 41.

6. Boyd *v.* Gill, 21 Blatchf. (U. S.) 543; Langdon *v.* Fogg, 18 Fed. Rep. 5.

A bill to quiet title requiring each of several defendants to set up any right or claim he may have or be forever barred from doing so and seeking an account of rents and profits, presents a separable controversy between the plaintiff and a defendant who replies that he is the sole owner and in sole possession of part of the land in dispute. Bacon *v.* Felt, 30 Fed. Rep. 870. See also Stanbrough *v.* Cook, 38 Fed. Rep. 369.

Where a railroad company and one of its engineers were sued together in an action of tort, but the cause of action against each was several, and not joint and several, it was held that the controversies were separable in Beuttel *v.* Chicago etc. R. Co., 26 Fed. Rep. 50.

If defendants are joined under a State statute allowing such joinder, who could not be joined except for such statute, and their defenses are separate, and separate judgments may be entered, one of them may remove the suit.

one of two defendants in a joint action defaults does not make the controversy between the plaintiff and the remaining defendant a separable one,[1] nor does the fact that one of the defendants is not served with process and does not appear.[2] The separable controversy between the plaintiff and non-resident defendant must be one that can be fully and finally determined by itself,[3] but it is immaterial whether it is the principal controversy in the case or not, or how many other controversies there may be.[4]

Cooke *v.* State Nat. Bank, 52 N. Y. 96. 11 Am. Rep. 667.

1. Putnam *v.* Ingraham, 114 U. S. 57. Brooks *v.* Clark, 119 U. S. 502; Hax *v.* Caspar, 31 Fed. Rep. 499.

2. Patchin *v.* Hunter, 38 Fed. Rep. 51; Ames *v.* Chicago etc. R. Co., 39 Fed. Rep. 881.

3. Corbin *v.* Van Brunt, 105 U. S. 576; Shainwald *v.* Lewis, 108 U. S. 158; Tyler *v.* Hagerty, 2 Flipp. (U. S.) 257; Capital City Bank *v.* Hodgin, 22 Fed. Rep. 209.

4. Snow *v.* Smith, 4 Hughes (U. S.) 204; Taylor *v.* Rockefeller, 6 Reporter 226; Bybee *v.* Hawkett, 6 Sawy. (U. S.) 593; Farmers' L. & T. Co. *v.* Chicago etc. R. Co., 9 Biss. (U. S.) 133.

The fact that the petitioner is the principal defendant gives him no right to remove the suit if other defendants, citizens of the same State with the plaintiff, are interested in the determination of the controversy. Winchester *v.* Loud, 108 U. S. 130; but if the other defendants who are citizens of the same State with the plaintiff are not interested in the separable controversy, their presence will not prevent the non-resident defendant from removing the suit. Sharp *v.* Whiteside, 19 Fed. Rep. 150.

In the following cases it has been held that no separable controversy was presented:

An action to establish a will as a will of real estate, in which there were several defendants, citizens of different States. Anderson *v.* Appleton, 32 Fed. Rep. 855. See also Fraser *v.* Jennison, 106 U. S. 191; Reed *v.* Reed, 31 Fed. Rep. 49.

An action on a bond against the principal and sureties, the only relief sought being a money judgment against all the defendants. Western Union Tel. Co. *v.* Brown, 32 Fed. Rep. 337.

An action of replevin against several defendants. Winnemans *v.* Edgington, 27 Fed. Rep. 324.

A foreclosure suit in which the rights of all the parties will depend on one final decree. Thompson *v.* Dixon, 28 Fed. Rep. 5. See also Le Mars *v.* Iowa Falls etc. R. Co., 4 McCrary (U. S.) 218.

A suit which raises simply a question of the priority of several liens against the same property. Bissell *v.* Canada etc. R. Co., 39 Fed. Rep. 225.

An action on a partnership obligation does not raise a separable controversy as to one of the partners. Fletcher *v.* Hamlet, 116 U. S. 408; Woodrum *v.* Clay, 33 Fed. Rep. 897. See also Stone *v.* South Carolina, 117 U. S. 430; Brooks *v.* Clark, 119 U. S. 502; Graves *v.* Corbin, 132 U. S. 571.

A creditor's bill to subject incumbered property to the payment of his judgment by sale and distribution of the proceeds among the lien holders according to priority creates no separable controversy as to different lien holders who are parties respondent, although their defenses may be separate. Fidelity Ins. Co. *v.* Huntington, 117 U. S. 280; Young *v.* Parker, 132 U. S. 267. See also Rumsey *v.* Call, 28 Fed. Rep. 769.

In an action by resident tax payers against county officials and bondholders, one of whom is a non-resident, to restrain the collection of a tax levied for the payment of the bonds, which are alleged to be illegally issued, and to cancel the bonds, there is no separable controversy as between the plaintiffs and county officials on the one hand, and the plaintiffs and bondholders on the other; and it not appearing that the bonds owned by the non-resident holder were of a different series from those owned by residents, there is no separable controversy between the plaintiff and the non-resident bondholder. Anderson *v.* Bowers, 40 Fed. Rep. 708.

In a suit by a sub-contractor against a railroad company and the principal contractor under a statute giving contractors and material-men a lien on a

The provisions for the removal of cases involving separable controversies have no application to cases where removal is sought on the ground of prejudice or local influence.[1]

7. Prejudice and Local Influence.—Under the act of March 2, 1867, either plaintiff or defendant might remove a suit on the ground of prejudice or local influence, and in order to entitle himself to do so (the requirements as to the citizenship of the parties and the value of the matter in dispute being satisfied) he had merely to present to the State court with his application, an affidavit[2] that he had reason to believe, and did believe, that from prejudice or local influence he would be unable to

railroad for work and labor done and materials, furnished, there is no separable controversy between the plaintiff and the railroad company. Ames *v.* Chicago etc. R. Co., 39 Fed. Rep. 881.

The fact that several *cestuis que trustent* contest their trustees' account does not make the controversy separable. *In re* McClean. 26 Fed. Rep. 49.

In the following cases it was held that the special facts involved disclosed a separable controversy: Galesburg *v.* Galesburg Water Co., 27 Fed. Rep. 321; Wilson *v.* Union Sav. Assoc., 30 Fed. Rep. 521; Taylor Co. Ct. *v.* Baltimore etc. R. Co., 35 Fed. Rep. 161; Foster *v.* Chesapeake etc. R. Co., 47 Fed. Rep. 369; Carter *v.* Scott, 82 Ga. 297; Davis *v.* Montgomery, 36 La. Ann. 874; Rich *v.* Gross, 29 Neb. 337; Feibelman *v.* Edmonds, 69 Tex. 334.

And in the following cases that the special facts involved did not disclose a separable controversy: Central R. Co. *v.* Mills, 113 U. S. 249; East Tenn. etc. R. Co. *v.* Grayson, 119 U. S. 240; Laidly *v.* Huntington, 121 U. S. 179; Thorn Wire Hedge Co. *v.* Fuller, 122 U. S. 535; Young *v.* Parker, 132 U. S. 267; Steinkuhl *v.* York, 2 Flipp. (U. S.) 376; Burke *v.* Flood, 6 Sawy. (U. S.) 220; Freidler *v.* Chotard, 19 Fed. Rep. 227; Lyddy *v.* Gano, 26 Fed. Rep. 177; Chapman *v.* Chapman, 28 Fed. Rep. 1; Richmond etc. R. Co. *v.* Findley, 32 Fed. Rep. 641; Weller *v.* J. B. Pace Tobacco Co., 32 Fed. Rep. 860; Reineman *v.* Ball, 33 Fed. Rep. 692; Yearian *v.* Horner, 36 Fed. Rep. 130; Southworth *v.* Reid, 36 Fed. Rep. 451; Sexton *v.* Seelye, 39 Fed. Rep. 705; *In re* San Antonio etc. R. Co., 44 Fed. Rep. 145; McNulty *v.* Connecticut Mut. L. Ins. Co., 46 Fed. Rep. 305; *Ex parte* Grimball, 61 Ala. 598.

1. Jefferson *v.* Driver, 117 U. S. 272; Cambria Iron Co. *v.* Ashburn, 118 U. S. 54; Young *v.* Parker, 132 U. S. 167.

2. **Affidavit.**—In Sands *v.* Smith, 1 Dill. (U. S.) 298, and Duff *v.* Duff. 31 Fed. Rep. 772, it was held that the affidavit required by the act of 1867 must be signed by the petitioner in person, but in the following cases, where the petitioner was a natural person, an affidavit signed by his attorney duly authorized was held to be sufficient: Dennis *v.* Alachua Co., 3 Woods (U. S.) 685; Hart *v.* New Orleans, 14 Fed. Rep. 180; Cooper *v.* Condon, 15 Kan. 572.

The affidavit, however, even if signed by an attorney, must be the affidavit of the petitioner. Cooper *v.* Condon, 15 Kan. 572; Tunstall *v.* Madison, 30 La. Ann. 471; and it should show why it was not signed by the party himself. Sands *v.* Smith, 1 Dill. (U. S.) 298; Cooper *v.* Condon, 15 Kan. 572.

It was at one time doubted whether a corporation, being unable to make affidavit, could avail itself of the provisions of the act of 1867. Cooke *v.* State Nat. Bank, 52 N. Y. 96; 11 Am. Rep. 667; Mix *v.* Andes Ins. Co., 9 Hun (N. Y.) 397. But the contrary view prevailed and affidavits made by the duly authorized officers of corporations were accepted.

Farmers' L. & T. Co. *v.* Maquillan, 3 Dill. (U. S.) 379; Minnett *v.* Milwaukee etc. R. Co., 3 Dill. (U. S.) 400; Quigley *v.* Central Pac. R. Co., 11 Nev. 350; 21 Am. Rep. 757; Shaft *v.* Phœnix Mut. L. Ins. Co., 67 N. Y. 544; 23 Am. Rep. 138; Mix *v.* Andes Ins. Co., 74 N. Y. 53.

But the authority of the agent or officer to make the affidavit should appear, and if made by the superintendent or secretary of a corporation without proof of special authority it was held to be sufficient. Mahone *v.* Manchester etc. R. Co., 111 Mass. 72; 15 Am. Rep.

obtain justice in the State court.[1] This act continued in force until it was superseded by the act of 1887, which limited the right of removal on this ground to the defendant,[2] and required that the petitioner should make it appear to the circuit court that from prejudice or local influence he would be unable to obtain justice, not only in the State court in which the suit was brought, but in any other State court to which he had the right to remove the cause on account of such prejudice or local influence.[3] But while under the earlier act the suit could be removed only by all the defendants, if there were more than one[4] under the later act, any one of several defendants may remove it.[5] All the plaintiffs, however, must be citizens of the State where the suit is brought.[6]

9; Dodge *v.* Northwestern Union Packet Co., 13 Minn. 458; Quigley *v.* Central Pac. R. Co., 11 Nev. 350; 21 Am. Rep. 757.

The affidavit must substantially follow the language of the statute. Baltimore etc. R. Co. *v.* New Albany etc. R. Co., 53 Ind. 597; and should be certified according to the laws of the State where the suit is pending. Bowen *v.* Chase, 7 Blatchf. (U. S.) 255; Sutherland *v.* Jersey City etc. R. Co., 22 Fed. Rep. 356; Florence *v.* Butler, 9 Abb. Pr. N. S. (N. Y.) 63.

1. Under the act of 1867 the petitioner need not make affidavit that prejudice and local influence actually existed, but of his belief that they existed. Sands *v.* Smith, 1 Dill. (U. S.) 298; Short *v.* Chicago etc. R. Co., 34 Fed. Rep. 225; Malone *v.* Richmond etc. R. Co., 35 Fed. Rep. 625; Meadow Valley Min. Co. *v.* Dodds, 7 Nev. 143; 8 Am. Rep. 709; Quigley *v.* Central Pac. R. Co., 11 Nev. 350; 21 Am. Rep. 757.

2. Tullock *v.* Webster Co., 40 Fed. Rep. 706.

A plaintiff against whom a counterclaim is filed does not thereby become a defendant within the meaning of this act. La Montague *v.* T. W. Harvey Lumber Co., 34 Fed. Rep. 645. *Contra*, Carson etc. Lumber Co. *v.* Holtzclaw, 39 Fed. Rep. 578; Walcott *v.* Watson, 46 Fed. Rep. 529.

3. Whelan *v.* New York etc. R. Co., 35 Fed. Rep. 849.

If the affidavit states facts showing the existence of prejudice or local influence in the county in which the suit is brought, but applying only to that county, and alleges in general terms that owing to prejudice or local influence the petitioner will not be able to obtain a fair trial in any other county to which he has a right to remove the suit, and under the State law the suit may be removed to the court of some other convenient county to which there is no valid objection, the petition should not be granted. Robison *v.* Hardy, 38 Fed. Rep. 49.

Where the defendant has a right to remove the suit into any one of seven adjoining counties, an affidavit stating ing eneral terms that, on account of prejudice or local influence, he will not be able to obtain justice in the courts of any of them is insufficient. Pike *v.* Floyd, 42 Fed. Rep. 247.

4. See *supra*, this title, *Act of* 1867.

5. In order that one of several defendants may remove a suit under the act of 1887, it is not necessary that there should be a separable controversy. A simple defendant may remove the whole suit, and then if it appears that it can be separated without prejudice to the parties, it may be remanded as to the other defendants. And this provision is constitutional, although it may operate to give the circuit court jurisdiction of an entire suit including a controversy between a plaintiff and defendant residing in the same State. Fisk *v.* Henarie, 32 Fed. Rep. 417; Whelan *v.* New York etc. R. Co., 35 Fed. Rep. 849.

In Anderson *v.* Bowers, 43 Fed. Rep. 321, this provision was held to mean that any defendant might apply for removal, but that the controversy must still, as under the act of 1867, be wholly between citizens of the State where the suit was brought on one side and citizens of other States on the other.

6. Thomson *v.* East Tenn. etc. R. Co., 38 Fed. Rep. 673; Pike *v.* Floyd, 42 Fed. Rep. 247; Niblock *v.* Alexander, 44 Fed. Rep. 306.

Under the act of 1887 the application for removal should be made to the circuit court,[1] and the actual existence of prejudice or local influence must be made to appear to the satisfaction of that court;[2] but as the statute does not prescribe the method by which it is to be made to appear, the circuit courts may adopt such rules as they see fit. The affidavit of the proper party following the language of the statute has been held to be a sufficient *prima facie* showing;[3] but the general rule is that the affidavit must state the facts which show the existence of prejudice or local influence.[4]

The value of the matter in dispute must exceed $2,000, exclusive of interest and costs, in order that the suit may be removable

1. Southworth *v.* Reid, 36 Fed. Rep. 451; Kaitel *v.* Wylie, 38 Fed. Rep. 865; Huskins *v.* Cincinnati etc. R. Co., 37 Fed. Rep. 504; Rome etc. Constr. Co. *v.* Smith, 84 Ga. 238; Blackwell *v.* Lynchburg etc. R. Co., 107 N. Car. 217; Beyer *v.* Soper Lumber Co., 76 Wis. 145.

But in Short *v.* Chicago etc. R. Co., 34 Fed. Rep. 225, it was held to be a proper practice to file the affidavit in the State court and have a certified copy sent to the circuit court.

2. Short *v.* Chicago etc. R. Co., 34 Fed. Rep. 225; Malone *v.* Richmond etc. R. Co., 35 Fed. Rep. 625; Southworth *v.* Reid, 36 Fed. Rep. 451; Hakes *v.* Burns, 40 Fed. Rep. 33; Minnick *v.* Union Ins. Co., 40 Fed. Rep. 369.

A cause having been properly moved on a petition of the defendant alleging the existence of prejudice and local influence, and supported by affidavits, the plaintiff cannot afterwards, as a matter of right, upon affidavits denying the existence of such prejudice and local influence, compel the court to reconsider its finding on the question. Carpenter *v.* Milwaukee etc. R. Co., 47 Fed. Rep. 535.

See also Adelbert College of Western Reserve University *v.* Toledo etc. R. Co., 47 Fed. Rep. 836. See also Taylor Co. Ct. *v.* Baltimore etc. R. Co., 35 Fed. Rep. 161; *Contra*, Fisk *v.* Henarie, 32 Fed. Rep. 417; 35 Fed. Rep. 230; Hills *v.* Richmond, 33 Fed. Rep. 81.

3. Whelan *v.* New York etc. R. Co., 35 Fed. Rep. 849; Cooper *v.* Richmond etc. R. Co., 42 Fed. Rep. 697. But see Malone *v.* Richmond etc. R. Co., 35 Fed. Rep. 625.

4. *Ex parte* Pennsylvania Co., 137 U. S. 451; Goldworthy *v.* Chicago etc. R. Co., 38 Fed. Rep. 769; Amy *v.* Manning, 38 Fed. Rep. 868; Walcott *v.* Watson, 46 Fed. Rep. 529.

Although the defendant swears positively that prejudice or local influence exists, his affidavit is insufficient unless the facts on which the averment is based appear. Amy *v.* Manning, 38 Fed. Rep. 536.

An affidavit of the defendant's attorney couched in the language of the statute, together with the averment that "affiant knows the fact of such prejudice and local influence and makes this affidavit from such knowledge" is insufficient. Niblock *v.* Alexander, 44 Fed. Rep. 306.

An affidavit that the petitioner cannot obtain justice in the State courts is insufficient, if it does not show that it is on account of prejudice or local influence. Goldworthy *v.* Chicago etc. R. Co., 38 Fed. Rep. 769.

In some circuits it has been held that the facts stated in the affidavit cannot be controverted by the adverse party. Whelan *v.* New York etc. R. Co, 35 Fed. Rep. 849; Huskins *v.* Cincinnati etc. R. Co., 37 Fed. Rep. 504; Cooper *v.* Richmond etc. R. Co., 42 Fed. Rep. 697; Brodhead *v.* Shoemaker, 44 Fed. Rep. 518.

And in others that they may be controverted, and that the court may receive evidence on the questions involved in the form of affidavits, depositions, or oral testimony. Short *v.* Chicago etc. R. Co., 34 Fed. Rep. 225; Malone *v.* Richmond etc. R. Co., 35 Fed. Rep. 625; Southworth *v.* Reid, 36 Fed. Rep. 451; Dennison *v.* Brown, 38 Fed. Rep. 535.

In Carson etc. Lumber Co. *v.* Holtzclaw, 39 Fed. Rep. 578, it was held that three days' notice to the adverse party did not give him a reasonable opportunity to contest defendant's allegations.

on the ground of prejudice or local influence.[1] This clause of the act of 1887 does not authorize the removal of a cause to which an alien is a party.[2]

8. **Federal Question.**—The Acts of 1875 and 1887 both provide for the removal of suits of a civil nature, at law or in equity, arising under the constitution or laws of the United States, or treaties made under their authority. In the language of Chief Justice Marshall, "a case in law or equity consists of the right of the one party as well as of the other, and may truly be said to arise under the constitution or a law of the United States whenever its correct decision depends on the right construction of either."[3]

A suit cannot be removed for the reason that during its progress a construction of the constitution or a law of the United States may become necessary. It must actually arise out of a question as to the operation or application of some provision of that constitution or law.[4] But the fact that other questions not

1. *Ex parte* Pennsylvania Co., 137 U. S. 451; Carson etc. Lumber Co. *v.* Holtzclaw, 39 Fed. Rep. 578; Roraback *v.* Pennsylvania Co., 42 Fed. Rep. 420; Bierbower *v.* Miller (Neb. 1890), 46 N. W. Rep. 431. But see Fales *v.* Chicago etc. R. Co., 32 Fed. Rep. 673; Huskins *v.* Cincinnati etc. R. Co., 37 Fed. Rep. 504. *Contra*, McDermott *v.* Chicago etc. R. Co., 38 Fed. Rep. 529; Frishman *v.* Insurance Co., 41 Fed. Rep. 449.

For the nature of the prejudice and local influence referred to by the act of 1887, see Neale *v.* Foster, 31 Fed. Rep. 53; Dennison *v.* Brown, 38 Fed. Rep. 535.

2. Cohn *v.* Louisville etc. R. Co., 39 Fed. Rep. 227.

3. Cohens *v.* Virginia, 6 Wheat. (U. S.) 379; see also Tennessee *v.* Davis, 100 U. S. 257; New Orleans etc. R. Co. *v.* Mississippi, 102 U. S. 135; Van Allen *v.* Atchison etc. R. Co., 1 McCrary (U. S.) 598; Trafton *v.* Mongues, 4 Sawy. (U. S.) 178; McFadden *v.* Robinson, 22 Fed. Rep. 10; Willard *v.* Mueller, 23 Fed. Rep. 209; New Orleans *v.* Seixas, 35 La. Ann. 36.

4. Gold Washing etc. Co. *v.* Keyes, 96 U. S. 199; Carson *v.* Dunham, 121 U. S. 421; Iowa *v.* Chicago etc. R. Co. 33 Fed. Rep. 391; Fitzgerald *v.* Missouri Pac. R. Co., 45 Fed. Rep. 812; Illinois Cent. R. Co. *v.* Chicago etc. R. Co., 122 Ill. 473.

When it appears in a suit that some right, title, privilege or immunity on which recovery depends will be defeated by one construction of the constitution or laws of the United States and sustained by the opposite construction, the case is one arising under the constitution or laws of the United States. Ames *v.* Kansas, 111 U. S. 449; Starin *v.* New York, 115 U. S. 248; Germania Ins. Co. *v.* Wisconsin, 119 U. S. 473.

The following cases have been held to be removable as arising under the constitution or laws of the United States:

A suit involving the question whether a State law impaired the obligation of a contract. Smith *v.* Greenhow, 109 U. S. 669; People *v.* Chicago etc. R. Co., 16 Fed. Rep. 706; People *v.* Illinois Cent. R. Co., 16 Fed. Rep. 881; Illinois *v.* Illinois Cent. R. Co., 33 Fed. Rep. 721. But a proceeding by a State to forfeit a franchise cannot be removed on the ground that it impairs the obligation of a contract, the prohibition in the constitution being that no State shall pass any law impairing the obligation of contracts. Com. *v.* Louisville Bridge Co., 41 Fed. Rep. 241.

An action of trespass in which the defendant justifies under the authority of a court or law of the United States. Houser *v.* Clayton, 3 Woods (U. S.) 273.

A suit involving the construction of the National Bankruptcy act. Connor *v.* Scott, 4 Dill. (U. S.) 242. See also Payson *v.* Dietz, 2 Dill. (U. S.) 404.

An action against an interstate carrier of goods for damages caused by unjust discriminations and excessive

charges, in which the defendant sets up a defense based on the interstate commerce law. Lowry *v.* Chicago etc. R. Co., 46 Fed. Rep. 83.

A suit involving the validity or operation of a patent issued by the land department of the United States. Mitchell *v.* Smale, 140 U. S. 406. Frank Gold etc. Min. Co. *v.* Larimer Min. etc. Co., 2 McCrary (U. S.) 138; Miller *v.* Wattier, 24 Fed. Rep. 49. See also Kenyon *v.* Squire, 1 Wash. 9.

An ejectment suit in which both parties claim under deeds from a trustee holding the legal title to a town site under a United States statute, and both claim to be *cestuis que trustent* under that statute. Dunton *v.* Muth, 45 Fed. Rep. 390.

A suit to set aside a sale made under a decree of a federal court. Johnson *v.* New Orleans Nat. Banking Assoc., 33 La. Ann. 479.

A suit against receivers appointed by a federal court. Evans *v.* Dillingham, 43 Fed. Rep. 177; Sowles *v.* First Nat. Bank, 43 Fed. Rep. 700. See also Sowles *v.* Witters, 46 Fed. Rep. 513.

A suit by or against a corporation created by act of Congress. Osborn *v.* Bank of U. S., 9 Wheat. (U. S.) 738; Ames *v.* Kansas, 111 U. S. 449; Pacific Railroad Removal Cases, 115 U. S. 1; Union Pacific R. Co. *v.* McComb, 1 Fed. Rep. 799; 68 How. Pr. (N. Y.) 478; Cruikshank *v.* Fourth Nat. Bank, 16 Fed. Rep. 888; Allen *v.* Texas Pac. R. Co., 25 Fed. Rep. 513. *Contra*, Pettilon *v.* Noble, 7 Biss. (U. S.) 449; Wilder *v.* Union Nat. Bank, 9 Biss. (U. S.) 178; Myers *v.* Union Pac. R. Co., 16 Fed. Rep. 292; Union Pac. R. Co. *v.* Dyche, 31 Kan. 120.

Since the act of Congress of July 12th, 1882, providing that the jurisdiction of suits by or against national banks shall be the same as that of suits by or against other banks at the same place, a suit to which a national bank is a party cannot be removed as a suit arising under a law of the United States on the ground that it is by or against a corporation created by act of Congress. Leather Manufacturers' Nat. Bank *v.* Cooper, 120 U. S. 778.

A suit against a United States marshal for damages for the seizure of goods under authority of a writ issued by a federal court. Feibelman *v.* Packark, 109 U. S. 421; Bock *v.* Perkins, 139 U. S. 628; Lawrence *v.* Norton, 4 Woods (U. S.) 383; Ellis *v.* Norton, 16 Fed. Rep. 4; McKee *v.* Brooks, 64 Tex. 255.

But a suit against a United States marshal for damages for a seizure of goods under an attachment which did not authorize the seizure, was held not to be removable in McKee *v.* Coffin, 66 Tex. 304.

An appeal by a national bank from an assessment of taxes, the rule of taxation applicable to national banks being prescribed by Federal statute. Richards *v.* Rock Rapids, 72 Iowa 77.

A suit by a collector of internal revenue against the deputy collector on his official bond. Orner *v.* Saunders, 3 Dill. (U. S.) 284. See also a case arising under Rev. Sts. U. S., § 4898, American Solid Leather Button *v.* Empire State Nail Co, 47 Fed. Rep. 741.

The following cases have been held not to be removable as arising under the constitution or laws of the *United States:*

A suit on a judgment recovered in a Federal court. Provident Sav. L. Assur. Soc. *v.* Ford, 114 U. S. 635; Carson *v.* Dunham, 121 U. S. 421.

A suit to recover taxes which had been declared invalid by a Federal court. Berger *v.* Douglas Co., 2 McCrary (U. S.) 483.

A proceeding under a State statute providing a mode of determining whether coupons tendered in payment of taxes are valid obligations of the State. Stewart *v.* Virginia, 117 U. S. 612; Jones *v.* Com., 25 Fed. Rep. 666.

A suit in which plaintiff claims title to bind under a sale by a United States marshal on *fieri facias*, but which does not bring in question the validity of the judgment, sale, or other proceedings. Gay *v.* Lyons, 3 Woods (U. S.) 56.

A suit in regard to the title to land derived originally under an act of Congress, but not involving the validity or effect of the act. Romie *v.* Casanova, 91 U. S. 379; McStay *v.* Friedman, 92 U. S. 723; Trafton *v.* Mongues, 4 Sawy. (U. S.) 178.

An action in the nature of *quo warranto* to determine the title of electors of president and vice-president to their offices. State *v.* Bowen, 8 S. Car. 382.

A suit against a United States marshal by his deputy for fees claimed to be due him. Upham *v.* Scoville, 40 Ark. 170.

For other cases in which it was held

arising under the constitution or laws of the United States are also involved in the suit, will not prevent its removal.[1] The fact that there is a controversy arising under the Constitution or laws of the United States which must be decided before the suit can be terminated must appear from the record;[2] and, finally, in order that a cause may be removed on the ground that a Federal

that no federal question was raised by the special facts involved, see Hoadley *v.* San Francisco, 94 U. S. 4; Dubuclet *v.* Louisiana, 103 U. S. 550; Albright *v.* Teas, 106 U. S. 613; Chicago etc. R. Co. *v.* Wiggins Ferry Co., 108 U. S. 18; Central R. Co. *v.* Mills, 113 U. S. 249; Starin *v.* New York, 115 U. S. 248; Rand *v.* Walker, 117 U. S. 340; Gibbs *v.* Crandall, 120 U. S. 105; Tehan *v.* First Nat. Bank, 39 Fed. Rep. 577.

An application for a mandamus by a commission appointed to abolish a grade crossing to compel a railroad company to obey its order changing the location of its tracks, was held not to be removable as arising under the constitution of the United States, the changes ordered being within the police power of the State. Woodruff *v.* New York etc. R. Co., 59 Conn. 63.

A suit is not removable for the reason that it involves questions of law which have been decided by the Federal courts in other suits. Leather Manufacturers' Nat. Bank *v.* Cooper, 120 U. S. 778.

The questions whether a State has power to tax the franchise of a corporation derived from acts of Congress, and whether a statute under which a railroad corporation is subjected to taxation without deduction of its mortgage incumbrances, while in the valuation of the property of other corporations and of individuals mortgage incumbrances are deducted, is repugnant to the 14th amendment to the constitution, are questions arising under the constitution and laws of the United States, and authorize the removal of the suit in which they were raised. Southern Pac. R. Co. *v.* California, 11 U. S. 109. *Contra*, People *v.* Southern Pac. R. Co., 65 Cal. 553.

When a proposition has once been decided by the Supreme court of the United States, it can no longer be treated as a Federal question. Kansas *v.* Bradley, 21 Fed. Rep. 289.

The Supreme court having decided that a law prohibiting the manufacture and sale of intoxicating liquors in a State where property has been invested in the business of such manufacture and sale was not in conflict with the constitution of the United States. Meegler *v.* Kansas, 123 U. S. 623.

It follows that suits brought under such laws to restrain the defendants from violating their provisions cannot be removed on the ground that the defendants are deprived of their property or that the value of their property is impaired without due compensation. Drake *v.* Kaiser, 73 Iowa 703; Dickinson *v.* Heeb Brewing Co., 73 Iowa 703.

Before the above decision of the United States supreme court such suits were held to be removable in State *v.* Walruff, 26 Fed. Rep. 178; Kessinger *v.* Hinkhouse, 27 Fed. Rep. 883; Mahin *v.* Pfeiffer, 27 Fed. Rep. 892. *Contra*, Lemen *v.* Wagner, 68 Iowa 660; Judge *v.* Arlen, 71 Iowa 186.

A Federal question cannot be raised by an answer which is bad in substance as an answer. Fitzgerald *v.* Missouri Pac. R. Co., 45 Fed. Rep. 812. See also Rothschild *v.* Matthews, 22 Fed. Rep. 6.

A suit arising under the Constitution or laws of the United States can be removed only on the petition of all the defendants. Mayor of N. Y. *v.* Independent Steamboat Co., 21 Fed. Rep. 593.

1. Mayor etc. of Nashville *v.* Cooper, 6 Wall. (U. S.) 247; Connor *v.* Scott, 4 Dill. (U. S.) 242; Western Union Tel. Co. *v.* National Tel. Co., 19 Fed. Rep. 561.

2. Little York Gold Washing etc. Co. *v.* Keyes, 96 U. S. 199; Germania Ins. Co. *v.* Wisconsin, 119 U. S. 473; Gibbs *v.* Crandall, 120 U. S. 105; Wilder *v.* Union National Bank, 9 Biss. (U. S.) 178; Trafton *v.* Nongues, 4 Sawy. (U. S.) 178; McFadden *v.* Robinson, 22 Fed. Rep. 10; Hambleton *v.* Duham, 22 Fed. Rep. 465; Iowa *v.* Chicago etc. R. Co., 33 Fed. Rep. 391; Austin *v.* Gagan, 39 Fed. Rep. 626; McLane *v.* Leicht, 69 Iowa 401.

It is not enough that the record shows that if certain conditions of fact were made to appear a Federal ques-

question is involved, the petition or pleadings must state *facts* showing that such a question is involved.[1]

9. **Time of Making Application for Removal.**—The 12th section of the Judiciary Act required the defendant to file his petition for removal in the State court at the time he entered his appearance. If he submitted himself to the jurisdiction of the court without filing a petition he was held to have waived the right to remove the cause,[2] and the State court could not restore it by allowing an appearance to be entered or the petition to be filed *nunc pro tunc*.[3] The act of July 27, 1866, provided that the application for removal must be made "before the trial or final hearing" of the case; in the act of March 2, 1867, the language used was "before the final hearing or trial." There was some difference of judicial opinion as to whether the same construction was to be put on these two expressions,[4] but when the acts were incorporated in the Revised Statutes (§ 639, subdivisions 2 and 3) the language of the earlier act was adopted in both clauses.

The word "trial" refers to actions at law, and "hearing" to equity suits.[5]

Under these acts a petition for removal was seasonable if filed after a trial had been had and a motion for a new trial granted,[6]

tion might arise. Iowa *v.* Chicago etc. R. Co., 33 Fed. Rep. 391.

1. Los Angeles Farming etc. Co. *v.* Hoff, 48 Fed. Rep. 340.

2. West *v.* Aurora City, 6 Wall. (U. S.) 139; Ward *v.* Arredondo, Paine (U. S.) 410; Johnson *v.* Monell, Woolw. (U. S.) 390; Kingsbury *v.* Kingsbury, 3 Biss. (U. S.) 60; Savings Bank *v.* Benton, 2 Metc. (Ky.) 240; Crane *v.* Reeder, 28 Mich. 527; 15 Am. Rep. 223; Davis *v.* Cook, 9 Nev. 134; Robinson *v.* Potter, 43 N. H. 188; Livingston *v.* Gibbons, 4 Johns. Ch. (N. Y.) 94.

3. Ward *v.* Arredondo, Paine (U. S.) 410; Gibson *v.* Johnson, Pet. (C. C.) 44. *Contra*, Gelston *v.* Johnson, 3 N. J. L. 207.

Appearance.—The filing of a petition for removal was a sufficient appearance, and defendant was not in default for not answering in the State court. La Morthe Mfg. Co. *v.* National Tube Works Co., 15 Blatchf. (U. S.) 432; Sweeney *v.* Coffin, 1 Dill. (U. S.) 73; Webster *v.* Crother, 1 Dill. (U. S.) 301.

The filing of an agreement or pleading by the defendant and his making an application thereon, was also held to be an appearance. Pugsley *v.* Freedman's Sav. Bank, 2 Tenn. Ch. 130.

But giving notice of appearance to the other side was held not to be an appearance in Chatham Nat. Bank *v.* Merchants' Nat. Bank, 1 Hun (N. Y.) 702. See also Norton *v.* Hayes, 4 Den. (N. Y.) 245. But see Livingston *v.* Gibbons, 4 Johns. Ch. (N. Y.) 94.

It was not necessary that all the defendants should apply for removal at the same time, but when part had appeared and filed petitions for removal the others could not enter an original appearance in the Federal court. Ward *v.* Arredondo, Paine (U. S.) 410; Field *v.* Lownsdale, Deady (U. S.) 288.

4. Home L. Ins. Co. *v.* Dunn, 19 Wall. (U. S.) 214; Hall *v.* Ricketts, 9 Bush (Ky.) 366; Galpin *v.* Critchlow, 112 Mass. 339; 17 Am. Rep. 176; Home L. Ins. Co. *v.* Dunn, 20 Ohio St. 175; Continental Ins. Co. *v.* Kasey, 27 Gratt. (Va.) 216.

5. Vannevar *v.* Bryant, 21 Wall. (U. S.) 41; Waggener *v.* Cheek, 2 Dill. (U. S.) 560; Minnett *v.* Milwaukee etc. R. Co., 3 Dill. (U. S.) 460; Bryant *v.* Rich, 106 Mass. 180, 8 Am. Rep. 311.

6. Home L. Ins. Co. *v.* Dunn, 19 Wall. (U. S.) 214; Schraeder Min. etc. Co. *v.* Packer, 129 U. S. 688; Dart *v.* McKinney, 9 Blatchf. (U. S.) 359; Johnson *v.* Monell, Woolw. (U. S.) 390; Minnett *v.* Milwaukee etc. R. Co., 3

or after one or more trials in which the judgment had been reversed by the appellate court and a new trial ordered,[1] or in which the jury had disagreed;[2] but not if filed while the motion for a new trial was pending or while the case was pending in the appellate court. The right to a new trial must be perfected before the petition was filed.[3] The petition must be filed before the trial or final hearing actually began.[4]

The act of March 3, 1875, provided that the petition for removal must be filed before or at the term at which the cause could first be tried and before the trial thereof. This was held to mean the first term at which, under the laws of the State, a right to trial existed, and not the first term at which the case was actually reached on the docket or at which the court or the parties were ready for trial.[5] A petition was seasonable if filed at the first

Dill. (U. S.) 460. *Contra*, Whittier *v.* Hartford F. Ins. Co., 55 N. H. 151; 20 Am. Rep. 185; Home L. Ins. Co. *v.* Dunn, 20 Ohio St. 175.

1. Baltimore etc. R. Co. *v.* Bates, 119 U. S. 464; Schraeder Min. etc. Co. *v.* Packer, 129 U. S. 688; Sims *v.* Sims, 17 Blatchf. (U. S.) 369; Melendy *v.* Currier, 22 Blatchf. (U. S.) 503; Akerly *v.* Vilas, 2 Biss. (U. S.) 110; 1 Abb. (U. S.) 284; Kellogg *v.* Hughes, 3 Dill. (U. S.) 357; Sutherland *v.* Jersey City etc. R. Co., 22 Fed. Rep. 356; Brayley *v.* Hedges, 53 Iowa 582; Dart *v.* Walker, 4 Daly (N. Y.) 188. *Contra*, Hall *v.* Ricketts, 9 Bush (Ky.) 366; Crane *v.* Reeder, 28 Mich. 527; 15 Am. Rep. 223; Chandler *v.* Coe, 56 N. H. 184; 22 Am. Rep. 437; Continental Ins. Co. *v.* Kasey, 27 Gratt. (Va.) 216; Akerly *v.* Vilas, 24 Wis. 165; 1 Am. Rep. 166; Jones *v.* Foster, 61 Wis. 25.

2. Osborn *v.* Osborn, 2 McCrary (U. S.) 455; Clark *v.* Delaware etc. Canal Co., 11 R. I. 36. *Contra*, Galpin *v.* Critchlow, 112 Mass. 339; 17 Am. Rep. 176.

3. Stevenson *v.* Williams, 19 Wall. (U. S.) 572; Vannevar *v.* Bryant, 21 Wall. (U. S.) 41; Lowe *v.* Williams, 94 U. S. 650; Chicago etc. R. Co. *v.* McKinley, 99 U. S. 147; Williams *v.* Williams, 24 La. Ann. 55; Bryant *v.* Rich, 106 Mass. 180; 8 Am. Rep. 331; Beery *v.* Irick, 22 Gratt. (Va.) 484. See also Waggener *v.* Cheek, 2 Dill. (U. S.) 560; Chicago etc. R. Co. *v.* Minnesota etc. R. Co., 29 Fed. Rep. 337; McKinley *v.* Chicago etc. R. Co., 44 Iowa 314; Douglas *v.* Caldwell, 65 N. Car. 248.

If the appellate court, instead of ordering a new trial, reversed the decision of the lower court and merely sent the case to a master to state accounts in accordance with its decree, it was too late to remove the case. Jifkins *v.* Sweetzer, 102 U. S. 177.

So if the appellate court remanded the case with instructions to enter a decree in accordance with its decision, Darst *v.* Peoria, 13 Fed. Rep. 561; or with instructions to dismiss the bill, Boggs *v.* Willard, 3 Biss. (U. S.) 256.

If a judgment in favor of several defendants was affirmed as to all but one, and as to him the case was remitted for a new trial, he might remove the case on a petition filed before the new trial began. Yulee *v.* Vose, 99 U. S. 539.

4. Fleming *v.* Philadelphia Fire Assoc., 76 Ga. 678; Adams Express Co. *v.* Trego, 35 Md. 473.

A hearing before an auditor whose report is to be used as evidence at a later trial before a court or jury is not a final trial, Stone *v.* Sargent, 129 Mass. 503. See also, Thome *v.* Towanda Tanning Co., 15 Fed. Rep, 289; nor is a report of commissioners to whom a claim against an estate has been referred by a probate court, Hess *v.* Reynolds, 113 U. S. 73.

In Field *v.* Williams, 24 Fed. Rep. 513, it was held that a hearing on a demurrer was not a final hearing within the meaning of the act of 1867.

A suit could not be removed after a judgment by default had been entered. Rice *v.* West, 42 Md. 614.

5. American Bible Soc. *v.* Grove, 101 U. S. 610; Babbitt *v.* Clark, 103 U. S. 606; Pullman Palace Car Co. *v.* Speck, 113 U. S. 87; Gregory *v.* Hartley, 113 U. S. 742; Knowlton *v.* Congress etc. Spring Co., 13 Blatchf. (U. S.) 170; Stough *v.* Hatch, 16 Blatchf. (U. S.) 233; Forrest *v.* Keeler, 17 Blatchf. (U. S.) 522; Traders' Bank *v.* Tallmadge,

term after the issues were made up, provided the making up of the issues was not delayed by any fault of the petitioner, and before trial.[1] The words "before the trial thereof" in the act of 1875 relate to the first trial, and a petition for removal under that

20 Blatchf. (U. S.) 39; Gurnee *v.* Brunswick Co., 1 Hughes (U. S.) 270; Blackwell *v.* Braun, 4 Hughes (U. S.) 203; 1 Fed. Rep. 351; Kerting *v.* American Oleograph Co., 11 Biss. (U. S.) 81; Ames *v.* Colorado Cent. R. Co., 4 Dill. (U. S.) 260; Atlee *v.* Potter, 4 Dill. (U. S.) 559; Murray *v.* Holden, 1 McCrary (U. S.) 341; Huddy *v.* Haven, 5 Cent. L. J. 66; Taylor *v.* Rockefeller, 6 Reporter 226; 7 Cent. L. J. 349; Fulton *v.* Golden, 9 Cent. L. J. 286; Forrest *v.* Edwin Forrest Home, 1 Fed. Rep. 459; Cramer *v.* Mack, 20 Blatchf. (U. S.) 479; 12 Fed. Rep. 803; Badger *v.* Mulville, 22 Fed. Rep. 257; Malley *v.* Firemen's Fund Ins. Co., 51 Conn. 486; Chicago etc. R. Co. *v.* Welch, 44 Iowa 665; Hebert *v.* Lefevre, 31 La. Ann. 363; New York Warehouse etc. Co. *v.* Loomis, 122 Mass. 431; Clark *v.* Child, 135 Mass. 344; School District No. 6 *v.* Aetna Ins. Co., 66 Me. 370; Preston *v.* Travellers' Ins. Co., 58 N. H. 76; Stebbins *v.* Lancashire Ins. Co., 59 N. H. 414; Wanner *v.* Sisson, 28 N. J. Eq. 117; Kennedy *v.* Ehlen, 31 W. Va. 540; Eldred *v.* Becker, 60 Wis. 43. See also Pettilon *v.* Noble, 7 Biss. (U. S.) 449.

In Aldridge *v.* Crouch, 11 Biss. (U. S.) 180, it was held that it must appear affirmatively on the record or be shown by the petition that the case could not have been tried at a term of the State court before the application for removal was made.

1. Carson *v.* Hyatt, 118 U. S. 279; Hunter *v.* Royal Canadian Ins. Co., 3 Hughes (U. S.) 234; Scott *v.* Clinton etc. R. Co., 6 Biss. (U. S.) 529; McCullough *v.* Sterling School Furniture Co., 4 Dill. (U. S.) 563; Michigan Cent. R. Co. *v.* Andes Ins. Co., 9 Chic. Leg. 34; Whitehouse *v.* Continental F. Ins. Co., 2 Fed. Rep. 498; Wheeler *v.* Liverpool etc. Ins. Co., 8 Fed. Rep. 196; 60 N. H. 456; Public Grain etc. Exchange *v.* Western Union Tel. Co., 16 Fed. Rep. 289; Winberg *v.* Berkeley Co. Railway & Lumber Co., 29 Fed. Rep. 721; Dunton *v.* Muth, 45 Fed. Rep. 390; Flagg *v.* Walker, 109 Ill. 494.

If a statute of the State prescribed the time at which an action should be tried, a petition filed at that term was seasonable. Atlee *v.* Potter, 4 Dill. (U. S.) 559; Palmer *v.* Call, 4 Dill. (U. S.) 566; Adam *v.* Pennypacker, 13 Reporter, 743; Chrissenger *v.* Democrat, 22 Fed. Rep. 753.

So if the court ordered issue to be joined at a certain time, there being no statutory provision on the subject. Van Allen *v.* Atchison etc. R. Co., 3 Fed. Rep. 545.

So where a rule of court provided that demurrers should be disposed of at the first term, and that the second term should be the trial term, a petition filed at the second term was held to be in time though there had been a hearing on the demurrer and the demurrer had been overruled. Hone *v.* Dillon, 29 Fed. Rep. 465.

But where the filing of the answer or the trial of the case was postponed by agreement to a term later than the first at which a trial might have been had this did not extend the time for filing a petition for removal. Pullman Palace Car Co. *v.* Speck, 113 U. S. 84; Stough *v.* Hatch, 16 Blatchf. (U. S.) 233; Scott *v.* Clinton etc. R. Co., 6 Biss. (U. S.) 529; Johnson *v.* Johnson, 13 Fed. Rep. 193; Wilkinson *v.* Delaware etc. R. Co., 25 Fed. Rep. 561, and if at the first term at which the case could be tried the defendant demurred and a decision on the demurer was not rendered until the next term, it was then too late to remove the case. Murray *v.* Holden, 2 Fed. Rep. 740.

But in Feibleman *v.* Edmonds, 69 Tex. 334, the defendant moved to quash the service at the return term, the record did not show that this motion was acted on but leave to amend the return was granted. Defendant then at the same term moved to dismiss for want of jurisdiction, and the case went over to the next term with these motions pending. The court then overruled the motion to dismiss and defendant filed a petition for removal which was held to be in time.

If the first term at which a case might be tried occurs during a time when the case is stayed by order of the court, a petition for removal filed at the next term was held to be seasonable in Warner *v.* Pennsylvania R.

act filed after a judgment had been reversed and a new trial ordered was too late.[1] A hearing on a demurrer based on the ground that the bill of complaint did not state facts sufficient to entitle the plaintiff to the relief prayed for was held to be a trial.[2] As under the previous statutes, the petition must be filed before the trial actually began.[3]

Co., 13 Blatchf. (U. S.) 231. *Contra*, Warner *v.* Pennsylvania R. Co., 6 Hun (N. Y.) 167; Bright *v.* Milwaukee etc. R. Co., 1 Abb. N. Cas. (N. Y.) 14.

And if the term at which a case might have been tried was not held a petition presented at the next term was in time. Livingston *v.* Frick, 76 Ga. 839.

The filing of amendments raising new issues, or the appearance of new parties who were represented by previous parties, after the first term at which the case might have been tried, did not revive the right to remove under the act of 1875. Edrington *v.* Jefferson, 111 U. S. 770; Phœnix L. Ins Co. *v.* Walrath, 117 U. S. 365.

The petition might be filed at any time before the final adjournment of the trial term. Steiner *v.* Mathewson, 77 Ga. 657.

But where the defendant removed the suit into another county, his petition for removal into the United States court, filed there, was held to be too late after the adjournment of the first term at which the case might have been tried in the county where it was originally brought. Baltimore etc. R. Co. *v.* Burns, 124 U. S. 165; First Nat. Bank *v.* Conway, 67 Wis. 210.

1. Holland *v.* Chambers, 110 U. S. 59; Core *v.* Vinal, 117 U. S. 347; Newdecker *v.* Rosenbaum, 19 Blatchf. (U. S.) 35; Young *v.* Andes Ins. Co., 1 Flipp. (U. S.) 599.

A petition filed after trial and verdict subject to a demurrer to the evidence was too late. Bank of Maysville *v.* Claypool, 120 U. S. 268.

So was a petition filed after a default had been entered and before it had been set aside. McCallon *v.* Waterman, 1 Flipp. (U. S.) 651; Berrian *v.* Chetwood, 9 Fed. Rep. 678; Bright *v.* Milwaukee etc. R. Co., 1 Abb. N. Cas. (N. Y.) 14.

But where service was made by publication and judgment obtained, if the plaintiff then appeared and the case was re-opened and he was allowed to plead, he might remove the case. Harter *v.* Kernochan, 103 U. S. 563; Smith *v.* Life Association of America, 76 Va. 380.

Where there had been a judgment as to part of the defendants but not as to the others, the latter could not remove the suit, for only the entire suit could be removed. Mooney *v.* Agnew, 2 McCrary (U. S.) 89.

A petition to remove a cause in case a certain motion is not allowed and a certain plea is not sustained is not a valid application under the act of 1875, and if such a petition is filed seasonably, but not actually pressed until after trial it should not be granted. Manning *v.* Amy, 140 U. S. 137.

2. Alley *v.* Nott, 111 U. S. 472; Scharff *v.* Levy, 112 U. S. 711; Gregory *v.* Hartley, 113 U. S. 742; Laidly *v.* Huntington, 121 U. S. 179; Boyd *v.* Gill, 21 Blatchf. (U. S.) 543; Wilson *v.* Rock Island Paper Co., 20 Fed. Rep. 705; St. Louis etc. R. Co. *v.* Weaver, 35 Kan. 412; Miller *v.* Kent, 60 How. Pr. (N. Y.) 451. *Contra*, Miller *v.* Tobin, 18 Fed. Rep. 609, but not a hearing on a demurrer which did not involve the merits of the case. Lewis *v.* Smythe, 2 Woods (U. S.) 117; nor the issuing of a temporary injunction or the appointment of a receiver. Franklin *v.* Wolf, 78 Ga. 446.

3. It was too late to apply for a removal after the case had been called for trial, and the pleadings had been read, Lewis *v.* Smythe, 2 Woods (U. S.) 117; or after the plaintiff had answered that he was ready, Watt *v.* White, 46 Tex. 338; but not if, when the case was called, the pleadings were not in a condition for trial. Maloy *v.* Duden, 25 Fed. Rep. 673.

In St. Anthony Falls Water Power Co. *v.* King Bridge Wrought Iron Co., 23 Minn. 186, it was held that a petition filed after the jury was called, was too late, that being part of the trial.

Where a State statute provided that an equity suit should not be ready for trial until a *pro confesso* had been taken against a defendant who failed to appear, a petition for removal filed before

Under the act of March 3, 1887, a suit may be removed on the ground of prejudice or local influence at any time "before the trial thereof,"[1] but in all other cases the party entitled to removal must file his petition in the State court "at the time or any time before the defendant is required by the laws of the State or the rules of the State court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff."[2] A

that was done, was held to be in time in Deford *v.* Mehaffy, 13 Fed. Rep. 481. It was not necessary that the defendant should have answered in order that a case might be removed under the act of 1875; where a suit has been brought, and the defendant has appeared, the court will presume that a controversy exists. Hodson *v.* Lake Shore etc. R. Co., 12 Reporter 41; Bailey *v.* American Central Ins. Co., 2 McCrary (U. S.) 43. *Contra*, Stanbrough *v.* Griffin, 52 Iowa 112; Bosler *v.* Booge, 54 Iowa 251; Flynn *v.* Des Moines etc. R. Co., 63 Iowa 490; but when it appeared affirmatively that there was no controversy, the suit could not be removed. Keith *v.* Levi, 1 McCrary (U. S.) 343.

Cases Pending at the Time the Act Was Passed could be removed if the petition was filed at the first term after the passage of the act, and before trial. The Removal Cases, 100 U. S. 457; American Bible Soc. *v.* Grove, 101 U. S. 610; Myers *v.* Swann, 107 U. S. 546; Merchants etc. Nat. Bank *v.* Wheeler, 3 Cent. L. J. 13; even though there had been a trial before the passage of the act, judgment in which had been reversed, and the case sent down for a new trial; King *v.* Worthington, 104 U. S. 44; Hewett *v.* Phelps, 105 U. S. 393; Phœnix Mut. L. Ins. Co. *v.* Walrath, 16 Fed. Rep. 161; Kaufman *v.* McNutt, 3 Cent. L. J. 408; Pettilon *v.* Noble, 7 Biss. (U. S.) 449; Hoadley *v.* San Francisco, 3 Sawy. (U. S.) 553; but where a new trial had been granted, and, thereafter, a term of the State court at which the case might have been tried, had passed before March 3, 1875, it was held that a petition filed at the first term after the passage of the act was too late in Knowlton *v.* Congress etc. Spring Co., 13 Blatchf. (U. S.) 170; and that it was not too late in Andrews *v.* Yarrett, 1 Flipp. (U.S.) 445.

If a suit was pending when the act was passed, and was afterwards tried, judgment reversed, and a new trial ordered, a petition for removal was then too late. Young *v.* Andes Ins. Co., 1 Flipp. (U. S.) 599; State *v.* Merritt, 1 McCrary (U. S.) 65. See also, Shirley *v.* Waco Tap R. Co., 4 Woods (U. S.) 411.

1. This was held to mean before the beginning of the first trial on the merits in Lookout Mountain R. Co. *v.* Houston, 32 Fed. Rep. 711, and Davis *v.* Chicago etc. R. Co., 47 Fed. Rep. 307; but a petition filed after a trial in which the jury disagreed or the verdict was set aside was said to be in time in Fisk *v.* Henarie, 32 Fed. Rep. 417; Huskins *v.* Cincinnati etc. R. Co., 37 Fed. Rep. 504; Stix *v.* Keith, 90 Ala. 121.

If the suit has been decided in one court but is to be tried again in an appellate court before a jury, a petition filed before the latter trial is in time. Brodhead *v.* Shoemaker, 44 Fed. Rep. 518.

A hearing on demurrer was held to be a trial in Lookout Mountain R. Co. *v.* Houston, 32 Fed. Rep. 711. *Contra*, Whelan *v.* New York etc. R. Co., 35 Fed. Rep. 849.

2. The petitioner has the full time allowed by law for the filing of the answer or plea, even though the defendant may actually answer or file a demurrer before that time expires. Gavin *v.* Vance, 33 Fed. Rep. 84; Tennessee Coal etc. Co. *v.* Waller, 37 Fed. Rep. 545; Conner *v.* Skagit Cumberland Coal Co., 45 Fed. Rep. 802.

The petition must be filed within the time allowed for filing the original answer or plea to the original complaint; not the time allowed for filing an amended answer or an answer to an amended complaint. Woolf *v.* Chisholm, 30 Fed. Rep. 881; Doyle *v.* Beaupre, 39 Fed Rep. 289; Delbanco *v.* Singletary, 40 Fed. Rep. 177; Beyer *v.* Soper Lumber Co., 76 Wis. 145.

But where an amended complaint is filed which makes a substantially different suit, the time within which the cause may be removed is calculated with reference to the amended complaint. Evans *v.* Dillingham, 43 Fed. Rep. 177.

stipulation or a special order of court extending the time allowed for filing the answer does not extend the time within which the petition for removal must be filed.[1] When one of several defendants loses his right to remove the cause by not applying in time, the right is lost as to all.[2] The application for removal should

1. Dixon *v.* Western Union Tel. Co., 38 Fed. Rep. 377; Hurd *v.* Geve, 38 Fed. Rep. 537; Austin *v.* Gagan, 39 Fed. Rep. 626; Velie *v.* Manufacturers' Accident Indemnity Co., 40 Fed. Rep. 545; Spangler *v.* Atchison etc. R. Co., 42 Fed. Rep. 305. See also Delbanco *v.* Singletary, 40 Fed. Rep. 177. But see Simonson *v.* Jordan, 30 Fed. Rep. 721.

The time within which the petition must be filed is not extended by an agreement that no answer need be filed. Dwyer *v.* Peshall, 32 Fed. Rep. 497. Nor by the fact that the plaintiff neglects to avail himself of his right to take judgment by default on defendant's failure to plead in time, Kansas City etc. R. Co. *v.* Daughtry, 138 U. S. 298; Tennessee Coal etc. Co. *v.* Waller, 37 Fed. Rep. 545; Kaitel *v.* Wylie, 38 Fed. Rep. 865; but where, by the State practice, a defendant may file pleadings at any time as a matter of right after default, if the opposing party fails to enter judgment therefor, a petition is not too late if filed before the defendant pleads, although the original time allowed by the code for pleading has expired, provided judgment for default has not been entered. Lockhart *v.* Memphis etc. R. Co., 38 Fed. Rep. 274.

The time for filing the petition is not extended by the defendant's appearing and moving to set aside the service of the summons, Wedekind *v.* Southern Pacific Co., 36 Fed. Rep. 279; nor by the addition of new parties who were previously represented after defendant has answered and there has been a trial, Hakes *v* Burns, 40 Fed. Rep. 33.

Under a State statute which enables the plaintiff to fix the time for the defendant's appearance by indorsement on the complaint, if filed in term time, but does not prescribe the time for filing an answer, a petition for removal is seasonable if filed within the time allowed for filing an answer by a rule of the court. McKeen *v.* Ives, 35 Fed. Rep. 801; Amsden *v.* Norwich Union F. Ins. Co., 44 Fed. Rep. 515.

If the pendency of a plea in abatement extends the time allowed for filing the petition for removal at all, the right of removal is lost on the overruling of the plea after the time allowed for an answer has expired. Browning *v.* Reed, 39 Fed. Rep. 625.

It was held in Craven *v.* Turner, 82 Me. 383, that the time for filing a petition for removal does not expire until after pleas in abatement are disposed of. See also Lockhart *v.* Memphis etc. R. Co., 38 Fed. Rep. 274. The time allowed for filing the petition may be extended by plaintiff's failure to enter the suit. Sowles *v.* Witters, 43 Fed. Rep. 700.

When a petition to remove on the ground of prejudice and local influence has been denied, a motion made several months later to annul it so as to set up another ground of removal is too late. Carson etc. Lumber Co. *v.* Holtzclaw, 44 Fed. Rep. 785.

But in a case which the Federal court had remanded on account of a defect in the petition and record, it was held that an amended petition related back to the time of the original. Freeman *v.* Butler, 39 Fed. Rep. 1.

The bond as well as the petition must be filed within the time allowed for an answer, and an order of the court directing a bond to be filed *nunc pro tunc*, as of a day previous to the expiration of that time, will not entitle the petitioner to a removal. Austin *v.* Gagan, 39 Fed. Rep. 626.

If the petition is filed within the time prescribed by the statute, though not presented to the court until after that time has expired, it is sufficient. Burck *v.* Taylor, 39 Fed. Rep. 581.

A suit was brought in December, 1886; defendant pleaded in February, 1887, and filed a petition for removal in May, 1887. It was held that, as the act of Mar. 3, 1887 repealed the act of Mar. 3, 1875, the removal must be under the act of 1887; but as the time allowed for the filing of an answer had expired before the act was passed the case could not be removed at all. Manley *v.* Olney, 32 Fed. Rep. 708.

2. Fletcher *v.* Hamlet, 116 U. S. 408; Rogers *v.* Van Nortwick, 45 Fed. Rep. 513.

be made in the court where the suit was commenced and not in an appellate court,[1] even though the suit be commenced in a court of limited jurisdiction.[2]

10. Waiver of the Right to Remove.—The right of removal may be waived in any given case by the party entitled thereto;[3] though an agreement in advance, made in compliance with an

1. Lowe *v.* Williams, 94 U. S. 650; Craigie *v.* McArthur, 4 Dill. (U. S.) 474; *In re* Fraser, 7 Cent. L. J. 227; Brice *v.* Somers, 1 Flipp. (U. S.) 574; Williams *v.* Williams, 24 La. Ann. 55; Miller *v.* Finn, 1 Neb. 254; Williams *v.* Lowe, 4 Neb. 382. In Georgia *v.* Port, 4 Woods (U. S.) 513, it was held that a prosecution commenced before a justice of the peace in *Georgia* might be removed directly into the circuit court under section 643 of the revised statutes, a justice of the peace being a "court" in that State; but in Rathbone Oil Tract Co. *v.* Ranch, 5 W. Va. 79, it was held that a justice of the peace was not a "court" in *West Virginia*, and, consequently, that a suit carried on appeal from a justice of the peace to the circuit court of the county might be removed from there into the circuit court of the United States.

A suit may be removed from a court to which an appeal has been taken from a board of supervisors, Gurnee *v.* Brunswick Co., 1 Hughes (U. S.) 270; or from a court to which an appeal has been taken from the decision of county commissioners on a claim against the county, Delaware Co. *v.* Diebold Safe etc. Co., 133 U. S. 473; or from a court to which a proceeding for widening a street has been appealed from a mayor of a city and a jury, Pacific Railroad Removal Cases, 115 U. S. 1.

In American Finance Co. *v.* Bostwick, 151 Mass. 19, it was held that a suit removed from the superior court to the Supreme Court of the State under a State statute might be removed from the latter court into the circuit court of the *United States;* and in Brodhead *v.* Shoemaker, 44 Feb. Rep. 518, a suit which had been tried in a lower court and taken to an appellate court, where it was to be retried before a jury, was held to be removable from the latter court.

2. Gaines *v.* Fuentes, 92 U. S. 10.

3. Where two actions for the same cause are pending in the State court between the same parties, if the defendant proceeds to trial in one he will be held to have waived the right to remove the other. Evans *v.* Smith, 21 Fed. Rep. 1.

The defendant applied for a postponement in the State court, which was refused unless he would agree to a reference. This he agreed to, and thereby an immediate trial was avoided. *Held*, that he had waived the right to remove the cause. Hanover Nat. Bank *v.* Smith, 13 Blatchf. (U. S.) 224.

Where the defendant filed a petition for removal and a bond, as required by the statute, but did not call the attention of the court to the fact and went to trial in the State court nearly a year after, his right of removal was held to have been waived. Home Ins. Co. *v.* Curtis, 32 Mich. 402.

In Amy *v.* Manning, 144 Mass. 153, the defendant filed a motion to dismiss and a petition for removal, and with the latter a motion in which he asked that, in case the motion to dismiss should not be allowed, the court would order the removal as prayed for in the petition. At the next term the motion to dismiss was overruled, and a year later the case was reached for trial, when the defendant called up his petition for removal, and asked that the action be removed. *Held*, that the right to remove the action under the petition had been waived.

A party who appears and gives a bond to satisfy such decree as may be found against him, waives his right to remove. Bell *v.* Bell, 3 W. Va. 183. See also Hazard *v.* Durant, 9 R. I. 602.

In First Nat. Bank *v.* Conway, 67 Wis. 210, it was held that where the defendant, after a petition for removal had been refused, obtained a change of venue on account of the prejudice of the judge, his right to remove the suit to the Federal court was waived.

A party may waive his right to remove by going to trial in the State court without objection. St. Louis etc. R. Co. *v.* Ransom, 29 Kan. 298.

In Wadleigh *v.* Standard Life etc. Ins. Co., 76 Wis. 439, it was held that if the party seeking removal asked leave to withdraw his petition and bond before a transcript of the record had

unconstitutional State law to waive the right in all cases brought against the party making such agreement is void.[1]

11. Effect of Filing Petition for Removal on Jurisdiction—*a.* OF STATE COURT.—The right of removal cannot be defeated by State laws. A State law which forbids foreign corporations to do business in the State unless they will waive the right to remove suits brought against them in the State courts is unconstitutional, and an agreement made in compliance with such a law is void.[2] So a State law which provides that foreign corporations shall be deemed to be domestic corporations in all suits in the State courts to which they may be parties will not prevent such corporations from removing suits brought against them;[3] and where a State statute gives a remedy provided suit is brought in the State court the suit may be removed.[4]

But a State law which makes it the duty of the Secretary of State to revoke the license of a foreign insurance company doing business in the State, if the company removes a suit brought against it from the State to a Federal court, is valid. Such a license may be revoked without cause, and the courts will not inquire into the motive or purpose of a revocation.[5]

When the petition for removal and the bond or surety required by the statute have been filed in the State court, it is the duty of that court to accept the bond or surety and proceed no further in the case; all further proceedings in the State court are *coram non judice.*[6]

been sent to the Federal court he should be allowed to do so, and the cause would then proceed in the State court.

1. Home Ins. Co. *v.* Morse, 20 Wall. (U. S.) 445.

2. Home Ins. Co. *v.* Morse, 20 Wall. (U. S.) 445; Railway Passenger Assur. Co. *v.* Pierce. 27 Ohio St. 155; Baltimore etc. R. Co. *v.* Cary, 28 Ohio St. 208; Rece *v.* Newport News etc. Co., 32 W. Va. 164. *Contra*, People *v.* Judge, 21 Mich. 579; Home Ins. Co. *v.* Davis, 29 Mich. 238; Continental Ins. Co. *v.* Kasey, 27 Gratt. (Va.) 216; Morse *v.* Home Ins. Co., 30 Wis. 496.

3. Moore *v.* Chicago etc. R. Co., 21 Fed. Rep. 817; Allen *v.* Texas etc. R. Co., 25 Fed. Rep. 513; Rece *v.* Newport News etc. Co., 32 W. Va. 164.

4. Chicago etc. R. Co. *v.* Whitton, 13 Wall. (U. S.) 270.

5. Doyle *v.* Continental Ins. Co., 94 U. S. 535. *Contra*, Hartford F. Ins. Co. *v.* Doyle, 6 Biss. (U. S.) 461.

6. Gordon *v.* Longest, 16 Pet. (U. S.) 97; Kanouse *v.* Martin, 15 How. (U. S.) 198; Home Ins. Co. *v.* Dunn, 19 Wall. (U. S.) 214; Kerne *v.* Huidekoper, 103 U. S. 485; National Steamship Co. *v.* Zugman, 106 U. S. 118; Hatch *v.* Chicago etc. R. Co., 6 Blatchf. (U. S.) 105; Fisk *v.* Union Pac. R. Co., 9 Blatchf. (U. S.) 362; 8 Blatchf. (U. S.) 243; Taylor *v.* Rockefeller, 6 Reporter 226; Matthews *v.* Lyall, 6 McLean (U. S.) 13; Akerly *v.* Vilas, 2 Biss. (U. S.) 110; 1 Abb. (U. S.) 284; Wellman *v.* Howland Coal & Iron Works, 19 Fed. Rep. 51; Young *v.* Merchants' Ins. Co., 29 Fed. Rep. 273; Stix *v.* Keith, 90 Ala. 121; Terra Haute etc. R. Co. *v.* Abend, 9 Ill. App. 304; St. Anthony Falls Water Power Co. *v.* King Bridge Wrought Iron Co., 23 Minn. 186; Herryford *v.* Ætna Ins. Co., 42 Mo. 148; Stanley *v.* Chicago etc. R. Co., 62 Mo. 508; Beery *v.* Chicago etc. R. Co., 64 Mo. 533; Stevens *v.* Phœnix Ins. Co., 41 N. Y. 149; Holden *v.* Putnam F. Ins. Co., 46 N. Y. 1; 7 Am. Rep. 287; Taylor *v.* Shew, 54 N. Y. 75; Shaft *v.* Phœnix Mut. Life Ins. Co., 67 N. Y. 544; 23 Am. Rep. 138; Amory *v* Amory, 36 N. Y. Super. Ct. 520; Durham *v.* Southern L. Ins. Co., 46 Tex. 182; Blum. *v.* Thomas, 60 Tex. 158; Southern Pac. R. Co. *v.* Harrison,

The State courts have generally claimed the right to examine the petition and record and determine whether the statutory requirements have been complied with;[1] and, while the Federal courts have frequently coincided with this view,[2] it is well set-

73 Tex. 103. But see Southern Pac. R. Co. *v.* Los Angeles Co., 63 Cal. 607 *Contra*, Hadley *v.* Dunlap, 10 Ohio St. 1.

The presentation of a petition and bond for the removal of a cause to the judge of a State court in vacation, and on his declining to act thereon, filing them in the office of the clerk of the county is not a compliance with the removal act of March 3, 1887, and will not effect a removal. Williams *v.* Massachusetts Benefit Assoc., 47 Fed. Rep. 533. But in Noble *v.* Massachusetts Benefit Association, 48 Fed. Rep. 337, it was held that simply filing the petition and bond with the clerk of the State court in the county in which the suit was pending was sufficient.

In Blair *v.* West Point Mfg. Co., 7 Neb. 146, it was held that further proceedings by a State court, after petition and bond had been duly filed, were voidable but not void. Even if the defendant appears and asks for a continuance in the State court after he has filed a proper petition and bond the court has no jurisdiction. Baltimore etc. R. Co. *v.* Ford, 35 Fed. Rep. 170.

The State court cannot award costs after the petition for removal and bond have been filed. Penrose *v.* Penrose, 1 Fed. Rep. 479.

1. Carswell *v.* Schley, 59 Ga. 17; Weed Sewing Mach. Co. *v.* Smith, 71 Ill. 204; U. S. Sav. Inst. *v.* Brockschmidt, 72 Ill. 370; Indianapolis etc. R. Co. *v.* Risley, 50 Ind. 60; Baltimore etc. R. Co. *v.* New Albany etc. R. Co., 53 Ind. 597; McWhinney *v.* Brinker, 64 Ind. 360; Burch *v.* Davenport etc. R. Co., 46 Iowa 449; 26 Am. Rep. 150; Lasson *v.* Cox, 39 Kan. 631; New Orleans Canal etc. Co. *v.* Recorder of Mortgages, 27 La. Ann. 291; State *v.* Johnson, 29 La. Ann. 399; Tunstall *v.* Madison, 30 La. Ann. 471; Liverpool etc. Ins. Co., *v.* McGuire, 52 Miss. 227; Hartford F. Ins. Co. *v.* Green, 52 Miss. 332; Blair *v.* West Point Mfg. Co., 7 Neb. 146; Texas etc. R. Co. *v.* McAllister, 59 Tex. 349.

In Larson *v.* Cox, 39 Kan. 631, it was held that even after a State court had made an order of removal, it might vacate it if found to be erroneous.

2. Phœnix Ins. Co. *v.* Pechner, 95 U. S. 183; Burlington etc. R. Co. *v.* Dunn, 122 U. S. 513; *Ex parte* Wells, 3 Woods (U. S.) 128; Shedd *v.* Fuller, 36 Fed. Rep. 609; Roberts *v.* Chicago etc. R. Co., 45 Fed. Rep. 433.

But the State courts must exercise a legal discretion in passing upon this question, Gordon *v.* Longest, 16 Pet. (U. S.) 97; Hatch *v.* Chicago etc. R. Co., 6 Blatchf. (U. S.) 105; Taylor *v.* Shew, 54 N. Y. 75; James *v.* Thurston, 6 R. I. 428; and in some cases their right to pass upon it at all has been denied. Dennistoun *v.* Draper, 5 Blatchf. (U. S.) 336; Cobb *v.* Globe Mut. L. Ins. Co., 3 Hughes (U. S.) 452.

The State court cannot refuse to accept a bond because one of the sureties is an attorney and as such not allowed to act as surety if the other surety is sufficient. The Removal Cases, 100 U. S. 457.

In Osgood *v.* Chicago etc. R. Co., 6 Biss. (U. S.) 330, and Brown *v.* Murray, 43 Fed. Rep. 614, it was held that it was not necessary that the State court should pass upon the petition and bond, and if they were filed with the clerk it was sufficient. See also Jones *v.* Amazon Ins. Co., 9 Chic. L. N. 68.

But in the following cases it was held that an opportunity must be given to the State court to pass upon the petition and bond: Mayo *v.* Taylor, 8 Chic. L. N. 10; Shedd *v.* Fuller, 36 Fed. Rep. 609; Roberts *v.* Chicago etc. R. Co., 45 Fed. Rep. 433; First Nat. Bank *v.* King Wrought Iron Bridge Co., 2 Cent. L. J. 505.

If the record, as certified to the circuit court, shows that a proper petition and bond were filed, it will be presumed that they were duly accepted by the State court, though no order of removal was made. Chattanooga etc. R. Co *v.* Cincinnati etc. R. Co., 44 Fed. Rep. 456.

In the following cases it was held that an order of a State court granting or denying a petition for removal cannot be reviewed by the appellate court of the State: Home L. Ins. Co. *v.* Dunn, 19 Wall. (U. S.) 214; Home Ins. Co. *v.* Morse, 20 Wall. (U. S.) 445;

tled that the decision of a State court upon the question is not binding upon the Federal courts, and cannot limit their jurisdiction.[1] It is also well settled that if the suit is one which may be removed, and the proper steps have been taken, no order of the State court is necessary to effect its removal;[2] and that if it is not a removable suit, or if the proper steps have not been taken, an order of the State court granting a petition for removal will neither divest the State court of its jurisdiction, nor confer jurisdiction upon the Federal court.[3]

Akerly *v.* Vilas, 2 Biss. (U. S.) 110; 1 Abb. (U. S.) 284; Hopper *v.* Kalkman, 17 Cal. 517; Brooks *v.* Calderwood, 19 Cal. 124; Aurora *v.* West, 25 Ind. 148; St. Anthony Falls Water Power Co. *v.* King Wrought Iron Bridge Co., 23 Minn. 186; Bell *v.* Dix, 49 N. Y. 232; Chamberlain *v.* American Nat. L. etc. Co., 11 Hun (N. Y.) 370; Kendrick *v.* McQuary, Cooke (Tenn.) 480; Durham *v.* Southern L. Ins. Co., 46 Tex. 182.

While, in the following cases State courts have held that such an order may be taken to the appellate court by appeal or exception: People *v.* Superior Ct. of Chicago, 34 Ill. 356; Darst *v.* Bates, 51 Ill. 439; Burson *v.* National Park Bank, 40 Ind. 173; 13 Am. Rep. 285; State *v.* Judge etc., 23 La. Ann. 29; 8 Am. Rep. 583; Goodrich *v.* Hunton, 29 La. Ann. 372; Johnson *v.* New Orleans Nat. Banking Assoc., 33 La. Ann. 479; Crane *v.* Reeder, 28 Mich. 527; Bryant *v.* Rich, 106 Mass. 180; 8 Am. Rep. 331; Mahone *v.* Manchester, etc. R. Co., 111 Mass. 72; 15 Am. Rep. 9; Stone *v.* Sargent, 129 Mass. 503; Ellis *v.* Atlantic etc. R. Co., 134 Mass. 338; Bryan *v.* Richardson, 153 Mass. 157; Hadley *v.* Dunlap, 10 Ohio St. 1; Home L. Ins. Co. *v.* Dunn, 20 Ohio St. 175; Akerly *v.* Vilas, 24 Wis. 165; 1 Am. Rep. 166. See also Hough *v.* West Transportation Co., 1 Biss. (U. S.) 425; De Camp *v.* New Jersey Mut. L. Ins. Co., 2 Sweeny (N. Y.) 481; Whiton *v.* Chicago etc. R. Co., 25 Wis. 424; 3 Am. Rep. 101.

1. Urtetiqui *v.* D'Arbel, 9 Pet. (U. S.) 692; Home L. Ins. Co. *v.* Dunn, 19 Wall. (U. S.) 214; The Removal Cases, 100 U. S. 457; Baltimore etc. R. Co. *v.* Koontz, 104 U. S. 5; Stone *v.* South Carolina, 117 U. S. 430. *Ex parte* Wells, 3 Woods (U. S.) 128; Taylor *v.* Rockefeller, 6 Reporter 226; 7 Cent. L. J. 349; Wilson *v.* Western Union Tel. Co., 34 Fed. Rep. 561, Walker *v.* O'Neill, 38 Fed. Rep. 374; National Union Bank *v.* Dodge, 42 N. J. L. 316.

But see Beadleston *v.* Harpending, 32 Fed. Rep. 644; Stone *v.* Sargent, 129 Mass. 503; Broadway Nat. Bank *v.* Adams, 130 Mass. 431; 43 Am. Rep. 504.

In a late case it is held that if under the act of Congress, a cause is removable, then upon the filing of a sufficient petition and bond it is in law removed so as to be docketed in the circuit court, notwithstanding an order of the State court refusing to recognize the right of removal. Marshall *v.* Holmes, 141 U. S. 589.

2. Home L. Ins. Co. *v.* Dunn, 19 Wall. (U. S.) 214; Kern *v.* Huidekoper, 103 U. S. 485; Hatch *v.* Chicago etc. R. Co., 6 Blatchf. (U. S.) 105; Fisk *v.* Union Pacific R. Co., 6 Blatchf. (U. S.) 362; Clippinger *v.* Missouri Valley L. Ins. Co., 1 Flipp. (U. S.) 456; Taylor *v.* Rockefeller, 6 Reporter 226; 7 Cent. L. J. 349; Fulton *v.* Golden, 8 Reporter 517; Wilson *v.* Western Union Tel. Co., 34 Fed. Rep. 561; Chattanooga etc. R. Co. *v.* Cincinnati etc. R. Co., 44 Fed. Rep. 456; LeRoux *v.* Bay Circuit Judge, 46 Mich. 189; St. Anthony Falls Water Power Co. *v.* King Wrought Iron Bridge Co., 23 Minn. 186; McNeal Pipe etc. Co. *v.* Howland, 99 N. Car. 202.

3. Barrow *v.* Hunton, 99 U. S. 80; Kaeiser *v.* Illinois Cent. R. Co, 2 McCrary (U. S.) 187; Field *v.* Lownsdale, Deady (U. S.) 288; Chattanooga etc. R. Co. *v.* Cincinnati etc. R. Co., 44 Fed. Rep. 456; Winchell *v.* Coney, 54 Conn. 24; Thatcher *v.* McWilliams, 47 Ga. 306; Larson *v.* Cox, 39 Kan. 631; Germania F. Ins. Co. *v.* Francis, 52 Miss. 457; 24 Am. Rep. 674; Knahtla *v.* Oregon Short Line etc. R. Co. (Oregon. 1881), 27 Pac. Rep. 91.

An order for the removal of a case to the circuit court merely suspends the jurisdiction of the State court, and if the circuit court remands the case that

The petition and pleadings should state facts showing that the case is a removable one,[1] and if they fail to do so the filing of the petition and bond will not deprive the State court of its jurisdiction,[2] but the State court cannot go into the question of the truth of the facts alleged as ground for removal.[3]

Where a State court asserts jurisdiction after a petition for removal has been denied, the petitioner does not waive his right of removal by appearing and contesting the case in the State court.[4] If the case is carried to the highest court in the State and is there decided against him, he may take it by writ of error to the supreme court of the United States, and if the record shows that the petition for removal was improperly denied that court will reverse the judgment of the State court with direction to the court in which the case originated to order its removal;[5] and this is the proper remedy rather than a writ of prohibition or punishment for contempt.[6] The Federal courts will not enjoin further proceedings in the State courts after the proper steps have been taken to effect a removal;[7] and before

jurisdiction will be resumed. Young *v.* Parker, 132 U. S. 267; Birdseye *v.* Schaeffer, 37 Fed. Rep. 821; Southern Pac. R. Co. *v.* Los Angeles Co., 63 Cal. 607; Germania F. Ins. Co. *v.* Francis, 52 Miss. 457; 24 Am. Rep. 674.

1. Carson *v.* Dunham, 121 U. S. 421; *Ex parte* Anderson, 3 Woods (U. S.) 124; Kaeiser *v.* Illinois Cent. R. Co., 2 McCrary (U. S.) 187; Tunstall *v.* Madison, 3 La. Ann. 471; Lalor *v.* Dunning, 56 How. Pr. (N. Y.) 209; Levy *v.* O'Neil, 14 Abb. Pr. N. S. (N. Y.) 63; McMurdy *v.* Conn. General Ins. Co., 4 W. N. C. (Pa.) 18.

2. Pittsburgh etc. R. Co. *v.* Ramsey, 22 Wall. (U. S.) 322; The Removal Cases, 100 U. S. 457; Gregory *v.* Hartley, 113 U. S. 742; Stone *v.* South Carolina, 117 U. S. 430; Delaware R. Const. Co. *v.* Davenport etc. R. Co., 46 Iowa 406.

3. Stone *v.* South Carolina, 117 U. S.) 430; Carson *v.* Hyatt, 118 U. S. 279; Carson *v.* Dunham, 121 U. S. 421; Burlington etc. R. Co. *v.* Dunn, 122 U. S. 513; Kansas City etc. R. Co. *v.* Daughtry, 138 U. S. 298; Fisk *v.* Union Pac. etc. R. Co., 8 Blatchf. (U. S., 243; Stix *v.* Keith, 90 Ala. 121; Little Rock etc. R. Co. *v.* Iredell, 50 Ark. 388; Stewart *v.* Mordacai, 40 Ga. 1; 2 Am. Rep. 555; Horan *v.* Strachan, 82 Ga. 566; Byson *v.* McPherson, 71 Iowa 437; Guinault *v.* Louisville etc. R. Co., 42 La. Ann. 52; Craven *v.* Turner, 82 Me. 383. *Contra*, Orosco *v.* Gagliardo, 22 Cal. 83; Burch *v.* Davenport etc. R. Co., 46 Iowa 449; 26 Am. Rep. 150; Blair *v.* West Point Co., 7 Neb. 146; Knickerbocker L. Ins. Co. *v.* Gorbach, 70 Pa. St. 150; Southern Pac. R. Co. *v.* Harrison, 73 Tex. 103.

4. Home L. Ins. Co. *v.* Dunn, 19 Wall. (U. S.) 214; The Removal Cases, 100 U. S. 475; New Orleans etc. R. Co. *v.* Mississippi, 102 U. S. 135; Baltimore etc. R. Co. *v.* Kountz, 104 U. S. 5; Richards *v.* Rock Rapids, 31 Fed. Rep. 505; Stix *v.* Keith, 90 Ala. 121; Upham *v.* Scoville, 40 Ark. 170; Little Rock etc. R. Co. *v.* Iredell, 50 Ark. 388; Stanley *v.* Chicago etc. R. Co., 62 Mo. 508; Stevens *v.* Phœnix Ins. Co., 41 N. Y. 149; Railway *v.* Stringer, 32 Ohio St. 468.

5. Gordon *v.* Longest, 16 Pet. (U. S.) 97; Gaines *v.* Fuentes, 92 U. S. 10; Chesapeake etc. R. Co. *v.* White, 111 U. S. 134; Stone *v.* South Carolina, 117 U. S. 430; Stix *v.* Keith, 90 Ala. 121; State *v.* Johnson, 59 La. Ann. 399. See also Atlas Mut. Ins. Co. *v.* Byrus, 45 Ind. 133; Shelby *v.* Hoffman, 7 Ohio St. 450.

6. Chesapeake etc. R. Co. *v.* White, 111 U. S. 134.

7. Fisk *v.* Union Pac. R. Co., 6 Blatchf. (U. S.) 362; Penrose *v.* Penrose, 17 Blatchf. (U. S.) 332; Missouri etc. R. Co. *v.* Scott, 4 Woods (U. S.) 386. But see Bell *v.* Dix, 49 N. Y. 232.

In French *v.* Hay, 22 Wall. (U. S.) 250, the complainant obtained a decree in the State court and the suit was re-

the act of 1875 it was held that they had no authority to issue a writ of mandamus to a State requiring it to certify a case to the circuit court and proceed no further therein.[1]

Section 7 of the act of 1875, however, provides that a circuit court may issue a writ of *certiorari* to a State court commanding it to make return of the record in a cause removable under that act,[2] and the clerk of the State court is also liable criminally if he refuses, after a tender of his fees, to furnish a copy of the record to the party applying for removal.

b. OF FEDERAL COURT.—The jurisdiction of the circuit court for the purpose of granting provisional remedies attaches immediately upon the filing of the petition with the proper bond or surety in the State court,[3] although it cannot hear and determine the cause before the time when the petitioner is required to enter a copy of the record.[4]

moved to the Federal court where the decree was annulled, the complainant in the meantime having sent a transcript of the decree into another State, and commenced a suit against the defendant there. *Held*, that the Federal court, having jurisdiction of the whole controversy could properly enjoin proceedings in this suit. See also Deitzsch *v.* Huidekoper, 103 U. S. 494.

1. Fisk *v.* Union Pac. R. Co., 6 Blatchf. (U. S.) 362; Huogh *v.* West Transportation Co., 1 Biss. (U. S.) 425; *In re* Cromie, 2 Biss. (U. S.) 160; Brown *v.* Crippin, 4 Hen. & M. (Va.) 173. But see *Ex parte* Turner, 3 Wall. Jr. (C. C.) 258; Spraggins *v.* Humphries Co. Ct, Cooke (Tenn.) 160.

2. *Ex parte* Wells, 3 Woods (U. S.) 128.

This provision is not repealed by the act of 1887, and circuit courts still have authority to issue the writ. Short *v.* Chicago etc. R. Co., 34 Fed. Rep. 225.

The writ is unnecessary if the record is already before the circuit court. Scott *v.* Clinton etc. Co., 6 Biss. (U. S.) 529. It is sufficient if a certified copy of the record be returned. U. S. *v.* McKee, 4 Dill. (U. S.) 1.

Mandamus from a superior to an inferior State court ordering the latter to remove a cause to the United States circuit court was held not to be a proper remedy in Glen's Falls Ins. Co. *v.* Jackson Co. Ct., 21 Mich. 579; 4 Am. Rep. 504; and People *v.* Judges of N. Y. C. P., 2 Den. (N. Y.) 197. *Contra*, Brown *v.* Crippin, 4 Hen. & M. (Va.) 173.

And in *Ex parte* State Ins. Co., 50 Ala. 464, it was held that where a case had been remanded to the State court, the supreme court of the State would not issue a mandamus or other process to restrain the State court from acting until the party seeking removal could invoke the revisory power of the Supreme court of the United States.

3. National Steamship Co. *v.* Tugman, 106 U. S. 118. *In re* Barnesville etc. R. Co., 2 McCrary (U. S.) 216; Mahoney Min. Co. *v.* Bennett, 4 Sawy. (U. S.) 289; Commercial Sav. Bank *v.* Corbett, 5 Sawy. (U.S.) 172; Portland *v.* Oregonian R. Co., 7 Sawy. (U. S.) 122; New Orleans City R. Co. *v.* Crescent City R. Co., 5 Fed. Rep. 160; McCullough *v.* Large, 20 Fed. Rep. 309; Wilson *v.* Western Union Tel. Co., 34 Fed. Rep. 561; State *v.* Coosaw Min. Co., 45 Fed. Rep. 804. See also Clark *v.* Delaware etc. Canal Co., 11 R. I. 36.

4. *In re* Barnesville etc. R. Co., 2 McCrary (U. S.) 216; New Orleans City R. Co. *v.* Crescent City R. Co., 5 Fed. Rep. 160; Kansas City etc. R. Co. *v.* Interstate Lumber Co., 36 Fed. Rep. 9.

In the case last cited the court refused to entertain a motion to remand before the time when the petitioner was required to enter a copy of the record, but in the following cases it was held that the adverse party might enter a copy of the record before that time and have the cause remanded if it appeared that the circuit court had no jurisdiction. Anderson *v.* Appleton, 32 Fed. Rep. 855; Mills *v.* Newell, 41 Fed. Rep. 529.

The removal does not vacate proceedings already had in the State court, the case being received by the circuit court just as it stood in the State court at the time when the petition was filed.[1]

The Federal courts will not assume jurisdiction of a case unless their right to do so appears of record,[2] and the petition for removal is a part of the record only as it states facts consistent

1. Bushnell *v.* Kennedy, 9 Wall. (U. S.) 387; Duncan *v.* Gegan, 101 U. S. 810; Milligan *v.* Lalance etc. Mfg. Co., 21 Blatchf. (U. S.) 407; Gier *v.* Gregg, 4 McLean (U. S.) 202; Brooks *v.* Farwell, 2 McCrary (U. S.) 220; Sutro *v.* Simpson, 14 Fed. Rep. 370; Loomis *v.* Carrington, 18 Fed. Rep. 97; Fogg *v.* Fisk, 19 Fed. Rep. 235; Davis *v.* St. Louis etc. R. Co., 25 Fed. Rep. 786.

A motion pending in the State court at the time of removal may be heard in the circuit court. Milligan *v.* Lalance etc. Mfg. Co., 21 Blatchf. (U. S.) 407; Kauffman *v.* Kennedy, 25 Fed. Rep. 785.

Under the act of 1789 it was held that an injunction granted by a State court was dissolved by the removal of the cause. Hatch *v.* Chicago etc. R. Co., 6 Blatchf. (U. S.) 105; McLeod *v.* Duncan, 5 McLean (U. S.) 342; but under the subsequent acts such injunctions remain in force until they are modified or dissolved by the Federal court. Portland *v.* Oregonian R. Co., 7 Sawy. (U. S.) 122; Sharp *v.* Whiteside, 19 Fed. Rep. 156; see also Carrington *v.* Florida R. Co., 9 Blatchf. (U. S.) 468.

An injunction granted by a State court will not be dissolved by the Federal court on the ground that the bill was not properly verified, that being a matter of practice for the State court to determine. Smith *v.* Schwed, 2 Mc Crary (U. S.) 441.

While a suit was pending in a State court the plaintiff, as a condition of retaining an attachment, consented to an order restricting him from setting up any cause of action in the suit except the one in which the attachment was granted. *Held*, that the circumstances remaining the same he could not amend his complaint in the circuit court after removal. Phelps *v.* Canada Cent. R. Co., 20 Blatchf. (U. S.) 450.

An order of a State court appointing a receiver may be vacated by the Federal court after removal. McHenry *v.* New York etc. R. Co., 25 Fed. Rep. 114; but a motion to discharge a receiver on the same grounds on which a similar motion was refused in the State court will not be granted by the Federal court. Bryant *v.* Thompson, 27 Fed. Rep. 881.

An attachment of property, though not made at the time of the original summons, holds good after removal. Barney *v.* Globe Bank, 5 Blatchf. (U. S.) 107. *Contra*, New England Screw Co. *v.* Bliven, 3 Blatchf. (U. S.) 240; but a motion to dissolve an attachment, if authorized by local laws may be made in the Federal court or renewed there after it has been denied in the State court. Garden City Mfg. Co. *v.* Smith, 1 Dill. (U. S.) 305.

An order of a State court putting a party in comtempt for refusing to produce papers will be recognized and enforced in the Federal court after removal. Williams Mower etc. Co. *v.* Raynor, 7 Biss. (U. S.) 245.

Where the examination of one of the parties as a witness has been begun in the State court it may be continued in the Federal court after removal, although such an examination could not have been commenced in that court. Fogg *v.* Fisk, 19 Fed. Rep. 235.

Property involved in a replevin suit removed into the circuit court may be sold and the proceeds brought into court to await the result of the suit. Dennistoun *v.* Draper, 5 Blatchf. (U. S.) 336.

If the State court had no jurisdiction of the suit, the Federal court to which it is removed has none. Fidelity Trust Co. *v.* Gill Car Co., 25 Fed. Rep. 737. See also, Goldstein *v.* New Orleans, 38 Fed. Rep. 626.

The time when execution can issue in a suit removed from a State court depends on Federal and not on State law. Nims *v.* Spun, 138 Mass. 209.

2. American Bible Soc. *v.* Grove, 101 U. S. 610; Peper *v.* Fordyce, 119 U. S. 469; Hegler *v.* Faulkner, 127 U. S. 482

with the pleadings and material to the issue.[1] If the record fails to show that the case is within the Federal jurisdiction the defect cannot be cured by amendment in the circuit court.[2] Nor will consent of the parties confer jurisdiction on the Federal courts.[3] But Federal jurisdiction once obtained relates back to the service of original process in the suit,[4] and includes all proceedings ancillary to the suit, even though, as separate and original proceedings, they could not have been brought in the Federal courts.[5]

12. Remand and Dismissal of Cause.—After a cause has been removed into the circuit court of the United States it should be remanded to the State court if it appears that the cause was not properly removable under the statutes in force at the time, or that the proper steps to effect a removal have not been taken.[6]

When a copy of the record has been entered in the circuit court the cause may be remanded on motion at any time, on the ground that it does not involve a controversy within the jurisdiction of the court;[7] and on the motion to remand, the petition

1. Rothschild *v.* Matthews, 22 Fed. Rep. 6.

2. Cameron *v.* Hodges, 127 U. S. 322; Crehore *v.* Ohio etc. R. Co., 131 U. S. 240; Walser *v.* Memphis etc. R. Co., 19 Fed. Rep. 152; MacNaughton *v.* South Pacific etc. R. Co., 19 Fed. Rep. 881; Endy *v.* Commercial F. Ins. Co., 24 Fed. Rep. 657; Freeman *v.* Butler, 39 Fed. Rep. 1; Fitzgerald *v.* Missouri Pac. R. Co., 45 Fed. Rep. 812; Camprelle *v.* Balbach, 46 Fed. Rep. 81; Overman Wheel Co. *v.* Pope Mfg. Co., 46 Fed. Rep. 577. See also Winnemans *v.* Edgington, 27 Fed. Rep. 324.

But if the petition shows on its face a sufficient ground for removal, it may be amended in the circuit court by adding a fuller statement of the facts, Carson *v.* Dunham, 121 U. S. 421; and in Barclay *v.* Levee Commissioners, 1 Woods (U. S.) 254, the plaintiff, having by mistake of his attorney alleged his citizenship wrongly, was allowed to amend the petition so as to show jurisdiction, and also to make new parties defendant. See also Hodgson *v.* Bowerband, 5 Cranch (U. S.) 303; Parker *v.* Overman, 18 How. (U. S.) 137; Glover *v.* Shepperd, 15 Fed. Rep. 833.

3. People's Bank *v.* Winslow, 102 U. S. 256; Kingsbury *v.* Kingsbury, 3 Biss. (U. S.) 60.

4. Owens *v.* Ohio Cent. R. Co., 20 Fed. Rep. 10.

But where one of several defendants removes a suit (the others not having been served with process in the State court), original process cannot issue from the United States court against the other defendants. Fisk *v.* Union Pac. R. Co., 8 Blatchf. (U. S.) 243; Field *v.* Lownsdale, 4 Deady (U. S.) 288. *Contra*, Fallis *v.* McArthur, 1 Bond (U. S.) 100.

5. Dewey *v.* West Fairmount Gas Coal Co., 123 U. S. 329.

6. Act of March 3, 1875, § 5; Act of March 3, 1887, § 2; Ayres *v.* Wiswall, 112 U. S. 187; Ryan *v.* Young, 9 Biss. (U. S.) 63; Pond *v.* Sibley, 7 Fed. Rep. 129.

In Davies *v.* Lathrop, 21 Blatchf. (U. S.) 164, it was held that section 5 of the act of 1875 referred only to cases collusively removed.

7. Am. Bible Soc. *v.* Grove, 101 U. S. 610; Galvin *v.* Boutwell, 9 Blatchf. (U. S.) 470; Mackaye *v.* Mallory, 19 Blatchf. (U. S.) 165; 61 How. Pr. (N. Y.) 24.

But it was held that when the question of jurisdiction involved a decision on the actual merits of the case it could not be raised before the trial in Wood *v.* Matthews, 2 Blatchf. (U. S.) 370; Dennistoun *v.* Draper, 5 Blatchf. (U. S.) 336.

A motion to remand on the ground of the collusive joinder of a party for the purpose of making the case a removable one may be made *in limine*, and the right to make the motion is not waived by having made a prior unsuccessful motion on another ground. Pennsylvania R. Co. *v.* Allegheny Valley R. Co., 25 Fed. Rep. 113.

for removal and the pleadings in the State court form the basis for determining the question of jurisdiction.[1] Defects in the pleadings and irregularities in the proceedings which are merely formal are not usually treated as affording a sufficient ground for remanding a cause,[2] the matter being in the discretion of the court where the defects and irregularities are not such as affect its jurisdiction.[3]

1. McLane *v.* Leicht, 27 Fed. Rep. 887; Anderson *v.* Appleton, 32 Fed. Rep. 855; State *v.* Coosaw Min. Co., 45 Fed. Rep. 804.

If the proceedings in the State court show that the case was removed to the circuit court on the ground of citizenship, it will not be remanded merely because the amended bill of complaint filed in the circuit court fails to show that that court has jurisdiction. Briges *v.* Sperry, 95 U. S. 401.

The admission of new parties in the circuit court, whose presence would have prevented a removal had they been joined in the State court is not a ground for remanding the suit. Stewart *v.* Dunham, 115 U. S. 61; Phelps *v.* Oaks, 117 U. S. 236.

In a case removed to the circuit court on the ground that it involved a Federal question, the circuit court disposed of the Federal question on a demurrer to a special plea. *Held*, that it might then be remanded under section 5 of the act of 1875 as no longer involving a controversy within the jurisdiction of the Federal courts. Hamblin *v.* Chicago etc. R. Co., 43 Fed. Rep. 401. See also Collins *v.* Wellington, 31 Fed. Rep. 244; Perry *v.* Clift, 32 Fed. Rep. 801.

So where a suit was removed by one of several defendants on the ground that it involved a separable controversy between him and the plaintiff that they were citizens of different States, the suit having been discontinued as to that defendant in the circuit court, it was held that it might be remanded. Texas Transportation Co. *v.* Seeligson, 122 U. S. 519; Iowa Homestead Co. *v.* Des Moines Nav. etc. Co., 3 McCrary (U. S.) 95.

But if after such discontinuance the circuit court still had jurisdiction on account of the diverse citizenship of the remaining parties. Bacon *v.* Felt, 38 Fed. Rep. 870.

If the record and petition contain no averments of facts which show jurisdiction the circuit court will simply dismiss the case. Merchants' Nat. Bank *v.* Brown, 17 Fed. Rep. 161.

2. Jackson *v.* Mutual L. Ins. Co., 3 Woods (U. S.) 413; Dennis *v.* Alachua Co., 3 Woods (U. S.) 683; Cook *v.* Whitney, 3 Woods (U. S.) 715; Osgood *v.* Chicago etc. R. Co., 6 Biss. (U. S.) 330; Hyde Park *v.* Phœnix Ins. Co., 2 Dill. (U. S.) 525. The objection that the petition is not signed, if not made in the State court, cannot be raised in the circuit court. The Removal Cases, 100 U. S. 457; St. Paul etc. R. Co. *v.* McLean, 108 U. S. 212.

3. Jackson *v.* Mutual L. Ins. Co., 3 Woods (U. S.) 413. A suit will not be remanded on account of the omission of the seal or other informality in the execution of the bond. Kain *v.* Texas Pac. R. Co., 3 Cent. L. J. 13; Deford *v.* Mehaffy, 13 Fed. Rep. 481; Harris *v.* Delaware etc. R. Co., 18 Fed. Rep. 853; Chambers *v.* McDougal, 42 Fed. Rep. 694; Overman Wheel Co. *v.* Pope Mfg. Co., 46 Fed. Rep. 577.

The circuit court will not inquire into the sufficiency of the sureties or proof of the execution of the bond, on a motion to remand. Cooke *v.* Seligman, 17 Blatchf. (U. S.) 452; Dennis *v.* Alachua Co., 3 Woods (U. S.) 683; VanAllen *v.* Atchison etc. R. Co., 1 McCrary (U. S.) 598.

The petitioner's failure to enter a copy of the record on the first day of the next session of the circuit court after the filing of his petition does not deprive the circuit court of jurisdiction; it may either retain or remand the cause. The Removal Cases, 100 U. S. 457; National Steamship Co. *v.* Tugman, 106 U. S. 118; St. Paul etc. R. Co. *v.* McLean, 108 U. S. 212; Jackson *v.* Mut. L. Ins. Co., 3 Woods (U. S.) 413; Kidder *v.* Featteau, 2 Fed. Rep. 616; Powell *v.* Hill, 28 Fed. Rep. 433; Anderson *v.* Appleton, 32 Fed. Rep. 855; Kramer *v.* Ferry, 27 Ill. App. 479; *contra*, Cobb *v.* Globe Mut. L. Ins. Co., 3 Hughes (U. S.) 452; Stoutenburgh *v.* Wharton, 18 Fed. Rep. 1.

The proper way to raise the objection that the circuit court has no jurisdiction of the cause, when the petition and pleadings allege facts showing such jurisdiction, is by plea in abatement;[1] and a judge may order such plea to be filed if he doubts the jurisdiction of the court.[2] When there is a doubt whether the Federal court has jurisdiction, the cause should be remanded,[3] the burden of proof being on the petitioner.[4]

Before the act of 1875 it was held that a writ of error would not lie from an order of the circuit court remanding a suit, because it was not a final decree.[5] The proper remedy was by mandamus to compel the circuit court to assume jurisdiction of the suit.[6] But under the act of 1875 a writ of error to the supreme court was the proper mode of reviewing an order of the circuit court remanding a cause[7] or refusing to remand a cause which had been improperly removed.[8]

If no excuse for the delay is given the court will usually remand the cause. Broadnax *v.* Eisner, 13 Blatchf. (U. S.) 366; Bright *v.* Milwaukee etc. R. Co., 14 Blatchf. (U. S.) 214; McLean *v.* St. Paul etc. R. Co., 16 Blatchf. (U. S.) 309.

It is a sufficient excuse for delay in entering copies of the record that the State court refused to grant the petition for removal, and that the defendant, being forced to trial in the State court, obtained in regular course a reversal of the judgment and an order allowing the removal, Baltimore etc. R. Co. *v.* Koontz, 104 U. S. 5; Winchell *v.* Coney, 27 Fed. Rep. 482 (but see Clippinger *v.* Missouri Val. L. Ins. Co., 1 Flipp. (U. S.) 456;) or that the petitioner's attorney was misinformed by the clerk of the court as to the date when the term began, Hall *v.* Brooks, 21 Blatchf. (U. S.) 167; or that the clerk of the State court failed to transmit the copies to the Federal court, it having been understood by the petitioner's attorney that he would transmit them. Rowell *v.* Hill, 28 Fed. Rep. 433.

But it is not a sufficient excuse that the petitioner's attorney, by inadvertence, allowed fifteen months to pass without entering the copies. McGregor *v.* McGillis, 30 Fed. Rep. 388.

If a suit has been remanded on account of petitioner's failure to file copies of the record at the proper time, he is not entitled to file a new petition in the State court on the same ground as the other. St. Paul etc. R. Co. *v.* McLean, 108 U. S. 212. See also Johnston *v.* Donvan, 30 Fed. Rep. 395.

But where a suit was remanded because of a defect in the petition, and an amended petition was filed in the State court, it was held that it might then be removed on the same transcript, notwithstanding the fact that it had been once remanded, in Freeman *v.* Butler, 39 Fed. Rep. 1.

1. Hoyt *v.* Wright, 1 McCrary (U. S.) 130; Clarkhuff *v.* Wisconsin etc. R. Co., 26 Fed. Rep. 465; La Croix *v.* Lyons, 27 Fed. Rep. 403; Rumsey *v.* Call, 28 Fed. Rep. 769; McDonald *v.* Salem Capital Flour Mills Co., 31 Fed. Rep. 577. The plea in abatement will not be tested by technical rules. Johnson *v.* Accident Ins. Co., 35 Fed. Rep. 374. See also Curnow *v.* Phœnix Ins. Co., 44 Fed. Rep. 305.

2. Gribble *v.* Pioneer Press Co., 5 McCrary (U. S.) 73.

3. Wolff *v.* Archibald, 14 Fed. Rep. 369; Fitzgerald *v.* Missouri Pac. R. Co., 45 Fed. Rep. 812. But see Mayor etc. of N. Y. *v.* New Jersey Steamboat Transp. Co., 24 Fed. Rep. 817.

4. Carson *v.* Durham, 121 U. S. 421; Heath *v.* Austin, 12 Blatchf. (U. S.) 320; Copeland *v.* Memphis etc. R. Co., 3 Woods (U. S.) 651.

5. Chicago etc. R. Co., *v.* Wiswall, 23 Wall. (U. S.) 507.

6. Knickerbocker Ins. Co. *v.* Comstock, 16 Wall. (U. S.) 258; Chicago etc. R. Co. *v.* Wiswall, 23 Wall. (U. S.) 507.

7. Act of Mar. 3, 1875, § 5; Ayers *v.* Chicago, 191 U. S. 184; Babbitt *v.* Clark, 103 U. S. 606.

8. *Ex parte* Hoard, 105 U. S. 578; Edlington *v.* Jefferson, 111 U. S. 770.

The act of 1887 makes an order of the circuit court remanding a cause final, no appeal or writ of error being allowed.[1] This act also takes away the remedy by mandamus to compel the circuit court to take jurisdiction of a cause.[2] Even under the act of 1875 a mandamus would not lie to compel the circuit court to remand a cause.[3]

Where a suit has been removed to the circuit court and there tried, if, on appeal to the supreme court, it appears that the circuit court should not have taken jurisdiction of the suit, the judgment will be reversed and the suit remitted to the circuit court with instructions to remand to the State court.[4]

If a suit has been properly removed it cannot be remanded by consent;[5] and, though a party may waive his right to have a suit remanded on account of irregularities in the proceedings by going to trial in the circuit court or by mere delay,[6] the court of its own motion will remand a cause on the ground of want of jurisdiction.[7]

1. Burlington etc. R. Co. *v.* Dunn, 122 U. S. 513; Morey *v.* Lockhart, 123 U. S. 56.

The proviso in § 6 of the Act of 1887, concerning jurisdiction of suits removed before the passage of the act, relates only to the jurisdiction of the circuit court, and gives the supreme court no right to review an order of the circuit court remanding such a suit. Wilkinson *v.* Nebraska, 123 U. S. 286.

Even though the order remanding the case was made before the act was passed. Sherman *v.* Grinnell, 123 U. S. 679; Chicago etc. R. Co. *v.* Gray, 131 U. S. 396.

An order of the circuit court remanding a cause is not a final judgment or decree and therefore is not appealable under the act of Feb. 25, 1889. Richmond etc. R. Co. *v.* Thouron, 134 U. S. 45; Gurnee *v.* Patrick Co., 137 U. S. 141; Birdseye *v.* Schæffer, 140 U. S. 117.

2. *Ex parte* Pennsylvania Co., 137 U. S. 451.

3. *Ex parte* Hoard, 105 U. S. 578.

4. Mansfield etc. R. Co. *v.* Swan, 111 U. S. 379; Hancock *v.* Holbrook, 112 U. S. 229; Jackson *v.* Allen, 132 U. S. 27; Graves *v.* Corbin, 132 U. S. 571.

But if the appeal is taken from some special order of the circuit court, the supreme court will not examine the entire record to see if the circuit court had jurisdiction. Turner *v.* Farmers' L. & T. Co., 106 U. S. 552.

5. Lawton *v.* Blitch, 30 Fed. Rep. 641. But see Wadleigh *v.* Standard L. etc. Ins. Co., 76 Wis. 439.

6. Ayers *v.* Watson, 113 U. S. 594; Davies *v.* Lathrop, 21 Blatchf. (U. S.) 164; Baltimore etc. R. Co. *v.* Ford, 35 Fed. Rep. 170.

The objection that the petition was not filed in time may be waived by the adverse party's submitting to the jurisdiction of the Federal court and neglecting to make the objection seasonably. French *v.* Hay, 22 Wall. (U. S.) 238; Pacific R. Removal Cases, 115 U. S. 1; Carrington *v.* Florida R. Co., 9 Blatchf. (U. S.) 467; Miller *v.* Kent, 20 Blatchf. (U. S.) 508.

Delay for one term during which no action was taken in the case, was held not to be a waiver in Young *v.* Andes Ins. Co., 1 Flipp. (U. S.) 599.

7. Ayers *v.* Watson, 113 U. S. 594; Cameron *v.* Hodges, 127 U. S. 322; Bronson *v.* St. Croix Lumber Co., 35 Fed. Rep. 634; Southworth *v.* Reid, 36 Fed. Rep. 451.

And it was held to be the duty of the circuit court of its own motion to remand a cause because the petition was not filed in time in Keeney *v.* Roberts, 39 Fed. Rep. 629, and Bowers *v.* Supreme Council, American Legion of Honor, 45 Fed. Rep. 81.

The fact that evidence taken in the Federal Court will not be admissible in the State court, is no objection to remanding a cause. Birdseye *v.* Schæffer, 37 Fed. Rep. 821.

A party on whose petition a suit has been removed, cannot object to the jurisdiction of the circuit court on the ground that the petition was not filed in time. Ayers *v.* Watson, 113 U. S. 594; nor on the ground that the

13. Pleading and Practice—*a.* PLEADING.—Upon the removal of a cause into the Federal court it is not necessary to file new pleadings if the pleadings originally filed in the State court are in proper shape for the trial of the issue between the parties.[1]

If the suit as commenced in the State court is in its nature an action at law it may proceed in the Federal court on the original pleadings, though brought under a State statute in the name of the real party in interest, while if brought originally in the Federal court the plaintiff would be obliged to sue in the name of another party.[2]

If a suit unites legal and equitable causes of action, or if legal and equitable defenses are joined, there must be a repleader in the Federal court,[3] even though this may involve a separation into more than one suit;[4] and the plaintiff will be allowed to maintain a suit at law and at the same time proceed by bill in equity for what is properly equitable relief.[5]

b. PRACTICE.—The rules of practice of the Federal courts govern the case after removal.[6]

State court had no jurisdiction. Edwards *v.* Connecticut Mut. L. Ins. Co., 20 Fed. Rep. 452.

But see Ferguson *v.* Ross, 38 Fed. Rep. 161, where it was held that he could have the suit dismissed on the ground that the circuit court had no jurisdiction.

And a defendant who has removed a suit under the act of 1887 cannot claim that he is really a plaintiff when the parties are properly arranged, the plaintiff having no right to remove the suit. Mayer *v.* Denver etc. R. Co., 41 Fed. Rep. 723.

1. Gridley *v.* Westbrook, 23 How. (U. S.) 503; Dart *v.* McKinney, 9 Blatchf. (U. S.) 359; Bills *v.* New Orleans etc. R. Co., 13 Blatchf. (U. S.) 227; Akerly *v.* Vilas, 3 Biss. (U. S.) 332; Republic Ins. Co. *v.* Williams, 3 Biss. (U. S.) 370; Merchants' etc. Nat. Bank *v.* Wheeler, 3 Cent. L. J. 13. But see Clarke *v.* Protection Ins. Co., 1 Blatchf. (U. S.) 150, note.

Whether new pleadings shall be required in the circuit court is one of practice to which error will not lie. Ætna Ins. Co. *v.* Weide, 9 Wall. (U. S.) 677.

2. Thompson *v.* Central Ohio R. Co., 6 Wall. (U. S.) 134. But see Suydam *v.* Ewing, 2 Blatchf. (U. S.) 359.

3. Hurt *v.* Hollingsworth, 100 U. S. 109; La North. Mfg. Co. *v.* National Tube works, 15 Blatchf. (U. S.) 432; Toucey *v.* Bower, 1 Biss. (U. S.) 81; Sands *v.* Smith, 1 Dill. (U. S.) 290; Whittenton Mfg. Co. *v.* Memphis & Ohio River Packet Co., 19 Fed. Rep. 273.

4. Perkins *v.* Hendryx, 23 Fed. Rep. 418.

5. Fisk *v.* Union Pac. R. Co., 8 Blatchf. (U. S.) 299.

In Pilla *v.* German School Assoc., 23 Fed. Rep. 170, a suit which involved a legal and an equitable cause of action was removed and the equitable cause being held bad on demurrer, the plaintiff was allowed to proceed with his legal action.

Where a defendant had set up a legal and an equitable defense to an action for conversion in the State court, upon removal to the circuit court his equitable defense is no longer available. Northern Pac. R. Co. *v.* Paine, 119 U. S. 561.

The time for filing an answer in the circuit court begins to run from the time designated for entering the copy of the record. Torrent *v.* S. K. Martin Lumber Co., 37 Fed. Rep. 727; Peltzer Mfg. Co *v.* St. Paul F. & M. Ins. Co., 40 Fed. Rep. 185. But see Heidecker *v.* Red Star Line Steamship Co., 32 Fed. Rep. 706.

Where the defendant removed a suit after the time for filing a plea in abatement in the State court had expired, held that he could not file such a plea in the circuit court. Werthein *v.* Continental R. etc. Co., 20 Blatchf. (U. S.) 508.

6. Henning *v.* Western Union Tel. Co., 40 Fed. Rep. 658.

Amendment.—The Federal courts usually allow any amendments after removal which are properly within the scope of the original suit. West *v.* Smith, 101 U. S. 263; Suydam *v.* Ewing, 2 Blatchf. (U. S.) 353; Toucey *v.* Bowen, 1 Biss. (U. S.) 81.

If the State court allows the defendant to put in a claim in set off to be tried in the same suit, it may also be done in the circuit court. Partridge *v.* Phœnix Mut. L. Insurance Co., 15 Wall. (U. S.) 573.

Costs.—A suit removed into the circuit court carries with it all costs accrued in the State court, and they are governed by the State law. Only the costs accruing after removal are governed by Federal law. Wolf *v.* Connecticut Mut. L. Ins. Co., 1 Flipp. (U. S.) 377.

If the circuit court has no jurisdiction of a cause removed to it from a State court, it cannot award costs on remanding the cause. Mayor etc. of Nashville *v.* Cooper, 6 Wall. (U. S.) 247.

But where a cause is removed to the circuit court, goes to the Supreme Court of the United States on a writ of error, and the Supreme Court reverses the judgment of the circuit court, on the ground that the circuit court had no jurisdiction of the cause, and remits it to that court with directions to remand it to the State court, this is an act of jurisdiction, and the costs of both the supreme and circuit courts will be adjudged against the party who wrongfully removed the cause. Mansfield etc. R. Co. *v.* Swan, 111 U. S. 379.

When a suit is removed to the circuit court the cost of taking depositions in the State court before removal will be allowed, though the depositions were not used on account of the presence of the witnesses, or because the facts were admitted. Young *v.* Merchants' Ins. Co., 29 Fed. Rep. 273.

In State *v.* Peck, 32 W. Va. 606, it was held that a bond given by the defendant in the State court to answer certain interrogatories before a commissioner of the State court remains in force after the suit has been removed.

When one of the issues is whether property was legally attached by a sheriff and what the plaintiff's rights in the property are, after the suit has been removed, the United States marshal may be ordered to take the property from the sheriff and hold it to await the decision of the Federal court. Friedman *v.* Israel, 26 Fed. Rep. 801.

Bond.—The bond accompanying the petition for removal must be approved by the court, not by the clerk. Southern Pac. R. Co. *v.* Harrison, 73 Tex. 103.

The bond need not be executed by the petitioner himself if the sureties are sufficient. Stevens *v.* Richardson, 20 Blatchf. (U. S.) 53; Public Grain etc. Exchange *v.* Western Union Tel. Co., 16 Fed. Rep. 289; Vandervort *v.* Palmer, 4 Duer (N. Y.) 677.

It is not necessary that the bond should follow the exact language of the statute. Ellis *v.* Atlantic etc. R. Co., 134 Mass. 338.

The penal sum named in the bond is sufficient if it is large enough to cover the costs that are likely to accrue. Com. *v.* Louisville Bridge Co., 42 Fed. Rep. 241.

The sum named in the bond is a penalty, not liquidated damages, but the plaintiff can recover at least nominal damages on the defendant's failure to enter the record as required by the condition of the bond. Henry *v.* Louisville etc. R. Co., 91 Ala. 585.

The act of 1887 only requires the bond to contain a condition that the defendant shall enter his appearance in the United States court in cases where special bail is demanded. In other cases the bond is sufficient without such condition though the defendant has not appeared in the State court. Burck *v.* Taylor, 39 Fed. Rep. 581.

Failure to enter copies of the record seasonably in the circuit court creates a liability on the bond. Kidder *v.* Featteau, 1 McCrary (U. S.) 323.

Under the act of 1875 a bond was insufficient if it contained no condition to pay costs. McMurdy *v.* Connecticut Genl. L. Ins. Co., 4 W. N. C. (Pa.) 18.

Even though the suit was also removable under the act of 1867 and the bond complied with the requirements of that act. Torrey *v.* Grant Locomotive Works, 14 Blatchf. (U. S.) 269; Webber *v.* Bishop, 13 Fed. Rep. 49; Sheldrick *v.* Cockroft, 27 Fed. Rep. 579. But see Gutwillig *v.* Zuberbier, 28 Fed. Rep. 721.

And the omission of the condition to pay costs was not supplied by a stipulation "to do such other appropriate acts as by the act of Congress in that behalf are required." Harrold *v.* Arrington, 64 Tex. 233.

Notice to the adverse party of the filing of a petition for removal is not necessary.[1] The act of 1867 required the petition to be verified by affidavit,[2] but no affidavit was required by the acts of 1789, 1866, 1875 or 1887.[3]

14. Removal of Suits and Prosecutions Against Persons Denied Civil Rights.—Section 641 of the Revised Statutes of the *United States* provides for the removal of any civil suit or criminal prosecution commenced in any State court for any cause whatsoever "against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs made or committed by virtue of, or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law," into the next circuit court to be held in the district where the suit is pending. The defendant's petition, stating the facts and verified by oath, must be filed in the State court before the trial or a final hearing of the cause.

This section, which is a re-enactment of the Civil Rights Bill and other kindred statutes, is intended to carry out the provisions of the Fourteenth Amendment to the Constitution, the object of which was to place colored men, as to all civil rights, upon an equal footing with white men.[4] It is directed against State action only,[5] and provides a remedy for cases where civil rights are denied by the constitution or laws of the State.[6] Where such rights are denied by the judicial power of the State exerted during the trial, it is too late to remove the cause; resort, in such case, must be had to the revisory power of the supreme court.[7]

In Burdick *v.* Hale, 7 Biss. (U. S.) 96, a bond was held insufficient under the act of 1875 which contained no penal sum, and which contained a condition that the petitioner should file in the circuit court "copies of all process" instead of a copy of the record as required by the act.

1. Fisk *v.* Union Pac. R. Co., 8 Blatchf. (U. S.) 243; Stevens *v.* Richardson, 20 Blatchf. (U. S.) 353; Strasburger *v.* Beecher, 44 Fed. Rep. 209; Ficklin *v.* Tarver, 59 Ga. 263; Erisman *v.* Pidcock, 62 How. Pr. (N. Y.) 327. *Contra*, Bristol *v.* Chapman, 34 How. Pr. (N. Y.) 140.

2. Sweeney *v.* Coffin, 1 Dill. (U. S.) 73.

3. Sweeney *v.* Coffin, 1 Dill. (U. S.) 73 (act of 1789); Allen *v.* Ryerson, 2 Dill. (U. S.) 501 (act of 1866); Houser *v.* Clayton, 3 Woods (U. S.) 273 (act of 1875); Connor *v.* Scott, 4 Dill. (U. S.) 242 (act of 1875); Guinault *v.* Louisville etc. R. Co., 42 La. Ann. 52 (act of 1887); Southern Pacific R. Co. *v.* Harrison, 73 Tex. 103 (act of 1887).

4. Strauder *v.* West Virginia, 100 U. S. 303; Virginia *v.* Rives, 100 U. S. 313; State *v.* Dunlap, 65 N. Car. 491; 6 Am. Rep. 746.

5. Virginia *v.* Rives, 100 U. S. 313; *Ex parte* Alabama, 71 Ala. 363. *Contra*, State *v.* Dunlap, 65 N. Car. 491; 6 Am. Rep. 746.

6. Virginia *v.* Rives, 100 U. S. 313; Neal *v.* Delaware, 103 U. S. 370; California *v.* Chue Fau, 42 Fed. Rep. 865; Cooper *v.* State, 64 Md. 40.

7. Virginia *v.* Rives, 100 U. S. 313;

If a State law which violates the Fourteenth Amendment to the Constitution has been declared unconstitutional or inoperative by the supreme court of the State, though it has not been repealed, a defendant cannot say in advance that by reason of the existence of such law he will be prevented from enforcing his civil rights.[1]

And if a State law is, on its face, constitutional, a defendant cannot remove a suit or prosecution against him on the ground that, owing to a prejudice against him, in the minds of the court officers, jurors, and people, the law will be unfairly administered.[2]

This section is constitutional[3] and, although the State court has the right to examine the sufficiency of the petition presented to it, still the Federal court, by virtue of its superior right to try the case if it be removable, is entitled to assert its jurisdiction by proper process directed to the State court, which the latter must obey.[4]

Neal *v.* Delaware, 103 U. S. 370; Cooper *v.* State, 64 Md. 40.

1. Neal *v.* Delaware, 103 U. S. 370; Bush *v.* Kentucky, 107 U. S. 110.

A State law which singles out colored citizens and denies them the right to participate in the administration of the law as jurors because of their color, though qualified in other respects, is unconstitutional and denies to colored citizens the equal protection of the laws, since the constitution of juries is a very essential part of the protection which the trial by jury is intended to secure. Strauder *v.* West Virginia, 100 U. S. 303.

2. *Ex parte* Wells, 3 Woods (U. S.) 128; *Ex parte* Alabama, 71 Ala. 363.

The fact that by reason of local prejudice against his race and color a person of African descent cannot have a fair trial in the State courts is not a ground under the civil rights act for removing a criminal prosecution against him. Texas *v.* Gaines, 2 Woods (U. S.) 342; Thomas *v.* State, 58 Ala. 365; Fitzgerald *v.* Allman, 82 N. Car. 492; State *v.* Smalls, 11 S. Car. 262. *Contra*, State *v.* Dunlap, 65 N. Car. 491; 6 Am. Rep. 746.

It has been held that a prosecution is not commenced within the meaning of § 641 until an indictment has been found, and that, consequently, a prosecution cannot be removed until then. Com. *v.* Artman, 3 Grant Cas. (Pa.) 436. See, however, North Carolina *v.* Kirkpatrick, 42 Fed. Rep. 689.

A removal under this section does not absolutely divest the State court of jurisdiction over the offense, and after an indictment has been quashed by the Federal court, it remains with the State court to determine whether the accused shall be indicted again. Bush *v.* Kentucky, 107 U. S. 110.

After a removal under this section the parties may raise any question in the circuit court which they could have raised if the cause had been commenced there, or which they could have raised in the State court. Lamar *v.* Dana, 10 Blatchf. (U. S.) 34.

An officer acting in good faith under a warrant purporting to come from his superior whom he is bound to obey, is acting "under color of authority" whether the superior transgresses his power, or the warrant is irregular or not. Hodgson *v.* Millward, 3 Grant Cas. (Pa.) 418.

3. Strauder *v.* West Virginia, 100 U. S. 303; California *v.* Chue Fau, 42 Fed. Rep. 865; Kulp *v.* Ricketts, 3 Grant Cas. (Pa.) 420. See also Mayor etc. of Nashville *v.* Cooper, 6 Wall. (U. S.) 247.

4. *Ex parte* Wells, 3 Woods (U. S.) 128; *Ex parte* Alabama, 71 Ala. 363.

The proper steps to be taken to obtain copies of the record and to enter the case in the circuit court if they are refused are fully described in § 641, and provision is made in § 642 for the issuing of a writ of *habeas corpus* by the clerk of the circuit court, in case where the defendant is in actual custody.

15. Removal of Suits and Prosecutions Against Revenue Officer and Officers Acting Under the Election Laws.—Under section 643 of the Revised Statutes of the *United States* any civil suit or criminal prosecution commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law; or against any person holding property or estate by title derived from any such officer, if the suit or prosecution affects the validity of any such revenue law; or against any officer of the United States or other person on account of any act done under the provisions of Title XXVI, "The Elective Franchise," or on account of any right, title, or authority claimed by such officer or other person under any of the said provisions, may, at any time before the trial or final hearing thereof, be removed for trial into the circuit court next to be holden in the district where it is pending, upon the petition of the defendant to such circuit court.

The petition must be verified by affidavit and be accompanied by a certificate of an attorney or counselor at law of some court of record of the State where the suit or prosecution is commenced, stating that, as counsel for the petitioner, he has examined the proceedings against him and inquired into the matters set forth in the petition and believes them to be true.

Provision is also made for issuing writs of *certiorari* and *habeas corpus* to obtain from the State court copies of the record and the custody of the defendant in cases where he has been arrested.[1] If copies of the record cannot be obtained the plaintiff may be required to plead anew in the circuit court.

This section is constitutional,[2] and was not repealed or superseded by the act of March 3, 1875, or the act of March 3, 1887.[3] It applies to all cases where a Federal officer or other

The words "or other trespasses or wrongs made or committed" apply to acts for which a personal action may be brought, and do not justify the removal of an action of ejectment. Bigelow *v.* Forrest, 9 Wall. (U. S.) 339.

A proceeding under a State statute which provides that any building where intoxicating liquors are manufactured, sold or given away contrary to law shall be deemed a nuisance, and may, together with the vessels and their contents, fixtures and furniture, be so declared and abated, and also imposes a fine on any person maintaining the same, is not removable under this section, on the ground that the defendant is deprived of rights guarantied to him under the civil rights law. Schmidt *v.* Cobb, 119 U. S. 286.

1. The writs of *certiorari* and *habeas corpus* are not required for the purpose of removing the cause; they are issued for the purpose of bringing up the record after the cause has been removed and to notify the State court of the removal. Abranches *v.* Schell, 4 Blatchf. (U. S.) 256.

2. Tennessee *v.* Davis, 100 U. S. 257; Findley *v.* Satterfield, 3 Woods (U. S.) 504; State *v.* Hoskins, 77 N. Car. 530; State *v.* Deaver, 77 N. Car. 555.

3. Venable *v.* Richards, 105 U. S. 636; 1 Hughes (U. S.) 326; Act of Mar. 3, 1887, § 5.

person described in the section is indicted or sued in a State court for an act done under color of the United States revenue or election laws, but alleged to be in violation of the laws of the State.[1]

1. Findley *v.* Satterfield, 3 Woods (U. S.) 504.

Section 643 applies to marshals of the United States and their deputies and assistants when engaged in making an arrest for violation of the United States revenue laws. Davis *v.* South Carolina, 107 U. S. 597.

But the mere fact that a man arrested for an offense committed at a Federal election holds a commission as deputy marshal does not entitle him to remove the prosecution. Illinois *v.* Fletcher, 22 Fed. Rep. 776.

A marshal sued in a State court for trespass in levying on property of a person other than the execution debtor, cannot remove the suit under this section, such levy not being under authority derived from any act of Congress. McKee *v.* Rains, 10 Wall. (U. S.) 22.

A collector of customs sued in a State court by an informer for part of the proceeds of goods, condemned as forfeited for a breach of the revenue laws may remove the suit into the circuit court. Van Zandt *v.* Maxwell, 2 Blatchf. (U. S.) 421.

An action to recover damages for slanderous words spoken by a collector of customs while in the discharge of his official duty and explanatory of it is removable. Buttner *v.* Miller, 1 Woods (U. S.) 620.

A suit against a collector of customs charging that he delivered imported goods on which there was a lien for freight to the consignee on receipt of the freight charges without notifying the carrier as required by the act of June 10, 1880, in which the plaintiff seeks to recover the money so received, may be removed under section 643, though the collector alleges in defense that he did not do the acts complained of. Cleveland etc. R. Co. *v.* McClung, 119 U. S. 454.

A suit against an assistant treasurer of the United States to recover the value of certain United States bonds retained under instructions from the Treasury Department, on the ground that they were unlawfully put into circulation as against the party to whom they were issued, is not a suit on account of any act done under a revenue law, and cannot be removed. Victor *v.* Cisco, 5 Blatchf. (U. S.) 128.

An action against a commissioner of the circuit court to recover money alleged to have been illegally exacted by him as fees and costs in a criminal proceeding is not a suit against an officer of the United States appointed under or acting by authority of the revenue law on account of any act done under color of his office, and is, therefore, not removable. Benchley *v.* Gilbert, 8 Blatchf. (U. S.) 167.

The postal laws of the United States are revenue laws, and an action brought in a State court against a postmaster for an alleged wrongful refusal to deliver a letter to the plaintiff may be removed to the circuit court. Warner *v.* Fowler, 4 Blatchf. (U. S.) 311.

A person sued for making an arrest in obedience to those claiming to be municipal officers of the peace and engaged in suppressing a riot, cannot remove the suit merely because, prior to the arrest, the military officers of the United States had issued an order recognizing the persons under whom the defendant acted as lawfully vested with the local government, and had declared that they would be sustained by the United States, but had not directly ordered the arrest or any other particular act. Woodson *v.* Fleet, 2 Abb. (U. S.) 15.

A defendant indicted for murder in a State court may remove the prosecution into the circuit court if it appears that at the time of the alleged act he was a deputy collector of internal revenue, engaged in seizing illicit distilleries, which was part of his official duty, and that the killing was in self-defense. Tennessee *v.* Davis, 100 U. S. 257.

A rule granted by a State court on petition of a sheriff against an internal revenue collector to show cause why an attachment should not issue against him for contempt in refusing to let the sheriff enter and seize goods held in a bonded warehouse, is a civil suit removable under section 643. McCullough *v.* Large, 20 Fed. Rep. 309.

The petition for removal under this section need not show what the cause of

Under this section a suit may be removed without regard to the value of the matter in dispute.[1] All further action in the State court is *coram non judice*,[2] and the suit proceeds as if originally commenced in the circuit court.[3]

III. **Removal From One Federal Court to Another.**—When the judge of any district court of the United States is prevented by any disability from holding court or performing the duties of his office, all suits and processes, civil and criminal, pending in such court and undetermined, may be removed on the written application of the district attorney or marshal of the district, by an order issued by the circuit judge or justice in the nature of a *certiorari*, into the next circuit court to be held in such district, and shall there proceed as if originally commenced in such circuit court.[4]

After such an order has been made, the clerk of the district court shall continue to transmit all suits thereafter commenced in the district court into the circuit court, as long as the disability of the district judge continues, but when that disability ceases the circuit court shall order all such suits and proceedings which are still undetermined, of which the district courts have an exclusive original cognizance, to be remanded to the district court next to be held in the district.[5] Whenever the judge of any district court is in any way interested in any suit pending before him, or has been of counsel for either party or is so connected with either party as to render it improper in his opinion, for him to

action was. It is enough if it shows facts sufficient to bring the case within the terms of the statute. Abranches *v.* Schell, 4 Blatchf. (U. S.) 256.

1. Wood *v.* Matthews, 2 Blatchf. (U. S.) 370.

2. Davis *v.* South Carolina, 107 U. S. 597; McCullough *v.* Large, 20 Fed. Rep. 309.

When a prosecution has been removed after the warrant issued but before an indictment was found, the State court has no power to find an indictment.

North Carolina *v.* Kirkpatrick, 42 Fed. Rep. 689. In this case it was held that a prosecution was commenced when the warrant was issued and the arrest made. See also Georgia *v.* Port, 4 Woods (U. S.) 513. But in Georgia *v.* O'Grady, 3 Woods (U. S.) 496, it was held that a prosecution was not commenced until an indictment was found.

Removal under this section dissolves an injunction granted by the State court (Northwestern Distilling Co. *v.* Corse, 4 Biss. (U. S.) 514), and discharges sureties on a recognizance to appear in the State court. Davis *v.* South Carolina, 107 U. S. 597.

3. Coggill *v.* Lawrence, 2 Blatchf. (U. S.) 304.

But the defendant is called upon in the circuit court to answer to the offense as defined by the laws of the State from whose courts the indictment was removed. Georgia *v.* O'Grady, 3 Woods (U. S.) 496.

A prosecution against a United States marshal for violating the election laws of a State having been removed to the circuit court of the United States, it was held to be the duty of the State to conduct the prosecution in that court, and of the attorney for the United States to act as counsel for the defendant.

For a particular case in which suits brought by an alien against a civil officer of the United States may be removed, see U. S. Rev. Stat., § 644.

4. U. S. Rev. Stats., §§ 587, 589, 637.

5. U. S. Rev. Stats., § 588.

If the disability of the district judge terminates in his death the circuit court must remand the causes certified to it under §§ 587 and 588 to the district court. *Ex parte* U. S., 1 Gall. (U. S.) 338.

sit on the trial, it shall be his duty on the application of either party to certify the cause to the next circuit court to be held for the district, and if there is no circuit court therein, to the next circuit court in the State, and if there is no circuit court in the State, to the next convenient circuit court in an adjoining State, and, upon the filing of the record in the circuit court, the cause shall proceed as if originally commenced there.[1]

IV. **Removal From One State Court to Another.**[2]—In addition to the provisions for a change of venue the statutes of several of the States provide for the removal of certain cases before trial from lower to higher courts.

The right of removal in such cases is made to depend either upon the amount involved in the suit or upon the nature of the questions raised.

Thus, in *Massachusetts*, actions, except of tort, and petitions for partition commenced in the superior court, in which the value of the matter in controversy exceeds $4,000 if brought in the county of Suffolk and $1,000 if brought in any other county, may be removed before trial to the supreme judicial court, either by consent of the parties or upon the application of the defendant made within thirty days after the day for appearance and accompanied by an affidavit that he believes he has a substantial defense; that the value of the matter in controversy exceeds the amount above mentioned, and that he intends to bring the cause to trial. The action must be entered at the next sitting of the supreme judicial court, and proceeds there as if originally commenced in that court.[3]

So in *New Jersey*, any suit commenced in a circuit court or court of common pleas, in which the value of the matter in contro-

1. U. S. Rev. Stats., §§ 601, 637.

The fact that a judge is interested in a suit does not disqualify him from certifying a cause to the circuit court. Spencer *v.* Tapsley, 20 How. (U.S.) 264.

2. For removal from one county to another, see CHANGE OF VENUE, vol. 3, p. 90.

3. *Massachusetts* Pub. Stat., ch. 152, §§ 7, 8; Acts of 1885, ch. 384, § 14.

The object of these statutes was to allow either party to bring into the supreme judicial court for trial any case which was within the concurrent jurisdiction of that court and the superior court. Sullivan *v.* Fall River, 125 Mass. 568.

A suit cannot be removed after a trial has been had, even though it resulted in a disagreement of the jury. Smith *v.* Castles, 1 Gray (Mass.) 108; Galpin *v.* Critchlow, 112 Mass. 339; 17 Am. Rep. 176.

A judgment rendered by the lower court after a suit has been removed is void. Boynton *v.* Foster, 7 Met. (Mass.) 415.

But if the defendant fails to enter the suit in the supreme judicial court the jurisdiction of the superior court is not ousted. Rice *v.* Nickerson, 4 Allen (Mass.) 66; and the suit cannot be entered at a subsequent term of the supreme judicial court. Knapp *v.* Lambert, 3 Gray (Mass.) 377.

Any one of several defendants may remove the suit. Whiton *v.* Brodhead, 3 Cush. (Mass.) 356.

But a person summoned as a stockholder in an action against a corporation is not properly a defendant, and cannot remove the suit. Robbins *v.* Suffolk Co. Ct., 12 Gray (Mass.) 225.

An action to foreclose a mortgage can be removed on the defendant's affidavit that the amount sought to be recovered exceeds the amount named in the statute, although the *ad damnum*

versy exceeds $200, may be removed into the supreme court at any time before issue is joined by a writ of *habeas corpus* granted by one of the justices of the supreme court.[1]

In most of the States justices of the peace have no jurisdiction of causes involving the title to real estate, and where such is the case, provision is commonly made by statute for the removal of such causes into the courts having jurisdiction thereof. These provisions, though differing considerably in detail, are to the same general effect—namely, that when, in an action commenced in a justice's court, it is made to appear, either by the defendant's answer or in some other specified manner, that the title to real estate will be brought in question, the justice shall proceed no further with the cause, but shall certify the same to the proper court, and transmit a copy of the record, after which the cause shall proceed in that court as if originally commenced there.[2]

is less than that amount. Hyde *v.* Greenough, 11 Cush. (Mass.) 87.

A complaint for flowing land cannot be removed, the superior court having exclusive jurisdiction of such complaints. Humphrey *v.* Berkshire Woolen Co., 10 Allen (Mass.) 420.

1. *New Jersey* Revision, title, Practice, §§ 222–228, pp. 882, 883.

If a cause has been removed and remanded to the court in which it originated it cannot be removed again. § 226.

If the writ of *habeas corpus* is improperly issued, the court to which it is directed may proceed with the cause. § 227.

A civil suit must be removed by writ of *habeas corpus*, not by *certiorari*. Chandler *v.* Monmouth Bank, 9 N. J. L. 101.

It is too late to remove a cause by *habeas corpus* after an interlocutory judgment. Sharp *v* Sinnickson, 1 N. J. L. 46; or after arbitrators have been appointed and have met. Brickham *v.* Denney, 1 N. J. L. 12.

The defendant is required to recognize to the plaintiff with sufficient sureties in double the sum demanded for the payment of the condemnation money and costs in case judgment passes against him. § 222.

For cases on the sufficiency of the recognizance or bail, see Hughes *v.* Hughes, 1 N. J. L. 209; Anonymous, 3 N. J. L. 222; Marcellis *v.* Hamburg Turnpike Co., 3 N. J. L. 505; Sneed *v.* Wallen, 5 N. J. L. 682; Craig *v.* Berry, 5 N. J. L. 852; Dickenson *v.* State Bank, 16 N. J. L. 354; Morris Canal etc. Co. *v.* Vannatta, 17 N. J. L. 159.

2. *California*, Code Civil Proc. (Deering's Annotated Codes and Statutes, vol. 3), § 838; Doherty *v.* Thayer, 31 Cal. 140.

Colorado, Mills' Annotated Stats., vol. 2, § 2630; Klopper *v.* Keller, 1 Colo. 410.

Indiana, Revised Stats., vol. 1, § 1434; Wall *v.* Albertson, 18 Ind. 145; Bibbler *v.* Walker, 69 Ind. 362.

Iowa, McClain's Annotated Code, vol. 2, §§ 4784–4785.

Kansas, Genl. Stats. (1889), vol. 2, § 4853; Douglas *v.* Easter, 32 Kan. 496. The justice must be satisfied that the title or boundary of land is in dispute. The mere filing of an answer, duly verified, stating the fact, does not oust him of jurisdiction. Duncan *v.* Yordy, 27 Kan. 348.

Maine, Rev. Stats. (1883), ch. 83, §§ 4–5; Low *v.* Ross, 3 Me. 256; Hodgdon *v.* Foster, 9 Me. 113.

Massachusetts, Pub. Stats. (1882), ch. 155, §§ 24–26; Magoun *v.* Lapham, 19 Pick. (Mass.) 419. In order to entitle himself to a removal it is not necessary that a party should formally request it: it is enough if he objects to the jurisdiction, recognizes to enter the action in the superior court, and does enter it. Leary *v.* Reagan, 115 Mass. 558.

Michigan. Howell's Annotated Stats. vol. 2, §§ 6890–6898.

Minnesota, Genl. Stats. (1891), vol. 2, § 4507; Lindekugel *v.* Angelhofer, 24 Minn. 324; Steele *v.* Bond, 28 Minn. 267.

The party seeking a removal is usually required to give a bond or other security to the adverse party, with the condition that he shall appear in the court to which a removal is sought and pay all costs that may be awarded against him. On his failure to give such security the case may proceed before the justice,[1] and in several of the States he is thereafter debarred from raising the question of title in the suit.[2]

In some States, when it appears in an action commenced before a justice of the peace, that a question of title to real estate is involved, the action is simply dismissed and the plaintiff is allowed to commence a new suit in the proper court.[3]

In order to be a ground for removal or dismissal the question of title must be directly and distinctly raised.[4]

Missouri, Rev. Stats. (1889), vol. 2, §§ 6219–6220.

Nevada, Genl. Stats. (1885), § 3561; State *v.* Rising, 10 Nev. 97; Tull *v.* Anderson, 15 Nev. 426.

New Hampshire, Genl. Laws (1878), ch. 214, §§ 2–4; ch. 250, §§ 12–14.

New Jersey, Rev. of the Stats. (1877), vol. 1. title, Justices Courts, §§ 25–27.

New York, Bliss' Annotated Code (3rd ed.), vol. 3, §§ 2951–2958.

Oregon, Hill's Annotated Laws (1887), § 2081; Sweek *v.* Galbreath, 11 Oregon 516; Aiken *v.* Aiken, 12 Oregon 203.

Rhode Island, Pub. Stats. (1882), ch. 196, §§ 30–31.

Wisconsin, Sanborn & Berryman's Annotated Stats., vol, 2. §§ 3619–3622; Kimball *v.* Adams, 52 Wis. 554.

Wyoming, Rev. Stats. (1887), § 3435.

In some States the action must be tried in the court to which it is removed on the same pleadings which were filed in the justice's court. Santa Cruz *v.* Santa Cruz R. Co., 56 Cal. 143; *Michigan*, Howell's Annotated Stats., vol. 2, § 6896.

New York, Bliss' Annotated Stats. (3d ed.) vol. 3, § 2957.

People *v.* Albany, 19 Wend. (N. Y.) 123; Fox *v.* Erie Preserving Co., 93 N. Y. 54; McNamara *v.* Biteley, 4 How. Pr. (N. Y.) 44; Cusson *v.* Whalon, 5 How. Pr. (N. Y.) 302; Wendell *v.* Mitchell, 5 How. Pr. (N. Y.) 424; Wiggins *v.* Tallmadge, 7 How. Pr. (N. Y.) 404.

In *New Jersey*, the defendant is limited to a plea of title in the court to which the action is removed, Dover School House *v.* McFarlan, 14 N. J. L. 471; Brain *v.* Snyder, 30 N. J. L. 56; Westervelt *v.* Marinus, 3 N. J. L. 266, unless the plaintiff enlarges his declaration so as to make substantially a new case. Snedicker *v.* White, 11 N. J. L. 87; Chambers *v.* Wambough, 28 N. J. L. 530; but he is not limited to the same plea which he filed before the justice, Hawk *v.* Segraves, 34 N. J. L. 355; nor to a plea of freehold title. He may prove any right to enter and have possession. Campfield *v.* Johnson, 21 N. J. L. 83.

1. *Maine*, Rev. Stats. (1883) ch. 83, § 3; *Massachusetts*, Pub. Stats. (1882), ch. 155, § 25; *Michigan*, Howell's Annotated Stats, vol 2, §§ 6892, 6894; *New Jersey*, Revision of the Stats. (1877), title, Justices Courts, § 27; *New York*, Bliss' Annotated Code (3rd ed.), vol. 3, §§ 2952, 2955; *South Carolina*, Code of Civil Procedure (1882), § 82; *Wisconsin*, Sanborn *v.* Berryman's Annotated Stats., vol. 2, § 3620; Strasson *v.* Montgomery, 32 Wis. 52.

2. *Michigan*, Howell's Annotated Stats., vol. 2, § 6894; *New York*, Bliss' Annotated Code (3rd ed.), vol. 3, § 2955; *South Carolina*, Code of Civil Procedure (1882), § 82; *Wisconsin*, Sanborn & Berryman's Annotated Stats., vol. 2, § 3620; Barteau *v.* Appleton, 23 Wis. 414; Brown *v.* Streng, 32 Wis. 59; State *v.* Preston, 34 Wis. 675; Bandlow *v.* Thieme, 53 Wis. 57; Bruins *v.* Bruins, 55 Wis. 548.

3. *Florida*, McClellan's Digest, ch. 128, § 82; *North Carolina*, Code (1883), vol. 1, §§ 836, 837; Evans *v.* Williamson, 79 N. Car. 86; Parker *v.* Allen, 84 N. Car. 466; *South Carolina*, Code of Civil Procedure (1882), §§ 79–86. See also Davis *v.* Morse, 21 N. H. 345; *New York*, Bliss' Annotated Code (3rd ed.), vol. 3, § 2956.

4. Hatch *v.* Allen, 27 Me. 85; Goenen *v.* Schroeder, 8 Minn. 387; Radley *v.* O'Leary, 36 Minn. 173; Flagg *v.*

In *Massachusetts*, a petition for partition may be removed from the probate court to the superior court at the request of any party in interest when it appears that the shares are in dispute or uncertain,[1] and in *Virginia*, an action brought before a justice of the peace, if the matter or thing in dispute exceeds twenty dollars, may be removed on the application of the defendant into the court of the county or corporation where the warrant was brought.[2]

REMOVE—(See also ERECT, vol. 6, p. 809).—1. To move away from the position occupied; to displace, as to remove a building.[3]

2. To go from one place to another; to change place of residence.[4]

Gotham, 7 N. H. 266; Boyer *v.* Schofield, 2 Keyes (N. Y.) 628; Bellows *v.* Sackett, 15 Barb. (N. Y.) 96; Fredonia etc. Plank Road Co. *v.* Wait, 27 Barb. N. Y. 214.

In an action of trespass a plea that the *locus in quo* is a public highway presents an issue involving the title to real estate. Spear *v.* Bicknell, 5 Mass. 125; Stront *v.* Berry, 7 Mass. 385; Whiting *v.* Dudley, 19 Wend. (N. Y.) 373; Randall *v.* Crandall, 6 Hill (N. Y.) 342; Ashbough *v.* Walter, 24 Wis. 466. *Contra*, Chambers *v.* Wambough, 28 N. J. L. 530; Brain *v.* Snyder, 30 N. J. L. 56; Yawger *v.* Manning, 30 N. J. L. 182.

A plea that the defendant has a private right of way also presents an issue of title. Randolph *v.* Montfort, 16 N. J. L. 226; Hawk *v.* Segraves, 34 N. J. L. 355; Little *v.* Denn, 34 N. Y. 452; Alleman *v.* Dey, 49 Barb. (N. Y.) 641; Stoppenback *v.* Zohrlant. 21 Wis. 385; Lowitz *v.* Leverentz, 57 Wis. 596.

A plea setting up a license to do an act which would otherwise be a trespass on real estate does not present an issue of title. Wheeler *v.* Rowell, 7 N. H. 515; Rathbone *v.* McConnell, 21 N. Y. 466; Launitz *v.* Barnum, 4 Sandf. (N. Y.) 637; Earl of Craven *v.* Price, 37 How. Pr. (N. Y.) 15.

For other cases deciding the question whether the title to real estate was or was not involved, see Wood *v.* Prescott, 2 Mass. 174; Martin *v.* Tobin, 123 Mass. 85; Vandoozer *v.* Dayton, 45 Mich. 247; Gay *v.* Hults, 55 Mich. 327; Labeau *v.* Labeau, 61 Mich. 81; Ostrom *v.* Potter, 71 Mich. 44; Tordsen *v.* Gummer, 37 Minn. 211; Main *v.* Cooper, 25 N. Y. 180; Watry *v.* Hiltgen, 16 Wis. 516; Murray *v.* Van Devlin, 24 Wis. 67; Lipsky *v.* Borgmann, 52 Wis. 256; Huddleston *v.* Johnson, 71 Wis. 336.

1. Pub. Stats. of *Massachusetts* (1882), ch. 178, § 46.

2. Code of *Virginia* (1887), § 2939.

3. Webster's Dict. *followed* in South *v.* Comm'rs of Sinking Fund, 86 Ky. 186.

Remove From.—These words in an indictment upon a statute declaring to "cut down or remove from land, any tree, timber, stone, or other valuable article," a criminal trespass—have no technical meaning restricting them to articles forming a part of the realty. The statute itself may and should be restricted by construction to cases of removing from land something which pertains to it, and would pass by a sale of it. But the language of an indictment cannot be thus modified. Bates *v.* State, 31 Ind. 72.

Figurative Sense.—In Nugent *v.* Goldsmith, 59 Mich. 593, which was an action of replevin, the trial court instructed the jury as follows: "That if they found the fact to be that there was actually a purpose to remove the property beyond the reach of creditors, it would have a bearing upon the motive of the transaction." This instruction was objected to, it being argued that the word "remove" meant the manual transportation of the property, and that there was no evidence that there was any such removal. It was held that the word "removal" in the sense in which it was used by the trial court "evidently meant the placing or putting of the property out of the reach of the creditors by this pretended transfer, and the jury must have so understood it. In that view of the meaning of the word, the evidence warranted this portion of the charge."

4. Waterbury *v.* Platt, 12 Conn. 186.

3. To deprive of office by the act of a competent officer or of the legislature.[1]

RENDER—(See also JUDGMENTS, vol. 12, p. 70, 73; JUSTICE OF THE PEACE, vol 12, p. 466).—To render is to make up, to finish, to state, to deliver, as to render a judgment.[2]

In that case the defendant's intestate, when an inhabitant and resident of the First Society of Waterbury, entered into an agreement with said First Society to pay $125, in five equal annual installments to the treasurer of the society, and gave his promissory notes for the payment of such installments, with the proviso that if he should "remove" without the local limits of the society before all the installments became payable, such installments as were not payable at the time of such removal, should not be collectible. Before the last two installments became due, the general assembly of the State, on petition of defendant's intestate, passed an act and thereby annexed the part of the society of Waterbury which was owned by defendant's intestate, and on which he resided, to the town and society of M. The society brought suit upon the two notes. It was held that within the meaning of the agreement, defendant's intestate could not be said to have "removed" from the First Society of Waterbury by reason of the annexation of his land to the society. See also PERSON.

"Leave the State" Synonymous with "Remove from the State."—See STATE, vol. 13, p. 5.

1. See also PUBLIC OFFICERS, and for the removal of the different officers see under such specific titles as SHERIFFS, CORONER, etc.

Removal for Cause.—See CAUSE, vol. 3, p. 44.

Removal Distinguished from Suspension.—"Suspension" is in no proper sense the same thing as "removal" and constitutional provisions with regard to removals do not apply to suspensions from office, although the suspension may be in effect a permanent deprivation of the office. Poe *v.* State, 72 Tex. 625. See also State *v.* Meeker, 19 Neb. 444.

2. Webster's Dict. *followed* in Ætna L. Ins. Co. *v.* Hesser, 77 Iowa 387.

That case turned upon a question of priority between a mortgage and a judgment creditor. It was held that a judgment was not "rendered" so as to be capable of enforcement as a lien until entered of record in the books prescribed by statute. But see *infra.* See also RECORDS.

A judgment given in a justices' court, but a transcript of which is filed and judgment docketed in the county court, cannot be said to have been "rendered" in the latter court so as to take it out of *New York* Code Civ. Pro., § 382, providing that an action upon a judgment "rendered" in a court not of record shall be commenced within six years, etc. Dieffenbach *v.* Roch, 112 N. Y. 621.

"Rendering" Distinguished from "Entering" a Judgment.—The rendition of a judgment is the judicial act of the court in pronouncing the sentence of the law upon the facts in controversy as ascertained by the pleadings and the verdict. The entry of a judgment is a ministerial act, which consists in spreading upon the record a statement of the final conclusion reached by the court in the matter, thus furnishing external and incontestable evidence of the sentence given, and designed to stand as a perpetual memorial of its action. It is the former, therefore, that is the effective result of the litigation. In the nature of things, a judgment must be rendered before it can be entered. 1 Black on Judgments, § 106.

In Sheuster *v.* Rayder, 13 Colo. 329, it is said that discriminating law writers speak of judgments by confession as being "entered," while other judgments are spoken of as being "given" or "rendered." The distinction is significant, as "rendering" the judgment is a judicial act, while "entering" one is merely ministerial.

An *Illinois* statute provided that "whenever any judgment shall have been rendered in the supreme court which, upon further consideration, is found to have been erroneously entered up, the judges thereof are authorized, during vacation, to change the same without ordering a rehearing thereof, by entering a proper judgment in said cause." In Blatchford *v.* Newberry, 100 Ill. 489, upon the construction of the word "rendered" and "entered" as

used in this statute, the court said: "It will be observed that the power here assumed to be conferred upon the judges is not to grant rehearings, but when a judgment is found to have been erroneously entered up, to change the same without ordering a rehearing. The words 'rendered' and 'entered' are plainly used antithetically, and each in its distinctive correct legal sense—"rendered' being used to indicate the giving of judgment, and 'entered' to indicate the act of placing the judgment rendered on record—in other words, enrolling or recording it. 'Erroneously entering up a judgment' expresses only an error in the clerical act of placing it upon the record, and implies that the judgment enrolled or recorded is not the judgment 'rendered' or given." See also JUDGMENTS, vol. 12, p. 71, n., and *infra*, this note.

See, however, Ætna L. Ins. Co. *v.* Hesser, 77 Iowa 387, *cited supra*, this note.

Statutes Limiting the Time Within which an Appeal May be Taken or a Writ of Error Issued to a Certain Period After the "Rendition" or "Rendering" of the Judgment.—A *New York* Statute of Limitations provided that a writ of error should be brought within two years after the rendering of the judgment or final determination of the court, and not after. In Fleet *v.* Youngs, 11 Wend. (N. Y.) 528, upon the question of whether the statute commenced running from the time of the entry of the rule for judgment, or from the time of the filing of the record. Tracy, Senator said: "So far as the policy of the statute is concerned it is indifferent whether we construe the time of the limitation to commence on the entry of the rule for final judgment, or not until the filing of the record; and it would not be doing violence to the language of the statute to give it either construction. But it strikes me that the more obvious and natural import of the expression 'rendering of such judgment' is the annunciation or declaring the decision of the court indicated by the rule for judgment." Accordingly it was held that the statute commenced running from the time of the entry of the rule for judgment. And to the same effect, see Lee *v.* Tillotson, 4 Hill (N. Y.) 29.

In Gray *v.* Palmer, 28 Cal. 416, the question was whether an appeal from a judgment had been taken in time, the statute then requiring the appeal to be taken within one year after the "rendition of the judgment." In that case the judgment had been rendered more than two months before it had been entered by the clerk; and the appeal had been taken within a year after the entry, but not within a year after the rendition. The court held that the appeal was too late. See also *In re* Newman's Estate (Cal. 1888), 16 Pac. Rep. 889; McLaughlin *v.* Doherty, 54 Cal. 519.

The *California* Code Civ. Pro., § 939 provides that an exception to the decision or verdict because not supported by the evidence cannot be reviewed, unless the appeal is taken within sixty days after the "rendition" of the judgment. *In re* Rose Estate, 80 Cal. 166, which was an appeal from the decree settling an administrator's account taken within sixty days of the entry of the decree, but not within sixty days from the announcement of the decision and the filing of the findings, it was held that the question of the sufficiency of the evidence could not be raised upon the appeal, the court saying, "the words 'rendition of the judgment' do not mean the same thing as 'entry of the judgment.' They mean either the announcement from the bench entered in the minutes, or the filing of the findings, if there are findings, or both, but it is not necessary to decide what is the precise meaning of the term here, for in this case both things occurred more than sixty days before the appeal was taken." This was reversed upon the rehearing, 80 Cal. 166; but upon the ground that an appeal from the action of a court in settling an administrator's account was not an appeal from a "final judgment in an action or special proceedings" so as to bring it within the provision in § 939.

In conformity with these decisions and with the proper construction of the term "rendition of judgment," it was held, in Furlong *v.* Griffin, 3 Minn. 207, that the statute limiting the issuance of writs of error to one year after the "rendition of judgment" had "reference to the time of making the decision by which the rights of the parties are determined and adjudged, and not to the time when such judgment is perfected by being entered of record."

But in Humphrey *v.* Havens, 9 Minn. 318, this case was overruled. It was there held that the time for bringing an appeal for writ of error begins

RENEW.—1. A common meaning of the word "renew" is to make again, as to renew a treaty or a covenant.[1]

2. To renew, in its popular sense, is to refresh, revive, or rehabilitate an expiring or declining subject, but is not appropriate to describe the making of a new contract, or the creation of a new existence.[2]

to run from the entry of the judgment or order upon the record. The court assigning as reasons for the reversal, of Furlong *v.* Griffin, 3 Minn. 207, that the interpretation as given that case was not in accordance with the spirit however it might be with the letter of the law; that the question was one of mere practice involving no principle, and that the change was as much for convenience as anything else.

"**Rendering" and Entering Judgment.** See JUSTICE OF THE PEACE, vol. 12, pp. 459, 468, 474.

1. Daggett *v.* Daggett, 124 Mass. 149. And in that case it was held that the words "I hereby renew the within note" indorsed upon the back of a promissory note, meant something more than an admission that the old note was unpaid; they import a promise anew to pay the amount of the note. See also Central Bank *v.* Willard, 17 Pick. (Mass.) 150; 28 Am. Dec. 284. See also LIMITATION OF ACTIONS, vol. 13, p. 748.

Renewal, as used in a statute requiring a tax affidavit, is not predicable of a note payable in United States currency for an amount agreed upon at a settlement made after the late war, and adjusting the equities of a previous Confederate contract. Greene *v.* Lowry, 46 Ga. 55.

2. Carter *v.* Brooklyn L. Ins. Co., 110 N. Y. 22, *citing* Webster's & Worcester's Dicts. That case turned upon the construction of a *New York* statute, providing that "no life insurance company, doing business in the city of New York, shall have power to declare forfeited or lapsed, any policy thereafter issued or renewed, by reason of non-payment of any annual premiums, or interest, or any portion thereof, unless a notice in writing," the particulars of which being prescribed by the statute, shall have been sent to the insured. It was held that the payment of each annual premium constituted a renewal of the policy of life insurance, within the meaning of the term "renewed" as used in the act. The court by Ruger, C. J., said: "It is contended by the appellant that the act applies only to policies 'issued or renewed' after its passage, and that the policy cannot be said to have been renewed unless it has been forfeited or lapsed, and has been afterward restored or reinstated by the company. . . . It is not according to the popular notion of the meaning of the word 'renewal' that it can take place only after the death or expiration of the subject to which it is applied. Thus to renew a note, a lease, or a contract, it is not essential to wait until they have respectively expired, for after that time it would be practically impossible to renew them. A new note or lease may be made or contract created, but they would have force and effect from the new creation, and not from the original agreement." *Compare*, however, Moers *v.* Reading, 21 Pa. St. 201 in which it is said: "To renew a charter, is to give a new existence to one which has been forfeited, or which has lost its validity by lapse of time." For the use of word with regard to the renewal of fire insurance policies see FIRE INSURANCE, vol. 7, p. 1011.

Renewal of Leases.—See LANDLORD AND TENANT, vol. 12, p. 658; LEASE, vol. 12, p. 974.

Renewal of Patents.—See PATENTS, vol. 18, p. 20.

Renewal of Bills and Notes.—A bill of exchange drawn the 28th of November, 1836, payable forty-two months after date, was accepted thus: "Accepted on condition of its being renewed, until November the 28th, 1844." It was held in an action by an indorsee against the acceptor that this was a good conditional acceptance. The court by Patterson, J., said: "Renewed is not a word of art; it has no legal or technical signification; and, though in common parlance it might appear, *prima facie*, to apply to something new, yet there is nothing forced or absurd in giving it a different meaning; especially when we consider that, if this writing of the defendant on the bill be held necessarily and restrictively to mean that he will pay the

RENTED.—The word "rented," according to its common and authorized use, refers as well to the act of the lessee as to that of the lessor. The lessor rents land to the lessee; the lessee rents land of the lessor.[1]

RENTS—(See also DISTRESS, vol. 5, p. 706; GROUND RENTS, vol. 9, p. 62; LEASE, vol. 12, p. 1020; and for other definitions of the term, as well as for a full treatment of the subject, see LANDLORD AND TENANT, vol. 12, p. 720.) A rent is a right to a certain profit issuing annually (or, rather, periodically) out of lands and tenements corporeal, or out of them and their furniture, in retribution (*reditus*) for the land that passes.[2]

bill at the end of forty-two months by then giving another acceptance payable on the 28th of November, 1844, and is capable of no other meaning, it would appear by the authorities that it is no acceptance at all, since an acceptance must be to pay in money; and, as we cannot suppose, nor can the defendant be heard to say, that he meant it to be void and to be no acceptance at all, we feel that we shall be carrying into effect the real intention of the parties '*ut res magis valeat quam pereat*', by holding that the word 'renewed' means 'extended;' that the defendant meant nothing more than extension of time by the expression he used." Russel *v.* Phillips, 14 Q.B. 892; 68 E. C. L. 890.

Where a mortgage was given to secure the payment of the promissory notes, made by the mortgagee for the accommodation of the mortgagor, and the renewals thereof until the whole sum was paid, it was held that it was not necessary, in order to constitute notes subsequently used "renewals" of such original notes, that they should have been issued for the same amounts, at the same periods, and that each successive note should have been applied to take up its immediate predecessor. Gault *v.* McGrath. 32 Pa. St. 392.

1. Gray *v.* La Fayette Co., 65 Wis. 568. That case arose upon the construction of the exemption of a statute, exempting the parsonage of a church, "whether occupied by its pastor permanently or rented for his benefit." Plaintiff's contended that the words "rented for his benefit" referred to a renting, by the church as lessee, of a parsonage for the benefit or use of its pastor, while the defendants insisted that the words refer to a renting by the church, to a lessee, of its own parsonage, for the same beneficial purpose. The court held that, though neither construction would be forced or unnatural, yet, looking at other provisions of the statute, the plaintiff's construction must be adopted.

"The words 'rented or leased' may be used in two senses. It is said that a landlord rented or leased his lands to his tenants, and, with almost equal propriety, it may be said that the tenant rented or leased an estate from his landlord." Zink *v.* Grant, 25 Ohio St. 354.

Rented For a Pasture.—"The word rented, aside from the qualification of it by the words with which it stands connected, naturally means that a tenant, to whom the property is rented, has the exclusive possession for the time. 'Rented for a pasture,' seems rather an equivocal phrase, which may be open to explanation, though it rather conveys the idea that the tenant has an exclusive right, at least during the proper season for pasturing. If the same was used in connection with a building, as, if it be said a building is rented for a dwelling-house, or store, or shop, it implies that the exclusive right of possession is in the tenant; and if this is not so as applied to a pasture, it is because the right of pasture is in its nature transient and less permanent, and more analogous to the incorporeal right of way, than the right which one has to the house in which he resider. Still we do not think that the expression can be said to imply that any other than the tenant has any right in the thing rented, during the time of the tenancy; and whether it would, or not, convey that idea, would, as we have said, depend upon other circumstances." Noyes *v.* Stillman, 24 Conn. 24. See also LANDLORD AND TENANT, vol. 12, p. 695.

2. 2 Min. Ins. 32, *citing* Gilb. Rents

9; 1 Th. Co. Lit. 442; Mickle *v.* Miles, 31 Pa. St. 20. The definition is Prof. Minor's, excepting the modification suggested by Mickle *v.* Miles, 31 Pa. St. 20.

"By statute as well as by usage in this commonwealth, the word 'rent' may include the compensation to be paid for the occupation of land by a tenant, whether he holds under a written lease or at will, or at severance, and whether the amount to be paid has been defined by the agreement of the parties, or has been left indefinite." Kites *v.* Church, 142 Mass. 589.

A Rent Is a Right.—"Let it be observed that a rent is a right, of which the arrears, periodically accruing, are merely the fruits. In consequence of omitting to note this obvious distinction between the incorporeal right and the fruits and profits which periodically arise from it, we have it laid down that for a freehold rent reserved on a lease for life, or in fee simple, no action of debt lay by the common law, during the continuance of the freehold out of which it issued, for that the law would not suffer a real injury to be remedied by an action merely personal (1 Rol. Abr. 595; 3 Th. Co. Lit. 270, n. (U). And provision had to be made for the case by Stat. 8 Anne, ch. 14, which has been, in substance, enacted with us (V. C. 1873 ch. 134, § 7). And under the influence of the same confusion of thought, not discriminating between rent and arrears of rent, a prohibition was awarded in Miller *v.* Marshall, 1 Va. Cas. 158, to prevent a justice of the peace from taking cognizance of a claim for arrears of a freehold rent, because it was a freehold estate.

The rent or right itself, where the estate or interest therein is an estate of freehold, cannot be recovered in a personal action, but the arrears, like the severed fruits of the soil, are not real property, and the injury of withholding them is a personal injury, which a personal action is well fitted to redress." 2 Min. Ins. 32.

The distinction made by Dr. Minor is also recognized in Washburn's definition of rent; Washb. Real Prop., vol. 2 (5th ed.) *5, and is obvious. For it is a contradiction in terms to define rent as "a certain profit," or "the return," and, at the same time, to denominate it an incorporeal hereditament. Yet a large majority of the lexicographers and text-writers fall into this inconsistency. 2 Bl. Com. 41; 3 Kent's Com. 460. See also Webst. Dict.; Bouv. L. Dict.; Abb. L. Dict.; And. L. Dict.

A Certain Profit.—The right must be to a profit, usually, though not necessarily money, for it frequently consists of part of the products of the land, labor, etc. 2 Bl. Com. 41; 2 Min. Ins. 33; Johnston *v.* Smith, 3 P. & W. (Pa.) 496; 24 Am. Dec. 339.

The profit must be certain or capable of being reduced to certainty by either party. 2 Bl. Com. 41; 2 Min. Ins. 33; Com. *v.* Contner, 18 Pa. St. 447; Smith *v.* Flyer, 2 Hill (N. Y.) 684; Bowser *v.* Scott, 8 Blackf. (Ind.) 86; Cross *v.* Tome, 14 Md. 247; Dutcher *v.* Culver, 24 Minn. 584; McFarlane *v.* Williams, 107 Ill. 33.

Issuing Periodically Out of Lands and Tenements Corporeal, or Out of Them and Their Furniture.—The profit or return reserved must be payable periodically, but it need not be yearly. If it issues from period to period during the whole continuance of the grantee's estate, whether from year to year, or from month to month, etc., this will constitute the reservation a rent; but, "if the purchase money of land is payable in installments, but not at intervals continuing throughout the duration of an estate, it is not a rent." 2 Min. Ins. 33; 2 Bl. Com. 41.

It must issue out of lands and tenements corporeal, therefore a rent cannot be reserved out of an advowson, a common, an office, a franchise, or the like. 2 Min. Ins. 33; 2 Bl. Com. 41; 3 Kent's Com. (Text-Book Series) 461.

In Com. *v.* Contner, 18 Pa. St. 447, the court by Black, C. J., says of rent: "Now a sum of money payable periodically, for the use of chattels, is not rent in any legal sense of the word. It cannot be distrained for; and unless it can, it is not demandable out of the proceeds of a sheriff's sale. For this right comes in place of a distress by the plain words of the statute. Rent must not only issue out of land, but it must be fixed, definite, and certain in amount, whether payable in money, chattels, or labor. If, therefore, a lease so mixes the real and personal property together that it cannot be determined how much of what is called the rent is to be paid for the chattels, and how much is the profit of land, there can be no distress for non-payment of it." The *Pennsylvania* court, however, has qualified these propositions, holding in Mickle *v.* Miles, 31

Rents are commonly divided into three classes: viz., rents service, rents charge and rents seck.[1]

A rent service is a rent reserved upon a grant of lands, when a reversion exists in the grantor. Its principal characteristics are that it always arises by reservation, that it supposes a tenure of the grantor and the reversion in him, and that the arrears are recoverable by a distress as of common right.[2]

Pa. St. 20, that, "a rent may issue out of lands and tenements corporeal, and also out of them and their furniture." In that case the court by Lowrie, J., said: "Legal definitions are, for the most part, generalizations derived from our judicial experience; and, in order to be complete and adequate, they must sum up the results of all that experience as they are to be found in the special cases that belong to the class to be defined. The ordinary definition of rent, as a profit issuing yearly out of lands and tenements corporeal, is defective in overlooking some of the cases that belong to the class; as where a furnished house or a stocked farm is leased, which are common cases. 5 Bos. & P. 224; 5 Co. 16*b*; 1 Leon. 42. In such cases the personal property is really a part of the consideration of the rent, and it is only by a fictitious accommodation of the case to the defective definition, that it can be said that the rent issues exclusively out of the land. It is better to correct the definition." And this modification of the ordinary definition seems consonant to reason, and has been adopted in the text.

In Return for the Land that Passes.—As rent is the return for the land that passes, it must be reserved to the grantor. If reserved to a stranger, it not only is a good rent, but at common law was altogether void and was not binding as a contract. 2 Min. Ins. 34; Co. Lit. 47*a*, 143*b*; Bac. Abr. Rents (*g*.); Gilb. Rents 54.

Rent is a compensation for the land that passes. And this is declared by Prof. Minor to be "the crowning characteristic of a proper rent, and it is to be regretted that it was ever lost sight of in the nomenclature connected with this subject." It will be observed that if the owner of lands grants a periodical payment issuing out of his lands, though it lacks this characteristic, it is universally denominated a rent. 2 Min. Ins. 34.

Rents to Become Due.—See BECOME, vol. 2, p. 160.

1. Bacon's Abr., tit. Rent; 3 Kent's Com. 460; 2 Bl. Com. 42.

Rents Reserved and Rents Granted.—"The important discrimination to be here made is between rents proper—that is, rents reserved—on the one side, and rents improper—that is rents granted—on the other. Rents proper, or rents reserved, are rents reserved upon a grant of lands being such as correspond to the definition given in the text. Had the designation 'rent' never been otherwise applied than to such rents as these, it would have saved much confusion of thought which must of course result from the use of the same word to signify very different things. A rent improper, or rent granted, is where a certain sum is granted, payable periodically, issuing out of the grantor's lands. Such grants were found very convenient as a security for debts, as marriage portions, and for other domestic occasions, especially if, as generally happened, the grantor charged the lands with a distress to enforce the payment of arrears. Because this transaction resembled a rent in several particulars (*e. g.*, in stipulating for a certain sum, payable periodically, and issuing out of lands and tenements), it was very infelicitously so named, although it wanted the most characteristic attribute of a rent, and that whence it derives its name: viz., the being a retribution or return for the land that passes. This discrimination between rents reserved and rents granted is incomparably the most important connected with the subject, and affords a clue which, in general, suffices to guide the student through whatever intricacies belong to it." 2 Min. Ins. 35.

2. 2 Minor's Ins. 36; 2 Bl. Com. 42; 3 Kent's Com. 461; Bac. Abr. Rents (A) 2.

"Rent service is where the tenant holdeth his land of his lord by fealty and certain rent, or by homage fealty

A Rent Charge is a right to a certain profit issuing periodically out of lands and tenements corporeal, to secure which the land is specially charged with a distress, unusually by the term of the grant. It is created either by the grantor conveying his whole interest in the land reserving a rent, in which case, as there is no reversion in him, it would not be a rent service, or by the owner of lands granting a rent to issue from his lands. In either case the land must be specially charged with the distress, as it is not incident to either of common right. And from this characteristic it derives its name of rent charge.[1]

A Rent Seck is a right to a certain profit issuing periodically out of lands and tenements corporeal, for which the land is not charged with a distress, either of common right or by express stipulation. It may be created in the same manner as a rent charge, omitting the clause of distress, or it may arise from a severance of the reversion from the rent, in a rent service; that is to say, whenever the holder of a rent service parts with either the rent or the reversion, the rent becomes a rent seck.[2]

RENT CHARGE.—See RENTS.

RENT SECK.—See RENTS.

and certain rent, or by other services and certain rent." Ingersoll *v.* Sergeant, 1 Whart. (Pa.) 337.

"So called because it has some corporal service incident to it, at least fealty or feudal oath, or fidelity." Cornell *v.* Lamb, 2 Cow. (N. Y.) 659.

"Where a tenant held land by fealty, homage or other service and a certain material return or rent, delivery of which was enforceable by distress." And. L. Dict.

1. 2 Min. Ins. 38; Bac. Abr., Tit. Rents (A) 2. "Thus if an owner of land in fee grants it to another in fee, and in his deed reserves an annual sum of money, or something money's worth, to be paid by the grantee or his heirs or assigns to him and his heirs or if, being owner in fee of the land, he grants to another and his heirs an annual sum to issue out of his said lands forever, these annual payments thus granted or reserved are called rents, although not strictly anything in the way of profits reserved or to be rendered out of the thing granted. For this reason while the common law gave to the reversioner, in case of a rent service, the remedy of distress for its recovery if unpaid, there was no such right attached to rents granted or reserved as above supposed, unless it was so stipulated in the deed or indenture by which the rent was created. If the owner of the rent was empowered, at its creation, to enforce its payment by distress, it was considered as charged upon the land and therefore called a rent charge. If no right of distress was attached to the rent at its creation it was called a rent seck (*siccus*), or dry rent, being a mere right to recover rent, without any right to seize upon the property out of which it was supposed to issue or to be derived." 2 Wash. Real Prop. (5th ed.) *6.

Rent charge is a rent granted out of lands by him who is owner thereof, with an express clause of distress, and it is called a rent charge, because the lands were charged with the distress, and the grantee, without the clause had no right of distress, because there was no fealty annexed to the grant. Spencer *v.* Austin, 38 Vt. 265.

Rent charge is a rent reserved where the landlord has no reversionary interest. He would have, for such rent, no right to distrain, unless the power be contained in the lease. Cornell *v.* Lamb, 2 Cow. (N. Y.) 659.

Rent Charge Distinguished from an Annuity.—See ANNUITY, vol. 1, p. 592.

2. 2 Min. Inst. p. 40; Bac. Abr. Tit. Rent. (A) 3; 2 Bl. Com. 42; 3 Kent's Com. 461.

Rent seck is the same as rent charge except that there is no right to dis-

RENT SERVICE.—See RENTS.

RENTS AND PROFITS.—See EJECTMENT, vol. 6, p. 217, 245 *y*; MORTGAGES, vol. 15, p. 819, 821; PROFITS; TRESPASS; TRUSTS; VENDOR AND PURCHASER; WILLS.

RENUNCIATION—(See also EXECUTORS AND ADMINISTRATORS, vol. 7, p. 197; PROBATE).—See note 1.

REPAIR—(See also IMPROVEMENTS, vol. 10, p. 242; LANDLORD AND TENANT, vol. 12, p. 720; LEASE, vol. 12, p. 1003, 1018; MARINE INSURANCE, vol. 14, p. 403).—To restore to a sound or good state, after decay, injury, dilapidation, or partial destruction.[2]

train reserved. Cornell *v.* Lamb, 2 Cow. (N. Y.) 659.

1. **Executors' Renunciation.**—A renunciation is an act whereby a person named in a will as executor declines to take on himself the burden of that office. The act is therefore, predicated of an existing office. It presupposes the existence of the will. If no will has been made, there is no executorship to renounce, nor until it is shown that there is a will, can it appear that there is a renunciable executorship. *In re* Maxwell, 3 N. J. Eq. 614.

2. Webst. Dict. *followed* in Gulf City, etc., R. Co. *v.* Galveston, 69 Tex. 660; Pittsburg, etc., R. Co. *v.* Pittsburg, 80 Pa. St. 76; Weaver *v.* Temple, 113 Ind. 298.

Not to make a new thing, but to refit, make good or restore an existing thing; as to repair a highway. Todd *v.* Rowley, 8 Allen (Mass.) 58.

A proposed by letter to B to put the gutter of a mill "in proper shape." B's letter of acceptance stated A's proposal to be to "repair and renew so far as necessary the gutter." *Held*, that the contract contained in the letters required A only to make such repairs and renewals that the existing gutter should do all that it was capable of doing when in good condition, according to its original plan of construction, and not to build a new gutter of a different construction, even if the original plan was defective. Dwight *v.* Ludlow Mfg. Co., 128 Mass. 280.

The leaving of nine cartloads of ashes, brickbats, and rubbish by a tenant on quitting the demised premises, is no breach of his agreement to peaceably yield up the premises in good, tenantable repair. Thorndike *v.* Burrage, 111 Mass. 531.

To Repair a Building—(See also BUILDING, vol. 2, p. 603; ALTERING, vol. 1, p. 523; ALTERATION, vol. 1, p. 497). To replace a building as it was, or to restore it after injury or dilapidation, not to enlarge or elevate it by raising it a story or extending its sides. Douglas *v.* Com., 2 Rawle (Pa.) 264.

Under the head of repairs should be included new roofing, new plumbing, and whatever is reasonably necessary to keep up a house; but not additions to houses and adaptations of the premises to new uses. Stephens *v.* Milnor, 24 N. J. Eq. 358.

Upon an agreement to rent a house and lot, out of the rent of which was "to be deducted any repairs that may be done to the same," the court held that the erection of a shed to the stable, a fowl-house, and —— house were not repairs. Darby *v.* Farrow, 1 McCord (S. Car.) 517.

In Alger *v.* Kennedy, 49 Vt. 109; 24 Am. Rep. 117, it was held that "a cellar partly filled with water month after month, because the drain has become stopped up, is out of repair;" and further that, if it was in such a condition that it rendered the whole tenement unfit and unsafe for habitation, there was no question but that it needed repairing, and the jury should have been so instructed.

"It seems too clear too admit of doubt or dispute that the covenants to repair do not embrace the erection of new buildings, whether built entirely of new material, or in part of new material, or in part of old structures; nor

REPAVEMENT.—See IMPROVEMENTS, vol. 10, p. 315; STREETS AND SIDEWALKS.

REPAY—(See generally, PAYMENT, vol. 18, p. 148).—To repay does not necessarily mean to repay money; it has also the meaning of return, restore, etc.[1]

REPEAL.—See STATUTES.

REPLEADER.—See PLEADING, vol. 18, p. 467.

REPLENISH.—From the Latin words *re*, "again," and *plenus*, "full," means literally to fill again, to fill up.[2]

the cutting off of parts of the dwelling-house and setting them up as independent structures. Such work cannot be regarded as repairs under the most liberal interpretation of that term." Naye *v.* Noezel, 50 N. J. L. 525.

Street and Highway Repairs—(See also HIGHWAYS, vol. 9, p. 362; STREETS AND SIDEWALKS). Repairs spoken of a street includes the substitution of new curb-stones and gutters for old ones, People *v.* Brooklyn, 21 Barb. (N. Y.) 484; but does not include the substitution of a new and different kind of pavement from that existing on a public street. *In re* Fulton Street, 29 How. Pr. (N. Y.) 429; Blount *v.* Janesville, 31 Wis. 648.

By the term "repairs" is included whatever is necessary to keep the road in a proper condition for the traffic, having regard for the character and original manufacture of the road, but nothing further; it does not include converting a macadamized road into a paved road. Leek, etc., Com'rs *v.* Justices of Stafford, 20 Q. B. Div. 797.

Maritime Liens for Repairs. — See MARITIME LIENS, vol. 14, p. 412.

"**Rebuild, Repair or Replace**" (in insurance).—See FIRE INSURANCE, vol. 7, p. 1052.

Drains and Sewers. — (See also DRAINS AND SEWERS, vol. 6, p. 2). By an *Indiana* act in relation to drainage, the township trustees are authorized to "repair drains and remove obstructions." It was held that they have no authority under this act to enlarge or improve the drains. The court, by Elliott, J., said: "Under authority to repair, there can be no enlargement and improvement, except in so far as the work of repairing necessarily enlarges and improves. 'Repair,' says the Supreme Court of *Pennsylvania*, 'means to restore to a sound or good condition after injury or partial destruction.'" Pittsburg, etc., R. Co. *v.* Pittsburg, 80 Pa. St. 72. The authority of the township trustees was to restore the ditch as nearly as practicable to its original condition, not to enlarge or improve, no matter how much the improvement may have been needed, nor how much property owners may have been benefited. Weaver *v.* Templin, 113 Ind. 298.

That a Covenant to "Repair" Includes Covenant to "Rebuild." — See LANDLORD AND TENANT, vol. 12, p. 721; LEASE, vol. 12, p. 1019 n.

"**Improve**" **and** "**Repair**" **Are Not Equivalent Words.**—Truscott *v.* Diamond Rock-Boring Co., 51 L. J. Ch. 261.

1. Grant *v.* Dabney, 19 Kan. 390; 27 Am. Rep. 125. This case arose upon the construction of the following contract: "Please let Mr. S and family have whatever they may want for their support, and I will repay you for the same." The drawee engaged a physician to attend S and his family. It was held, that the drawee could not recover upon the authority of the letter, from the drawer for the medical services thus rendered, and that it would not be at variance with the language of the order to hold that the drawer had the right to repay in kind of articles furnished for the support of S.

2. Bynum *v.* Miller, 89 N. Car. 395. In common acceptation when a merchant speaks of replenishing his stock of goods, it is understood that he means to fill up his stock that has been reduced by sale. To replenish a thing necessarily implies exhaustion, reduction, diminution in quantity. Bynum *v* Miller, 89 N. Car. 395.

REPLEVIN—(See also DETINUE, vol. 5, p. 651; TROVER).

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I. **DEFINITION.**—Replevin is defined to be a remedy for any unlawful taking and detention, or detention alone, of personalty, the same being delivered to the claimant upon security given either to make out the injustice of the detention or to return the property.[1] This is a proper definition of the action as it exists in *New Hampshire*,[2] *Massachusetts*,[3] *Maine*,[4] *Vermont*,[5] *Rhode Island*,[6] *Connecticut*,[7] *New York*,[8] *Pennsylvania*,[9] *Ohio*,[10] *Indiana*,[11]

1. And. L. Dict. 880. See Taylor *v.* Royal Saxon, 1 Wall. Jr. (C. C.) 326.

Other Definitions.—Replevin is a justicial writ of the sheriff, complaining of an unjust taking and detention of goods or chattels, commanding the sheriff to deliver back the same to the owner upon security given to make out the injustice of such taking, or else to return the goods and chattels. Cobbey's Law of Replevin, p. 3; Morris on Replevin, p. 51; Williamson *v.* Ringgold, 4 Cranch (C. C.) 42.

A form of action which lies to regain the possession of personal chattels which have been taken from the plaintiff unlawfully. 2 Bouv. L. Dict. p. 53.

2. Gen. Laws *New Hampshire*, 1878, pp. 564–5, ch. 245, §§ 1–7.

3. Pub. Sts. *Massachusetts*, 1882, ch. 184, §§ 1, 3, 10, 12.

4. Rev. Sts. *Maine*, 1884, §§ 1, 3, 8, 10.

5. *Vermont* Rev. Laws, 1880, §§ 1218, 1219, 1225, 1226, 1230, 1232.

6. Pub. Sts. *Rhode Island*, 1882, ch. 235, §§ 1, 3.

7. Gen. Sts. *Connecticut*, 1888, §§ 1323, 1326. See also Ormsbee *v.* Davis, 16 Conn. 567.

8. *New York* Code Civ. Proc., 1891, §§ 1695, 1699.

9. Bower *v.* Tallman, 5 W. & S. (Pa.) 556; Harlan *v.* Harlan, 15 Pa. St. 507; Taylor *v.* Adams Express Co., 9 Phila. (Pa.) 272. Brightly's Purdon's Dig. 1488–89, §§ 1, 3.

10. Rev. Sts. *Ohio*, 1890, §§ 5815, 5819.

11. *Indiana* Rev. Sts. 1888, art. 49, §§ 1266, 1270.

Illinois,[1] *Michigan*,[2] *Wisconsin*,[3] *Iowa*,[4] *Minnesota*,[5] *Kansas*,[6] *Nebraska*,[7] *Maryland*,[8] *Delaware*,[9] *North Carolina*,[10] *Tennessee*,[11] *Arkansas*,[12] *California*,[13] *Nevada*,[14] *Oregon*,[15] *Missouri*,[16] *Washington*,[17] *Colorado*,[18] *Dakota*,[19] *Idaho*,[20] *Montana*,[21] *Wyoming*,[22] *Utah*,[23] *South Carolina*,[24] *Mississippi*,[25] *Florida*,[26] *New Mexico*,[27] *Arizona*.[28]

1. *Illinois* Rev. Sts. 1891, ch. 119, §§ 1, 10.

2. How. Ann. Sts. *Michigan*, 1882, §§ 8315, 8324.

3. Sanborn & B. Ann. Sts. *Wisconsin*, 1889, §§ 2718, 2720.

4. Rev. Code *Iowa*, 1888, §§ 3225, 3229.

5. Sts. *Minnesota*, 1891, §§ 4970–71.

6. Gen. Sts. *Kansas*, 1889, §§ 4260–61.

7. Comp. Sts. *Nebraska*, 1891, p. 874; B. & M. R. Co. *v.* Young Bear, 18 Neb. 494.

8. Pub. Gen. Laws *Maryland*, 1888, p. 884, art. 52, §§ 46–47; Cromwell *v.* Owings, 7 H. & J. (Md.) 55.

9. Law of *Delaware*, 1874, p. 649; Clark *v.* Adair, 3 Harr. (Del.) 113. See also Johnson *v.* Johnson, 4 Harr. (Del.) 171. And *compare* Drummond *v.* Hopper, 4 Harr. (Del.) 327.

In this case, however, the declaration charged an unlawful taking; it cannot therefore be regarded as an authority, especially as there is not an authority cited in the whole case and the preceding cases were neither overruled nor referred to.

10. *North Carolina* Code Civ. Proc., §§ 322, 324.

11. Code of *Tennessee*, 1884, §§ 4111, 4113; Braunnell *v.* Hart, 12 Heisk. (Tenn.) 366. See Wilson *v.* McQueen, 1 Head (Tenn.) 17.

12. Mansfield's Dig. *Arkansas*, §§ 5572, 5575.

13. *California* Code Civ. Proc., §§ 510, 512. See De Thomas *v.* Witherby, 61 Cal. 92.

14. Gen. Sts. *Nevada*, §§ 3122–24. See Carson *v.* Applegarth, 6 Nev. 187.

15. Hill's Ann. Laws of *Oregon*, 1887, §§ 133–135.

16. Rev. Sts. *Missouri*, 1889, §§ 7479–7481; 7 Mo. App. 584.

17. Hill's Code *Washington*, 1891, §§ 256–7.

18. *Colorado* Gen. Sts. 1883, §§ 2023–24.

In *Colorado* the exclusive original jurisdiction in replevin seems to be before a justice of the peace. Gen. Sts. *Colorado*, 1883, §§ 2022–40. The amount for which the action may be brought before them must not exceed three hundred dollars. Gen. Sts. *Colorado*, § 2022.

19. Comp. Laws *Dakota*, 1887, §§ 4973, 4975.

20. Rev. Sts. *Idaho*, 1887, §§ 4272, 4274.

21. Comp. Sts. *Montana*, 1887, §§ 157, 159.

22. Rev. Sts. *Wyoming*, 1887, §§ 3021, 3025.

In *Wyoming*, where the property consists of relics, heirlooms, etc., the officer may keep the property subject to the order of court when the defendant serves a notice on the officer that he will demand return of the property at the final trial of the cause, and that he will move the court at the next term to allow the officer to retain the property until the final trial. Rev. Sts. *Wyoming*, § 3026.

23. Comp. Laws *Utah*, 1888, §§ 3288, 3290.

24. Code Civ. Proc. *South Carolina*, 1882, §§ 228, 230.

The action was formerly confined to cases of wrongful distress in *South Carolina*. Hewitson *v.* Hunt, 8 Rich. (S. Car.) 106.

25. *Mississippi* Rev. Code, 1880, §§ 2613, 2617.

In *Mississippi* the sheriff serves the writ without bond, and returns the property, but does not deliver it to the plaintiff until the plaintiff gives the defendant a bond conditioned to prosecute the suit and abide the judgment. Rev. Code *Mississippi*, 1880, § 2617.

26. McClellan's Dig. L. Florida, 1881, pp. 860–61.

27. *New Mexico* Comp. Laws 1884, §§ 1974, 1978.

28. Rev. Sts. of *Arizona*, §§ 192–4.

New Jersey.—In *New Jersey* the action lies only for an unlawful taking and detention; but it is provided that any unlawful detention shall be deemed an unlawful taking for the purpose of supporting the action. Revision of *New Jersey*, p. 71, §§ 1–2.

Georgia.—In *Georgia* the action is called a possessory warrant, and it is available only when a personal chattel has been wrongfully taken, "either by fraud, violence, seduction or other

Replevy is to obtain possession of personalty by an action of replevin.[1] Repleviable is something obtainable by replevin. Replevisor is the plaintiff in replevin.[2] In many of these States the action is called one to "recover a chattel,"[3] or "an action of claim and delivery;"[4] but the same principles apply to these as to those bearing the usual name.

II. **Origin and History.**—Replevin is an ancient common-law remedy. When it was first invented it was used for the purpose of regaining the possession of property which had been unlawfully taken.[5] It has undergone several modifications, all tend-

means." *Georgia* Code, 1882, § 4032. Under this warrant the sheriff is required to arrest the defendant and seize the property. *Georgia* Code, § 4033.

See Bryan *v.* Whitsett, 39 Ga. 715; New *v.* Le Hardy, 46 Ga. 616; Amos *v.* Dougherty, 65 Ga. 612; Wilborn *v.* Shirley, 65 Ga. 695.

Alabama.—In *Alabama*, there is no action of replevin in existence by that name. An action does exist, however, to recover personal property in specie, in which the plaintiff upon giving the usual bond may have the property delivered to him by making affidavit that it belongs to him. Code of *Alabama*, 1886, § 2717. It has been held by the courts of that State that the action as it exists under the statute is the same as the common law action of detinue with statutory modifications. Cooper *v.* Watson, 73 Ala. 252; Seals *v.* Edmondson, 73 Ala. 395; Russell *v.* Walker, 73 Ala. 315; Jones *v.* Anderson, 76 Ala. 427. But in its modified form it seems to correspond exactly with the action of replevin as it exists under the statutes of the various States.

Texas.—The action of replevin does not seem to exist in *Texas*. Provision is made by *Texas* Civ. Sts. 1888, art. 3116, for the replevying of property seized by distress warrant upon the defendant in distress giving bond to satisfy the judgment of the court. The replevy bond is an unconditional obligation to pay the judgment, etc., and is in no way dependent upon the validity of the distress warrant proceedings. A distress warrant was quashed because the affidavit and bond were defective, and judgment was rendered against the defendant and the sureties on the replevy bond for the rent due, etc. Sexton *v.* Hindman, 2 App. C. C., § 462; Watson *v.* Cox, 2 App. C. C., § 278. See Replevy—Replevy Bond.

Virginia.—The action of replevin has not existed in *Virginia* since 1850. The statutory substitutes for it are, in favor of the tenant, in the case of a distress for rent, delivery or forthcoming bond; in all other cases, the process of interpleader, 4 Min. Insts. (2nd ed.) 483–86–87; 3 Rob. Pr. (2nd ed.) 482-3. *Virginia* Code, 1887, § 2899.

West Virginia.—No action of a replevin exists in *West Virginia*. The person injured has his remedy by action; presumably by action for damages. Code of *West Virginia*, 1891, p. 725.

For the law in *Kentucky* on this subject, see Civ. Co. Ky., §§ 385, 386, 387, 388.

1. And. L. Dict.; 2 Bouv. L. Dict.; Black's L. Dict.

2. And. L. Dict.

3. *New York* Code Civ. Proc., § 1690.

4. Ellingboe *v.* Brakken, 36 Minn. 156; *Minnesota* Stats. 1891, §§ 4969–81; Gist *v.* Loring, 60 Mo. 487; *North Carolina*, Code Civ. Proc., 1883, §§ 321–333.

5. Shannon *v.* Shannon, 1 Sch. & Lef. 324; Gilbert on Replevin, p. 82; Wilkinson on Replevin, p. 2.

Blackstone in his third commentary, page 145, lays it down that replevin cannot be maintained except in cases where the property has been taken by an illegal distress. But more modern authorities have held this to be an erroneous statement of the law, even in Blackstone's time; and Lord Chancellor Redesdale, in Shannon *v.* Shannon, 1 Sch. & Lef. 324, referring to Blackstone's statement said: "I am always sorry to hear Mr. Justice Blackstone cited as an authority; he would have been sorry himself to hear the book so cited: he did not consider it such. His definition of the action of replevin is certainly too narrow: many old authorities will be found in the books, of replevin being brought

ing to enlarge its scope and simplify its practice; until now it has come to exist almost altogether in the statutes of all of the States, and altogether in the statutes of some of the States.[1] It differs, however, from statutory writs in that they are said to be in derogation of the common law, and therefore to be construed strictly; while the writ or action of replevin is a common-law remedy, and statutory enactments with regard thereto are in aid of the common law and are to be construed liberally.[2]

III. NATURE OF THE ACTION.—In attempting to distinguish trover, trespass, detinue, and replevin it has been thought best to give some of the general characteristics of each action. Trover and conversion was originally an action of trespass on the case, for the recovery of damages against such person as had found another's goods and refused to deliver them on demand, but converted them to his own use, from which finding and converting, it is called an action of trover and conversion; but the fact of the finding is now wholly immaterial, and the action lies against any one who has had in his possession the goods of another and refuses to deliver them upon demand.[3] Trespass lies

where there was no distress." This statement of Blackstone's, however, although it has been generally repudiated, has led to the abolition of replevin in Virgina and West Virginia (see Min. Inst., vol. 4, 2nd ed. p. 482); and to the enactment of separate provisions of replevin in case of distrained or impounded property in the States of Massachusetts (Public Statutes of *Massachusetts* 1882, pp. 1062, 1063, ch. 184, §§ 1 to 9). Maine (Rev. Stat. *Maine* 1884, pp. 1792, 1793, ch. 96, §§ 1 to 7), Vermont (Rev. Laws of *Vermont*, 1880, §§ 1218 to 1224), and New Hampshire (Gen. Laws of *New Hampshire* 1878, p. 564, ch. 245, § 1).

The following authorities may be cited as contradicting Blackstone's position, and holding that replevin has always lain for property wrongfully taken. 4 Min. Inst., 2nd ed. p. 115; 1 Chit. Pl. (16 Am. ed.), 184; And. L. Dict., p. 880; Pangburn *v.* Patridge, 7 Johns. (N. Y.) 140; Bruen *v.* Ogden, 11 N. J. L. 370; Caldwell *v.* West, 21 N. J. L. 411; Crocker *v.* Mann, 3 Mo. 472; Ilsley *v.* Stubbs, 5 Mass. 280; Daggett *v.* Robins, 2 Blackf. (Ind.) 415.

1. See statutes cited in notes to section 1, *supra*, this title, *Definition*.

New York.—The *New York* code of Civ. Proc. ch. 2, tit. 7, §§ 206 to 217 entitled "claim and delivery of personal property" was intended to supply the provisional relief formerly obtained in the action of replevin, but not to change the requisites to maintain the action. Scofield *v.* Whitelegge, 49 N. Y. 259.

Colorado.—In a dispute between settlers as to the ownership of certain felled timber, replevin will not lie; it not being among the statutory remedies allowed to such settlers under *Colorado* Gen. Stat., ch. 90, Div. 1, § 8: Adkison *v.* Hardwick, 12 Colo. 581.

Georgia.—The statutory proceeding by possessory warrant may be resorted to, only in cases strictly within the statute. Not where there is a *bona fide* dispute, and where trover would be available. Trotti *v.* Wyly, 77 Ga. 684.

Vermont.—See Miller *v.* Warner, Brayton (Vt.) 168.

North Carolina.—The act of assembly of *North Carolina*, in relation to replevin, Rev. Stat. *North Carolina*, ch. 101, does not repeal or supersede the common law remedy of replevin. Duffy *v.* Murrill, 9 Ired. L. (N. Car.) 46.

Iowa.—The provisions of the *Iowa* code are not the whole of the law of replevin. The common law still contains the body and substance of the action. Chadwick *v.* Miller, 6 Iowa 34.

2. Martinez *v.* Martinez, 2 N. Mex. 464.

3. 3 Blacks. Com. 152; 3 Rob. Pr. 442; McCormick *v.* Stevenson, 13 Neb. 70; Ferrill *v.* Brewis, 25 Gratt. (Va.) 765;

only when the goods have been unlawfully taken.[1] Detinue lies wherever the property has been illegally detained, without regard to the manner of taking.[2] Replevin also lies whenever the defendant unlawfully detains property from the plaintiff, without regard to the manner of taking, though, at common law, the taking must have been unlawful.[3] In trover the plaintiff never obtains the possession of the property, but only its alternative value in damages,[4] and the same is true of trespass.[5] In detinue judgment is rendered, on completion of the action, in favor of the plaintiff for the property itself, or in case it cannot be delivered, its alternative value in damages;[6] while in replevin, the plaintiff, by giving bond, obtains possession of the property at the beginning of the action. Replevin, therefore, differs from trover and tresspass, in that it is for the recovery of the specific property, and not for damages. It differs from trespass in that it lies for property wrongfully detained, irrespective of the manner of taking; and it differs from detinue in that it restores the property to the plaintiff at the beginning of the action.

Replevin is a civil action subject to the same rules as other civil actions.[7] From the general nature of this action, the state of facts existing at the beginning of the suit will ordinarily control its determination.[8]

In replevin, the plaintiff takes the property from the possession of the defendant under a claim of right to either the pos-

CONVERSION, vol. 4, p. 104. See 6 Wait's Acts. & Def. 129 and cases cited.

1. Ferrill *v.* Brewis, 25 Gratt. (Va.) 765; Dame *v.* Dame, 43 N. H. 38; 6 Wait's Acts. and Def. 95; Erisman *v.* Walters, 26 Pa. St. 467. See State *v.* Pearson, Phill. (N. Car.) 468.

2. 4 Min. Insts. 483; 2 Wait's Acts. and Def. 532; 1 Chit. Pl. 122; Bennett *v.* Flowers, 1 Dev. & Bat. (N. Car.) 468; Kettle *v.* Bromsall, Willis (Eng.) 118; Dame *v.* Dame, 43 N. H. 37; DETINUE, vol. 5, p. 651.

3. *Infra*, this title, *Manner of Taking*.

"It would seem that the original distinction between replevin and detinue was very similar to that between trespass and trover. Trespass *de bonis asportatis* was brought not to recover the identical thing taken, but damages for the illegal taking and loss of the same, when such taking was unjust and unlawful, while trover was brought for the unjust detention and conversion of property where the original taking was lawful and proper." Sargent, J., in Dame *v.* Dame, 43 N. H. 38.

4. 4 Min. Insts. (2nd ed.) 402; Chit. Pl. 146; 6 Wait's Acts. and Def., p. 222.

5. 4 Min. Inst. (2nd ed.) 489; 6 Wait's Acts. and Def. 114.

6. 4 Min. Insts. (2nd ed.) 483; Robinson *v.* Richardson, 45 Ala. 354; Morris *v.* Peregoy, 7 Gratt. (Va.) 373.

7. Broom and Had. Bl., vol. 3, p. 260; Wilson *v.* Fuller, 9 Kan. 176; Gilchrist *v.* Schmidling, 12 Kan. 263; Leroy *v.* McConnell, 8 Kan. 273; Brown *v.* Holmes, 13 Kan. 482; Smith *v.* Woodleaf, 21 Kan. 717.

The action of replevin in *Michigan*, is a substitute for detinue, and concurrent with both trespass and trover; and the action will lie for damages where defendant has wrongfully transferred the property before the issuing of the writ. McBrian *v.* Morrison, 55 Mich. 351.

8. Cary *v.* Hewitt, 26 Mich. 228; Belden *v.* Laing, 8 Mich. 500; Clark *v.* West, 23 Mich. 242; Aber *v.* Bratton, 60 Mich. 357.

In replevin against a constable who holds the goods in controversy, as the property of a third person under a writ of attachment, evidence is not admissible, on behalf of the plaintiff, to

session, or to both the title and possession of the property.[1] The primary object is to recover the property in specie;[2] hence, if the property, though unlawfully taken, has not been detained, the action will not lie.[3] The secondary object is to recover the value of the property, if it cannot be obtained in specie, together with damages for the unlawful taking and detention.[4] In replevin, the question is, who was entitled to the property when the action was begun;[5] therefore, other property than that originally claimed by the plaintiff cannot be brought into the action by answer.[6] The action being to gain possession of property, the question of title to the property is not tried, unless distinctly put in issue,[7] but where the property is not taken

show that the attachment was dissolved after the replevin was brought. McCraw *v.* Welch, 2 Colo. 284.

1. Chadwick *v.* Miller, 6 Iowa 34.

In *Georgia* the issue in replevin is not the right of property or of possession, but in whose lawfully acquired, quiet and peaceable possession it last was. *Georgia* Code, § 4035; 22 Ga. 319; 30 Ga. 209; 63 Ga. 745; Ivey *v.* Hammock, 68 Ga. 429.

2. Herdic *v.* Young, 55 Pa. St. 176; Hickey *v.* Hinsdale, 12 Mich. 99; Clark *v.* West, 23 Mich. 242; Hunt *v.* Robinson, 11 Cal. 262; Nickerson *v.* Chatterton, 7 Cal. 568; Hamilton *v.* Clark, 25 Mo. App. 428. See Thomas *v.* Spoffard, 46 Me. 408. *Compare* Buckley *v.* Buckley, 12 Nev. 423; Burrage *v.* Melson, 48 Miss. 237.

Replevin does not lie, where one person acting in good faith and under color of title, has made use of materials belonging to another, in manufacturing a new article, to recover the manufactured article. Potter *v.* Mardre, 76 N. Car. 36.

3. Paul *v.* Luttrell, 1 Colo. 317.

A took up certain stock of B's and served a notice on B, stating the amount of damages claimed. About thirty-four hours afterwards B went to the residence of A and tendered to A the amount of damages stated in the notice, and demanded his stock. A thereupon demanded an additional sum for keeping the same since the time of notice. This was refused. About nine P.M. of the same day, and before proceedings in replevin were instituted, A went to the residence of B and notified him to take away his stock and pay him (A) the amount first claimed. *Held*, that A did not thereafter wrongfully detain the stock. Allen *v.* Van Ostrand, 19 Neb. 579.

4. Hunt *v.* Robinson, 11 Cal. 262.

In replevin, the question of value is not in issue. The title and right of possession are the matters to be determined. Thomas *v.* Spofford, 46 Me. 408.

5. Kingsbury *v.* Buchanan, 11 Iowa 387; Cassell *v.* Western Stage Co., 12 Iowa 47; Campbell *v.* Williams, 39 Iowa 646; Marshall *v.* Bunker, 40 Iowa 121; Bartlett *v.* Goodwin, 71 Me. 350; Hoke *v.* Applegate, 92 Ind. 570; Loomis *v.* Youle, 1 Minn. 175; Blue Valley Bank *v.* Bane, 20 Neb. 294.

Survivor of Action.—The executor of a plaintiff who dies pending a replevin suit shall be admitted to prosecute, but the representative of the defendant cannot come in and defend, because the action does not survive against him, being founded upon a tort. Pitts *v.* Hale, 3 Mass. 321; Mellen *v.* Baldwin, 4 Mass. 480. It is apprehended that the above cases do not state the law at the present time, the common law rule with regard to survivor of actions of tort having been generally abolished.

6. Lovensohn *v.* Ward, 45 Cal. 8.

7. McFadden *v.* Ross, 108 Ind. 512; Noble *v.* Epperly, 6 Ind. 414; Warner *v.* Matthews, 18 Ill. 83; Leroy *v.* East Saginaw City R. Co., 18 Mich. 233; Dows *v.* Greene, 32 Barb. (N. Y.) 490.

Where property is seized and sold for a fine, the party against whom the fine was recovered, and whose property was sold in satisfaction thereof, may contest the purchaser's title to the property in an action of replevin. Heagle *v.* Wheeland, 64 Ill. 423.

Replevin lies to obtain possession of personal property, and it cannot be turned into a suit to quiet a party's title to property already in his possession. Bacon *v.* Davis, 30 Mich. 157; Hickey *v.* Hinsdale, 12 Mich. 99. See

on the writ and the action proceeds as one for damages, the title to the property is the question in issue.[1] The title to real property cannot be tried in this action,[2] but the title may be proved in order to show who has the right to the chattels.[3] The right to an office cannot be tried in this form of action;[4] neither can the constitutionality of a statute;[5] nor the regularity and sufficiency of an execution.[6] The delivery of the property to the plaintiff, by the writ, does not confer the title to the property upon him.[7]

Replevin in the *cepit* is the action as used when the wrongful taking is the material allegation. Replevin in the *detinet* is the action as used when the detention is the material allegation.[8]

IV. Manner of Taking.—At common law, the action of replevin for personal property could be maintained only when the original taking was tortious or wrongful.[9] There was one exception to this rule of the common law in the case of cattle distrained *damage feasant*, where sufficient amends were tendered before they

also Morrison *v.* Lumbard, 48 Mich. 548.

Although replevin generally tests merely the right of possession, yet where the title was put in issue and no evidence was offered by either party except that which tended to support the defendant's title, a verdict and judgment therein for the defendant may be conclusive as to the want of title in the plaintiff. Seldner *v.* Smith, 40 Md. 602.

In replevin a plea of property raises the issue of title, which is not determined by a finding of wrongful detention. Page *v.* Ramsdell, 59 N. H. 575.

1. Parmalee *v.* Loomis, 24 Mich. 242.

2. Smith *v.* Stanford, 62 Ind. 392; Ricketts *v.* Dorrel, 55 Ind. 470; Caldwell *v.* Custard, 7 Kan. 303; Baker *v.* Campbell, 32 Mo. App. 529; McAllister *v.* Lawler, 32 Mo. App. 91; Lehman *v.* Kellerman, 65 Pa. St. 489; Harlan *v.* Harlan, 15 Pa. St. 507; Busch *v.* Nester, 70 Mich. 525; De Mott *v.* Hagerman, 8 Cow. (N. Y.) 220; Martin *v.* Thompson, 62 Cal. 618; Emerson *v.* Whitaker, 83 Cal. 147.

The writ of replevin was never intended as a means for the summary removal from a dwelling house of a tenant at will, who has a possession thereof which he has a right to retain until removed by due process of law for such cases made and provided. Smith *v.* Grant, 56 Me. 255.

In replevin for hay which plaintiff claims by reason of his alleged ownership of the land on which it was grown, and of which defendant has possession the title to the land may be inquired into. Laurendean *v.* Fugelli, 1 Wash. 559. See also Atherton *v.* Fowler, 96 U. S. 513.

In replevin for logs against the owner of the land from which they were cut, by one in possession, claiming title in good faith under a tax deed, such owner may assert his title to defeat the action, though the question of title has not been determined by a real action. Busch *v.* Nester, 70 Mich. 525.

The question whether or not a distrainor of cattle had a lawful fence may be determined in an action of replevin against him. Seyford *v.* Shriver, 61 Iowa 155.

3. Busch *v.* Nester, 70 Mich. 525; Hart *v.* Vinsant, 6 Heisk. (Tenn.) 616; Clement *v.* Wright, 40 Pa. St. 250; Simmonsen *v.* Curtiss, 43 Minn. 539. See Waterman *v.* Matteson, 4 R. I. 539.

4. Desmond *v.* McCarthy, 17 Iowa 525.

5. Kamman *v.* Lane, 55 Mich. 426.

6. Boyce *v.* Cannon, 5 Del. 409.

7. Moore *v.* Herron, 17 Neb. 697.

8. Ronge *v.* Dawson, 9 Wis. 246; Cobby on Replevin 6. See Morrison on Replevin (3rd ed.) 191.

9. Dame *v.* Dame, 43 N. H. 37; Trapnall *v.* Hattier, 6 Ark. 18; Meany *v.* Head, 1 Mason (U. S.) 319; Wright *v.* Armstrong, 1 Ill. 172; Pangburn *v.* Patridge, 7 Johns. (N. Y.) 140; Hopkins *v.* Hopkins, 10 Johns. (N. Y.) 369; Ely *v.* Ehle, 3 N. Y. 506; Rector *v.* Chevalier, 1 Mo. 345; Vaiden *v.* Bell, 3 Rand. (Va.) 448.

were impounded.[1] In this country, however, the remedy has been enlarged in most of the States until at the present time the action lies for any chattels which are unlawfully detained from the plaintiff by the defendant.[2] The detention is the gist of the action.[3] Replevin will lie to regain possession of property which has been obtained from the plaintiff by fraud; as, for example, by fraudulent representations in a sale,[4] even though they are in

1. 3 Bl. Com. 151; Dame *v.* Dame, 43 N. H. 37.

2. Cullum *v.* Bevans, 6 Har. & J. (Md.) 469; Waterman *v.* Matterson, 4 R. I. 539; Daggett *v.* Robins, 2 Blackf. (Ind.) 415; Ronge *v.* Dawson, 9 Wis. 246; Leroy *v.* East Saginaw City R. Co., 18 Mich. 233; Sexton *v.* McDowd, 38 Mich. 148; Weaver *v.* Laurence, 1 Dall. (Pa.) 156; Harlan *v.* Harlan, 15 Pa. St. 507; Herdic *v.* Young, 55 Pa. St. 176; Craig *v.* Kline, 65 Pa. St. 399; Lathrop *v.* Bowen, 121 Mass. 107; Esson *v.* Tarbell, 9 Cush. (Mass.) 407; Whitman *v.* Merrill, 125 Mass. 127; Marston *v.* Baldwin, 17 Mass. 606; Baker *v.* Fales, 16 Mass. 147; Badger *v.* Phinney, 15 Mass. 359; Roberts *v.* Randel, 3 Sandf. (N. Y.) 707; Rogers *v.* Arnold, 12 Wend. (N. Y.) 30; Wyman *v.* Dorr, 3 Me. 183; Seaver *v.* Dingley, 4 Me. 306; Murphy *v.* Tindall, Hempst. (U. S.) 10; Skidmore *v.* Taylor, 29 Cal. 619; Savery *v.* Hays, 20 Iowa 25; Eveleth *v.* Blossom, 54 Me. 447; Burrage *v.* Melson, 48 Miss. 237; Smith *v.* Lyon, 44 Conn. 175. See Gen. Laws *New Hampshire* 564, ch. 245; Pub. Stats. *Massachusetts*, § 1062, *et seq.*; ch. 184; *Maine* Rev. Stats., ch. 96, § 8. See also FREIGHT, vol. 8, p. 978.

If A takes a thing, and A and B detain it, B is liable in replevin. Rowe *v.* Hicks, 58 Vt. 18.

A had an absolute right, by bill of sale, to one of four billiard tables in the hands of C; B held a mortgage upon three of said tables; no separation or selection had been made, and B foreclosed his mortgage and took all four tables. *Held*, that B by taking the first three tables, made a selection of them, and that the fourth one at once became the property of A, and the taking it by B was a trespass, leaving to A the right to bring a suit in replevin to recover possession, or an action for conversion. Clark *v.* Gifford, 24 N. Y. 595.

3. 61 Mich. 413; Philipps *v.* Schall, 21 Mo. App. 38; Melton *v.* McDonald, 2 Mo. 45; Rowe *v.* Hicks, 58 Vt. 18; Blue Valley Bank *v.* Clement, 20 Neb. 294; Moore *v.* Kepner, 7 Neb. 291; Williams *v.* West, 2 Ohio St. 83; Wilson *v.* Fuller, 9 Kan. 176; Leroy *v.* McConnell, 8 Kan. 273; Bailey *v.* Bayne, 20 Kan. 657.

4. Faulkner *v.* Klamp, 16 Neb. 174; Farley *v.* Lincoln, 51 N. H. 577; Hall *v.* Gilmore, 40 Me. 578; Ayers *v.* Hewett, 19 Me. 281; Bussing *v.* Rice, 2 Cush. (Mass.) 48; Thurston *v.* Blanchard, 22 Pick. (Mass.) 18; Buffington *v.* Gerrish, 15 Mass. 156; Wiggin *v.* Day, 9 Gray (Mass.) 97; Acker *v.* Campbell, 23 Wend. (N. Y.) 372; McDonald *v.* Smith, 21 Ark. 460; Joplin *v.* Carrier, 11 S. Car. 327; Morford *v.* Peck, 46 Conn. 380. See EXPRESS COMPANIES, vol. 7, p. 575.

As to burden of proving fraud, see FRAUDULENT SALES, vol. 8, p. 848.

Tender of Consideration.—It is a condition precedent to the right of recovery of a party seeking to rescind a contract of sale or purchase, that he return whatever he may have received. But a license or an interest in the business to be done under a patent right in a given territory within a given time, is not such a thing of value as is required to be reconveyed. Poe *v.* Stockton, 39 Mo. App. 550. See also Burt *v.* Mears, 41 Mo. App. 231; Farwell *v.* Hanchett, 19 Ill. App. 620.

If the fraudulent vendee gives his own negotiable note for the price of the goods, the vendor may maintain such action without a previous tender of the note, provided the note has not been negotiated, but remains in his hands and is produced at the trial to be surrendered to the defendant. Thurston *v.* Blanchard, 22 Pick. (Mass.) 18.

Georgia.—A possessory warrant does not lie where the title has been obtained by fraud, and possession accompanies it by consent of the owner, and a tender back of what was received in exchange will not enable the plaintiff to maintain it. Amos *v.* Dougherty, 65 Ga. 612; Welborn *v.* Shirly, 65 Ga.

the hands of a third party having notice of the fraud.[1] But where the third party takes in good faith and without notice, replevin cannot be maintained against him.[2] The burden of proof is on him to show that he is a *bona fide* purchaser without notice.[3] Fraud on the part of the plaintiff in obtaining title to the property may be set up by the defendant to defeat the plaintiff's action.[4] If the original taking were without the consent of

695. But see Peak *v.* Cogborn, 50 Ga. 562.

A taking under color of a contract of purchase from a bailee made when such bailee was drunk, whether made so for the purpose or not, is tortious, and the owner of the property may maintain replevin therefor. Drummond *v.* Hopper, 4 Harr. (Del.) 327.

When it appears that property belonging to plaintiff was fraudulently assigned by one defendant to the other, both being participants in the fraud, the fact that a consideration passed between them, is immaterial. Burke *v.* Koch (Cal.), 17 Pac. Rep. 228.

Replevin was brought by the vendor of goods which had been obtained by false pretenses, for part of the same, on account of the fraud, and while the replevin suit was pending proved a claim against the estate of the vendee, who had made a general assignment for the price of the goods not replevied. No objection was made to this proof. *Held*, that making such proof did not waive plaintiff's right to replevy, as, under *Massachusetts* Pub. St., ch. 157, §§ 35, 36, the court of insolvency could at any time expunge the proof, or allow it to be amended into one for goods fraudulently obtained. Raphael *v.* Reinstein (Mass.), 28 N. E. Rep. 141.

An action was brought for the price of goods sold, and an attachment was issued on an affidavit which alleged that the sale was made in reliance on defendant's representations as to his financial condition, which representations were false, and must have been known by defendant to have been false when he made them. The attachment was issued on the ground that the defendant had made an assignment in fraud of his creditors. Plaintiffs afterwards discontinued this action, and brought replevin for the goods. *Held*, that plaintiff's right to maintain replevin depended solely on whether they knew, when they sued for the price of the goods, that defendant had purchased the same with fraudulent intent; and an instruction which went beyond this, and made plaintiff's right to depend partly on their knowledge of their legal right to rescind the sale, and partly on the fact whether plaintiff's were aware of their remedy by replevin, was erroneous. Bach *v.* Tuch, 7 N. Y. Supp. 611.

1. Bussing *v.* Rice, 2 Cush. (Mass.) 48; Buffington *v.* Gerrish, 15 Mass. 156; Wiggin *v.* Day, 9 Gray (Mass.) 97; Kline *v.* Baker, 99 Mass. 253; Acker *v.* Campbell, 23 Wend. (N. Y.) 372; Neff *v.* Landis, 110 Pa. St. 204; Peters Box, etc., Co. *v.* Lish, 119 Ind. 98. See Gassner *v.* Marquardt, 76 Wis. 579.

Replevin may be maintained for goods obtained from plaintiff by fraudulent representation, by a purchaser against auctioneers having actual possession of the goods, by delivery to them from a subsequent purchaser with notice, for the purpose of sale. Grossman *v.* Walters, 58 Hun (N. Y.) 603.

2. Benedict *v.* Williams, 48 Hun (N. Y.) 123.

Where goods were purchased with an intention not to pay for them, the vendor can recover them from a mortgagee who had notice of facts sufficient to put a prudent man on inquiry, which, if prosecuted with reasonable diligence, would have led to a discovery of the fraud. Mahoney *v.* Gano (Ind.), 27 N. E. Rep. 315.

3. Benedict *v.* Williams, 48 Hun (N. Y.) 123; Neff *v.* Landis, 110 Pa. St. 204.

4. Bailey *v.* Swain, 45 Ohio St. 657; Butler *v.* Reynolds, 3 Thomp. & C. (N. Y.) 242.

In replevin by A for goods attached as the property of B, attachment plaintiff answered that the goods had been delivered to B under contract to sell in the course of trade, and apply to plaintiff's indebtedness, but that B had fraudulently transferred them in gross to A. *Held*, that to defeat recovery by A, defendant must allege

the plaintiff, the fact that the third party took them in good faith without notice, will not prevent the plaintiff from maintaining the action against him for them.[1]

V. Title in Plaintiff.—It may be laid down as a general proposition that the right of possession and not the right of property is the issue to be tried in this form of action; therefore, in order to maintain the action of replevin, the plaintiff must show a right of exclusive possession in himself as against the defendant in the action.[2] The burden of proof lies on the plaintiff to do

and prove that the sale by B was without authority. Shelly *v.* Heater, 17 Neb. 505.

1. Parish *v.* Morey, 40 Mich. 417.

2 Wheeler, etc., Mfg. Co. *v.* Seetzlaff, 53 Wis. 211; Martin *v.* Watson, 8 Wis. 315; Gaynor *v.* Blewitt, 69 Wis. 582; Dodworth *v.* Jones, 4 Duer (N. Y.) 201; M'Curdy *v.* Brown, 1 Duer (N. Y.) 101; Rockwell *v.* Saunders, 19 Barb. (N. Y.) 473; Redman *v.* Hendricks, 1 Sandf. (N. Y.) 32; Rogers *v.* Arnold, 12 Wend. (N. Y.) 30; Kellogg *v.* Anderson, 40 Minn. 207; Hooser *v.* Hays, 10 B. Mon. (Ky.) 72; 50 Am. Dec. 540; Marienthal *v.* Shafer, 6 Iowa 223; Alden *v.* Carver, 13 Iowa 253; 81 Am. Dec. 430; Marshall *v.* Bunker, 40 Iowa 121; Smith *v.* Williamson, 1 Har. & J. (Md.) 147; Collins *v.* Evans, 15 Pick. (Mass.) 63; Wade *v.* Mason, 12 Gray (Mass.) 335; 74 Am. Dec. 597; Fairbank *v.* Phelps, 22 Pick. (Mass.) 535; Leonard *v.* Stickney, 131 Mass. 541; Hunt *v.* Strew, 33 Mich. 85; Hess *v.* Griggs, 43 Mich. 397; Belden *v.* Laing, 8 Mich. 500; Clark *v.* West, 23 Mich. 242; Nottingham *v.* Vincent, 50 Mich. 461; Updike *v.* Henry, 14 Ill. 378; Underwood *v.* White, 45 Ill. 437; Bradley *v.* Michael, 1 Ind. 551; Noble *v.* Epperly, 6 Ind. 414; Easter *v.* Fleming, 78 Ind. 116; Walpole *v.* Smith, 4 Blackf. (Ind.) 304; Adams *v.* Davis, 109 Ind. 10; Williams *v.* West, 2 Ohio St. 83; Ott *v.* Specht (Del. 1887), 12 Atl. Rep. 721; Hunt *v.* Chambers. 21 N. J. L. 620; Chambers *v.* Hunt. 22 N. J. L. 552; Dixon *v.* Thatcher, 14 Ark. 141; Robinson *v.* Calloway, 4 Ark. 94; Smith *v.* Graves, 25 Ark. 458; Britt *v.* Aylett, 11 Ark. 475; Hill *v.* Robinson, 16 Ark. 90; Bostick *v.* Brittain, 25 Ark. 482; Thatcher *v.* Franklin, 37 Ark. 64; Titsworth *v.* Spitzer, 42 Ark. 310; Melton *v.* McDonald, 2 Mo. 45; 22 Am. Dec. 437; Bayless *v.* Lefaivre, 37 Mo. 120; Ingraham *v.* Martin, 15 Me. 373; Pierce *v.* Stevens, 30 Me. 184; Gillerson *v.* Mansur, 45 Me. 25; Shaddon *v.* Knott, 2 Swan (Tenn.) 358; 58 Am. Dec. 63; Bogard *v.* Jones, 9 Humph. (Tenn.) 739; Brammell *v.* Hart, 12 Heisk. (Tenn.) 366; Harlan *v.* Harlan, 15 Pa. St. 507; 53 Am. Dec. 612; Lester *v.* McDowell, 18 Pa. St. 91; Sprague *v.* Clark, 41 Vt. 6; Spenser *v.* Roberts, 42 Conn. 75; Peters *v.* Stewart, 45 Conn. 103; 29 Am. Rep. 663; Krosmopolski *v.* Paxton, 58 Miss. 581; Saunders *v.* Jordan, 54 Miss. 428; Frizell *v.* White, 27 Miss. 198. See also Meyer *v.* Mosler, 64 Miss. 610. See also Bailments, vol. 2, p. 60. See Bates *v.* Wiggin, 37 Kan. 44.

A mortgagee of personal property, not in actual possession, may maintain replevin against a person taking the same in defiance of his right, where the terms of the mortgage entitle him to take possession whenever he deems it desirable or necessary. Welch *v.* Sackett, 12 Wis. 243; Frisbee *v.* Langworthy, 11 Wis. 375.

Joint Owners.—One tenant in common of a chattel cannot maintain replevin for it without joining his cotenants; and it is not necessary that the non-joinder should be pleaded in abatement. Reimheimer *v.* Hemingway, 35 Pa. St. 432. See Hacker *v.* Johnson, 66 Me. 21; Titsworth *v.* Fraumthal, 52 Ark. 254; Smith *v.* Graves, 25 Ark. 458; Phipps *v.* Taylor, 15 Oregon 484; Kindy *v.* Green. 32 Mich. 310. *Compare* D'Wolf *v.* Harris, 4 Mason (U. S.) 515.

A member of a firm may maintain replevin for his interest as a partner in, and his right of possession as such partner, to the goods replevied. Bostick *v.* Brittain, 25 Ark. 482. See Keegan *v.* Cox, 116 Mass. 289. But he cannot maintain replevin against his copartner. Reynolds *v.* McCormick 62 Ill. 412.

A tenant in common cannot maintain replevin against his cotenant. Carle *v.* Wall (Ark. 1891), 16 S. W. Rep. 293; Barnes *v.* Bartlett, 15 Pick.

(Mass.) 71; Wills *v.* Noyes, 12 Pick. (Mass.) 324; Silloway *v.* Brown, 12 Allen (Mass.) 30; Frans *v.* Young, 24 Iowa 375; Busch *v.* Nester, 70 Mich. 525; Davis *v.* Lottich, 46 N. Y. 393. See Reynolds *v.* McCormick, 62 Ill. 412. JOINT TENANTS, vol. 11, p. 1123.

Where a sheriff levies upon personal property, which is owned in common by the debtor and a third party, he has the right to take the entire property into his possession, and the co-owner cannot maintain replevin for the property. Lawrence *v.* Burnham, 4 Nev. 361; 97 Am. Dec. 540.

One of two joint owners of goods cannot maintain replevin to recover them of a stranger. M'Arthur *v.* Lane, 15 Me. 245; Hart *v.* Fitzgerald, 2 Mass. 509; 3 Am. Dec. 75; Kimball *v.* Thompson, 4 Cush. (Mass.) 441.

If the defendant can show that he is the joint owner with the plaintiff of the property replevied, this will defeat the plaintiff's action. Hunt *v.* Chambers, 21 N. J. L. 620; Cross *v.* Hulett, 53 Mo. 397; Mills *v.* Malott, 43 Ind. 248; Noble *v.* Epperly, 6 Ind. 414; Withman *v.* Withman, 57 Me. 447; 99 Am. Dec. 787; Hewett *v.* Hatch, 57 Vt. 16; Prentice *v.* Ladd, 12 Conn. 331; M'Elderry *v.* Flannagan, 1 Har. & G. (Md.) 308. See Scrugham *v.* Carter, 12 Wend. (N. Y.) 131.

A joint owner, however, who is entitled to the sole possession of goods, may maintain replevin for the same. Chaffee *v.* Harrington, 60 Vt. 718. See also on this subject Newton *v.* Gardner, 24 Wis. 232.

One who has leased a farm upon the tenant's agreement to deliver in payment part of the produce, is a tenant in common in respect to such produce, and may maintain replevin for it after it is in condition to deliver. Sutherland *v.* Carter, 52 Mich. 471.

If the defendant shows title in a third person, he will defeat the plaintiff's action. Davis *v.* Warfield, 38 Ind. 461; Landers *v.* George, 40 Ind. 160; Domestic Sewing Mach. Co. *v.* Arthurhultz, 63 Ind. 322; Loomis *v.* Youle, 1 Minn. 175; *compare* Rankine *v.* Greer, 38 Kan. 343.

But in order to have the property returned to him, he must connect himself with the stranger's title. Rogers *v.* Arnold, 12 Wend. (N. Y.) 30; Gerber *v.* Monie, 56 Barb. (N. Y.) 652; Robinson *v.* Calloway, 4 Ark. 94. See Nicholson *v.* Dyer, 45 Mich. 610; *compare* Prosser *v.* Woodward, 21 Wend. (N. Y.) 205; Ingraham *v.* Hammond, 1 Hill (N. Y.) 353; Anderson *v.* Talcott, 6 Ill. 365.

When the property in a third person is shown, it is not necessary that such person should be a party to the action. Thompson *v.* Sweetser, 43 Ind. 312.

If the defendant by the performance of some condition can defeat the plaintiff's right to the possession of the property, he will also defeat his right of action. Le Flore *v.* Miller, 64 Miss. 204.

Where personal property has been leased, the right to replevy it is with the lessee during the continuance of the lease. Hunt *v.* Strew, 33 Mich. 85; Nottingham *v.* Vincent, 50 Mich. 461.

A lessor of printing presses and the good will of a newspaper business, and the lease of which provides that the lessee should have the use of them for five years, keep and then return them, may maintain replevin during the term of the lease against the creditor of the lessee who has levied on and taken possession of the property. Warren *v.* Gutches, 71 Mich. 407.

Where a tenant agreed to give his landlord one-half of the wheat raised on the leased premises to be delivered to the landlord in the bushel on the premises at thrashing time, and the tenant only set apart and delivered one-third of the wheat and retained the remainder under a claim of ownership without separating the remainder of the landlord's share from his own, replevin would not lie for the landlord to recover the remaining portion of his one-half because he was not entitled to any particular or ascertained portion of the wheat, the title and possession of which remained in the tenant. Lacy *v.* Weaver, 49 Ind. 373; 19 Am. Rep. 783. See also Williams *v.* Smith, 7 Ind. 559; Chissom *v.* Hawkins, 11 Ind. 316; Lester *v.* East, 49 Ind. 588; Dixon *v.* Niccolls, 39 Ill. 372; 87 Am. Dec. 312; Sargint *v.* Courrier, 66 Ill. 245; Parker *v.* Garrison, 61 Ill. 250; Lanyon *v.* Woodward, 55 Wis. 652; Burns *v.* Cooper, 31 Pa. St. 426; Cunningham *v.* Baker, 84 Ind. 597.

Compare Hart *v.* State, 29 Ind. 200; Lindley *v.* Kelley, 42 Ind. 294.

In these actions the crop was not to be delivered in the bushel, but each party was to gather and take care of his own share, and it was held that each was entitled to his share, though it were standing in the field. See also Livingston *v.* Farish, 89 N. Car. 140.

A landlord may make an assignment of his lease and such assignment gives the assignee a right to replevy the part assigned when set apart. Lufkin *v.* Preston, 52 Iowa 235.

Where a party took up a stray which he kept in his possession for a year without proceeding as a taker up of a stray animal under the *Missouri* statute he is to be treated as a trespasser *ab initio*, and cannot recover possession of the animal from a party into whose possession the animal has again come as a stray. Bayless *v.* Lefaivre, 37 Mo. 120.

Actual possession, together with an equitable interest in the property, is sufficient to maintain an action against a person, although the general property and right of immediate possession be in a stranger, between whom and the defendant there was no privity. Johnson *v.* Carnley, 10 N. Y. 570; 61 Am. Dec. 762; Stowell *v.* Otis, 71 N. Y. 36.

A bailee received a chattel under an agreement not to remove it from certain premises under a penalty of forfeiture to the bailor. It was held that the agreement was not broken by the removal of the chattel by an officer attaching it on mesne process against the bailee; and that such removal did not give the bailor a right of possession sufficient to enable him to maintain replevin against the officer. Wade *v.* Mason, 12 Gray (Mass.) 335; 74 Am. Dec. 597.

In *Michigan*, one holding goods on which he has a lien may recover their full value from a stranger who has unlawfully converted them, by action of replevin, but he can only recover the value of his special interest from the general owner. Davidson *v.* Gunsolly, 1 Mich. 388. *Compare* Williams *v.* Bresnahan, 66 Mich. 634.

The owner of property is in the constructive possession of it, although a bailee may, at the time of the tortious taking, have the actual possession. Ely *v.* Ehle, 3 N. Y. 506; White *v.* Dolliver, 113 Mass. 400; 18 Am. Rep. 502.

Possession by an agent is sufficient for the plaintiff to maintain an action of replevin for goods taken out of his possession. Hillyer *v.* Brogden, 67 Ga. 24.

Where goods are in the hands of a factor who has a lien for advances, the general owner has not sufficient right of possession to maintain replevin. Wood *v.* Orser, 25 N. Y. 348.

A joint owner from whose sole possession a horse has strayed may recover such horse in replevin from a defendant whose right to the possession thereof is not superior to his. Chaffee *v.* Harrington, 60 Vt. 718.

A person buying property for another but in his own name may maintain an action of replevin in his own name for their recovery. Douglass *v.* Wolf, 6 Kan. 88.

An administrator may, under the *Minnesota* statute, bring claim and delivery for personal property fraudulently transferred by his intestate. Bennett *v.* Schuster, 24 Minn. 383.

An administrator may maintain replevin for any property to which his intestate has the right of possession. Smith *v.* Ferguson, 90 Ind. 229. See Eberstein *v.* Camp, 37 Mich. 176.

A pledgee of personal property has a right to the possession of the property and may retain replevin for it. Deeter *v.* Sellers, 102 Ind. 458; Jones on Pledges, § 429.

A wife who has left her husband without good cause, and is living apart from him, may maintain replevin against him to recover articles of personal property belonging to her which were left in his possession. Howland *v.* Howland, 20 Hun (N. Y.) 472.

In replevin against an officer who had seized on an attachment against a third person, goods which the plaintiff claimed as his own, it appeared that the plaintiff gave the officer a receipt for the goods, and retained them in his hands; but the defendant insisted at the trial that his seizure was valid, and that he had a right to hold the goods as property of the attachment defendant. *Held*, that the plaintiff was not precluded by his receipt from maintaining the action. Williams *v.* Morgan, 50 Wis. 548.

The owner of a posted animal cannot maintain replevin therefor, until he has proven his property before a justice, and paid, or tendered, the costs to the taker-up. Phelan *v.* Bonham, 9 Ark. 389.

Replevin lies by the mortgagee of a chattel against one tortiously taking it from the custody of the mortgagor, default in payment having been made by the mortgagor. Fuller *v.* Acker, 1 Hill (N. Y.) 473.

In the case of a proceeding to enforce a laborers' lien upon logs, where the owner is not made a party defendant, but only the contractor by whom the laborer was employed, whatever rem-

edy the owner may have for the protection of his rights, he cannot proceed by way of replevin against the officer who attaches the logs. Union Lumbering Co. *v.* Tronson, 36 Wis. 126.

A resident in Nova Scotia, the owner of a vessel, mortgaged her to B, also resident there, who had his mortgage duly recorded, under the laws of the province, at the custom house, and a memorandum thereof indorsed on the register of the vessel, these acts, by the *lex loci*, making B the owner of the vessel so far as was necessary to give him security for his debt. *Held*, that he had thus acquired the possession of the vessel sufficiently to enable him to maintain replevin against an attaching creditor here. Esson *v.* Tarbell, 9 Cush. (Mass.) 407.

An action of trover or replevin may be maintained in the name of a parish for the recovery of the parish records. First Parish *v.* Stearns, 21 Pick. (Mass.) 148.

A writing in these words: "We have this day sold to W. L. and Co. four hundred tons of pig metal, now at our landing, or that will soon be delivered there," is not such evidence of delivery of the property to the vendees as will support an action of replevin by them against one who had obtained possession of the property, before the arrival of their agent at the landing mentioned, under a valid contract with the vendor thereof. Winslow *v.* Leonard, 24 Pa. St. 14.

A contract to deliver wheat "to be manufactured into flour," at a fixed price per barrel, imports a bailment and not a sale, and replevin will lie to recover the flour manufactured from wheat so delivered. Mallory *v.* Willis, 4 N. Y. 76.

Where a chattel mortgage given to secure the payment of notes provided that the mortgagee might take possession of the property if the mortgagor failed to pay the debt "on or before maturity," a summons issued by the mortgagee in an action of claim and delivery for the property on the day the notes fell due, was premature, in the absence of any allegation or proof that payment of the notes was demanded and refused on that day. Moore *v.* Ray, 108 N. Car. 252.

The plaintiff took possession of goods previously mortgaged to him and bid them in on a sale by virtue of the mortgage, and retained the possession. The mortgagors afterwards made a general assignment for the benefit of creditors, and a few days thereafter the sheriff levied on and took the goods from the plaintiff under executions against the mortgagors. *Held*, that plaintiff's possession of the property was sufficient to sustain replevin by him therefor against the sheriff, and that the latter could not defeat such action by showing merely that plaintiff's mortgage was fraudulent as to creditors, since, in that case, the title to the property would be in the assignee which would not justify the sheriff's taking from plaintiff. Guilford *v.* Mills, 57 Hun (N. Y.) 493.

Other Cases.—For circumstances under which the plaintiff was held to have an immediate right of possession, see Kidd *v.* Belden, 19 Barb. (N Y.) 266; Dezell *v.* Odell, 3 Hill (N. Y.) 215; 36 Am. Dec. 628; Weeks *v.* Martin, 57 Hun (N. Y.) 589; Scott *v.* Elliott, Phil. (N. Car.) 104; Bray *v.* Flickinger, 79 Iowa 113; Eldridge *v.* Sherman, 70 Mich. 266; Rose *v.* Eaton, 77 Mich. 247; Bassett *v.* Armstrong, 6 Mich. 397; Detroit Frear Stone Water Works *v.* White, 35 Mich. 77; Tandler *v.* Saunders, 56 Mich 142; Wilcox *v.* Turner, 46 Ga. 218; Allen *v.* Smith, 45 Ga. 84; Brewster *v.* Carmichael, 39 Wis. 456; Lazard *v.* Wheeler, 22 Cal. 139; Barbour *v.* White, 37 Ill. 164; Davis *v.* Easley, 13 Ill. 192; Mohn *v.* Stoner, 14 Iowa 115; Crum *v.* Hill, 40 Iowa 506; Wills *v.* Barrister, 36 Vt. 220; Proctor *v.* Tilton (N. H. 1889), 17 Atl. Rep. 638; Bunker *v.* McKenney, 63 Me. 529; Bergstrom *v.* Franklin, 74 Tex. 38; Biemuller *v.* Schneider, 62 Md. 547; Brooke *v.* Berry, 1 Gill (Md.) 153; Filley *v.* Norton, 17 Neb. 472; Weeks *v.* Baker, 152 Mass. 20; Odd Fellows' Hall Assoc. *v.* McAllister (Mass. 1891), 26 N. E. Rep. 862; Kent *v.* Bothwell, 152 Mass. 341; Browning *v.* Bancroft, 8 Met. (Mass.) 278; Keep Mfg. Co. *v.* Moore, 11 Lea (Tenn.) 285; Deaderick *v.* Oulds, 86 Tenn. 14; Ferguson *v.* Rafferty, 128 Pa. St. 337; Young *v.* Kimball, 23 Pa. St. 193; Halpin *v.* Stone, 78 Wis. 183.

For circumstances under which the plaintiff was held not to have the immediate right of possession, see Jayne *v.* Dillon, 28 Mich. 283; Coverlee *v.* Warner, 19 Ohio 29; Macomber *v.* Saxton, 28 Mich. 516; Mulheisen *v.* Lane, 82 Ill. 117; Stockon *v.* Lochnitt, 31 Ill. App. 214; McNail *v.* Zeigler, 68 Ill. 224; Parker *v.* Foster, 29 Ill. App. 586; Reese *v.* Mitchell, 41

this.[1] Actual possession is evidence of title against every one who does not show a better title.[2] The plaintiff must show a general or special property in the goods replevied,[3] and when the issue raised is one of title, he must also prove a title on which

Ill. 365; Stanley *v.* Robinson, 14 Ill. App. 480; Northrup *v.* Trask, 39 Wis. 515; Witherby *v.* Sleeper, 101 Mass. 138; Lewis *v.* Buttrick, 102 Mass. 412; Jimmerson *v.* Greene, 7 Neb. 26; Graves *v.* Damrow, 28 Neb. 271; McNorton *v.* Akers, 24 Iowa 369; Weller *v.* Ely, 45 Conn. 547; Tully *v.* Fairly, 51 Ind. 311; Whitehead *v.* Coyle, 1 Ind. App. 450; Cooper *v.* Brown, 23 Kan. 582; Boeger *v.* Langenberg, 42 Mo. App. 7; Baldridge *v.* Dawson, 39 Mo. App. 527.

1. Hunt *v.* Chambers, 21 N. J. L. 620; Chambers *v.* Hunt, 22 N. J. L. 552; Harwood *v.* Smethurst, 29 N. J. L. 195; Mathias *v.* Sellers, 86 Pa. St. 486; 27 Am. Rep. 723; Reinheimer *v.* Hemingway, 35 Pa. St. 432; Hamilton *v.* Iowa City Nat. Bank, 40 Iowa 307; M'Curdy *v.* Brown, 1 Duer (N. Y.) 101; Tittemore *v.* Labounty, 60 Vt. 624; Gartside *v.* Nixon, 43 Mo. 138; Morgner *v.* Biggs, 46 Mo. 65; Wilson *v.* Fuller, 9 Kan. 176. See also Rogers *v.* Arnold, 12 Wend. (N. Y.) 30; Dixon *v.* Thatcher, 14 Ark. 141.

Where *non cepit* is pleaded, with a statement alleging the property in the articles replevied to be in the defendant, the plaintiff, after proving the taking, is not bound to prove property in himself, but it is incumbent on the defendant to show that he is the owner thereof. Greene *v.* Dingley, 24 Me. 131. See Sawyer *v.* Huff, 25 Me. 464.

2. Summons *v.* Austin, 36 Mo. 308; Moorman *v.* Quick, 20 Ind. 67; Sprague *v.* Clark, 41 Vt. 6; Cox *v.* Fay, 54 Vt. 446; Prater *v.* Frazier, 11 Ark. 249; Van Namee *v.* Bradley, 69 Ill. 299; Van Baalen *v.* Dean, 27 Mich. 104; Bryan *v.* Whitsitt, 39 Ga. 715. See Johnson *v.* Carnley, 10 N. Y. 570; 61 Am Dec. 762.

A party owned a quantity of corn which had been purchased for him by a warehouseman, who put it in a mixed mass with other corn owned by different persons who had stored their corn with the warehouseman. The warehouseman delivered the whole of the corn in its mixed condition to the party for whom he had been buying, from whose possession it was afterwards wrongfully taken by a third party. The party from whom the corn was thus taken recovered it by action of replevin. Warner *v.* Cushman, 31 Ill. 283.

3. Broadwater *v.* Darne, 10 Mo. 277; Wright *v.* Richmond, 21 Mo. App. 76; McMahill *v.* Walker, 22 Mo. App. 170; Crocker *v.* Mann, 3 Mo. 472; 26 Am. Dec. 684; Gartside *v.* Nixon, 43 Mo. 138; Waterman *v.* Robinson, 5 Mass. 303; Johnson *v.* Neale, 6 Allen (Mass.) 227; Hallett *v.* Fowler, 8 Allen (Mass.) 93; Wade *v.* Mason, 12 Gray (Mass.) 335; 74 Am. Dec. 597; Dixon *v.* Hancock, 4 Cush. (Mass.) 96; Tracy *v.* Warren, 104 Mass. 376; Perley *v.* Foster, 9 Mass. 112; Barry *v.* O'Brien, 103 Mass. 520; Gillett *v.* Treganza, 6 Wis. 342; Beckwith *v.* Phillieo, 15 Wis. 223; Rose *v.* Tolly, 15 Wis. 443; Timp *v.* Dockham, 32 Wis. 146; Child *v.* Child, 13 Wis. 18; M'Curdy *v.* Brown, 1 Duer (N. Y.) 101; Rockwell *v.* Saunders, 19 Barb. (N. Y.) 473; Pattison *v.* Adams, 7 Hill (N. Y.) 126; 42 Am. Dec. 59; Sager *v.* Blain, 44 N. Y. 445; Dunham *v.* Wyckoff, 3 Wend. (N. Y.) 280; 20 Am. Dec. 995; Lake Shore, etc., R. Co. *v.* Ellsey, 85 Pa. St. 283; Lester *v.* McDowell, 18 Pa. St. 91; Wilson *v.* Royston, 2 Ark. 315; Thatcher *v.* Franklin, 37 Ark. 64; Clark *v.* Heck, 17 Ind. 281; Buck *v.* Payne, 52 Miss. 271; Cassel *v.* Western Stage Co., 12 Iowa 47; Pierce *v.* Stevens, 30 Me. 184; Haythorn *v.* Rushforth, 19 N. J. L. 160; 38 Am. Dec. 540. See School District No. 5 *v.* Lord, 44 Me. 374; Warner *v.* Hunt, 30 Wis. 200; Bassett *v.* Armstrong, 6 Mich. 397; Rucker *v.* Donovan, 13 Kan. 252; 19 Am. Rep. 84.

The language of the *Ohio* statute allowing the "owners," etc., to bring replevin, does not limit the action to the general owner. Williams *v.* West, 2 Ohio St. 83.

S delivered to W a quantity of hides and received his note at their agreed value, payable in eight months. W at the same time gave to S a written agreement, if his note should not be paid at maturity, to return the leather made from the hides to S, to be sold by him, and the proceeds to be applied to the payment of the note,

to base a lawful possession.[1] In cases where the title is put in issue, and the right to possession is to be determined by the title to the property, the burden of proof is on the plaintiff to show property in himself.[2] If the plaintiff show a *prima facie* right to the possession of the property, he should obtain a verdict, unless the defendant prove a better title.[3] The right of possession in the plaintiff necessary to sustain replevin is a present and existing right, and not one to arise on the performance, or non-

and the surplus, if any, paid to W. *Held*, that S could not maintain replevin for the hides, because the property in them had passed to W.

Where the owner of personal property parts with the possession thereof under a contract which is *contra bonos mores* and void as against public policy, he cannot recover it in an action of replevin. Hutchins *v.* Weldin, 114 Ind. 80.

Replevin may be maintained by a receiptor of goods, where he is bound to deliver them by a specific day or pay the amount of the execution under which the levy was made, although the property be left by him in the possession of the defendant in the execution. Miller *v.* Adsit, 16 Wend. (N. Y.) 335.

A constable who has seized goods under attachment acquires such a special property in them as will enable him to maintain replevin for them against any one except the true owner, if such owner is not the defendant in attachment. Carroll *v.* Frank, 28 Mo. App. 69.

1 Gray *v.* Parker, 38 Mo. 160. See Whitwell *v.* Wells, 24 Pick. (Mass.) 25; Morgner *v.* Biggs, 46 Mo. 65; Andrews *v.* Costican, 30 Mo. App. 29; Gartside *v.* Nixon, 43 Mo. 138; Hungerford *v.* Rexford, 29 Wis. 345.

A person who purchases and takes possession of personal property subject to mortgages thereon, which he assumes to pay, cannot, in an action of replevin, brought in his own name, recover upon the ground that he is the agent of the mortgagees. McNorton *v.* Akers, 24 Iowa 369.

Where an administrator pays and satisfies a judgment in favor of the estate against a third party, and takes a bill of sale of personal property to himself, as administrator, from the third party in consideration of such payment, the sale is to him personally, the reference to him as administrator being descriptive of the person; and he may bring an action in his own name to recover the property from the debtor, to whom he afterwards leased it. Afflerback *v.* McGovern (Cal.), 21 Pac. Rep. 837.

Where plaintiff in replevin claims title to the property under an assignment for the benefit of creditors, a motion for nonsuit should be granted when the evidence shows that the assignment does not include all the creditors, and is therefore void under Code of *Oregon*, § 3173. Stout *v.* Watson, 19 Oregon 251.

Where plaintiff in replevin for a Champion Binder showed that its business was "manufacturing these machines;" that this particular machine was manufactured by it; that "this machine in controversy" was shipped by it to its agent for sale, held, that such evidence established *prima facie* ownership, and that it was error to direct a verdict for defendant on the ground that plaintiff had shown no evidence of title. Warder *v.* Ingli (S. Dak. 1890), 46 N. W. Rep. 181.

2. Hatch *v.* Fowler, 28 Mich. 205; Patterson *v.* Fowler, 22 Ark. 396; Simcoke *v.* Frederick, 1 Ind. 54; Hallett *v.* Fowler, 8 Allen (Mass.) 93. See also Appleton *v.* Barrett, 22 Wis. 568. See generally BURDEN OF PROOF, vol. 2, p. 649.

3. Ingersoll *v.* Emmerson, 1 Ind. 76; Moorman *v.* Quick, 20 Ind. 67; Morris *v.* Danielson, 3 Hill (N. Y.) 168. See Knox *v.* Hellums, 38 Ark. 413; Woolston *v.* Smead, 42 Mich. 54.

In replevin for the unlawful taking of horses the plaintiff showed that he bought the horses and took possession of them on the 19th of August; that in September following the defendants had them in their possession and took them to the stable of a third person, where they were left to be kept. *Held*, that the evidence made out *prima facie* a tortious taking, and if not answered was sufficient to entitle the plaintiff to

performance of some condition.[1] In this action, the plaintiff must recover on the strength of his own title and not on the weakness of his adversary's,[2] and if he fail to establish his own title, the property should, as a general rule, be restored to the defendant.[3] Replevin may be maintained wherever the plaintiff has a special property in the goods,[4] but not where the plaintiff

a verdict. Morris *v.* Danielson, 3 Hill (N. Y.) 168.

1. Bailey *v.* Troxell, 43 Ind. 432; Kirkpatrick *v.* Snyder, 33 Ind. 169; Wainscott *v.* Smith, 68 Ind. 312; Lambert *v.* McCloud, 63 Cal. 163; M'Isaacs *v.* Hobbs, 8 Dana (Ky.) 268.

It may be brought for property sold on condition, when the condition is not complied with. See CONDITIONAL SALES, vol. 3, p. 434.

Personal property sold and delivered on condition that the title shall remain in the vendor, unless the purchase price is paid at a specified time, may, if such payment is not made, be replevied from the vendee or from a purchaser claiming under him. Hodson *v.* Warner, 60 Ind. 214.

Replevin lies to recover possession of a chattel removed by the buyer from the place where, by the terms of the conditional sale, it was to remain until paid for. Hall *v.* Draper, 20 Kan. 137.

2. Easter *v.* Fleming, 78 Ind. 116; Davis *v.* Warfield, 38 Ind. 461; Simcoke *v.* Frederick, 1 Ind. 54; Lane *v.* Sparks, 75 Ind. 278; Goodman *v.* Kennedy, 10 Neb. 270; Bardwell *v.* Stubbert, 17 Neb. 485; Reinheimer *v.* Hemingway, 35 Pa. St. 432; Johnson *v.* Neale, 6 Allen (Mass.) 227; Stanley *v.* Neale, 98 Mass. 343; Holler *v.* Coleson, 23 Ill. App. 324; Anderson *v.* Talcott, 6 Ill. 365; Hamilton *v.* Iowa City Nat. Bank, 40 Iowa 307.

3. Stanley *v.* Neale, 98 Mass. 343; Johnson *v.* Neale, 6 Allen (Mass.) 227.

4. Miller *v.* Adsit, 16 Wend. (N. Y.) 335; City Bank *v.* Rome etc. R. Co., 44 N. Y. 136; Wheeler *v.* McFarland, 10 Wend. (N. Y.) 318; Rich *v.* Ryder, 105 Mass. 306; First Nat. Bank *v.* Dearborn, 115 Mass. 219; 15 Am. Rep. 92; Fifth Nat. Bank *v.* Bayley, 115 Mass. 228; Allen *v.* Wright, 134 Mass. 347; Hazard *v.* Hall, 5 Mo. App. 584; Wilson *v.* Royston, 2 Ark. 315; Cox *v.* Morrow, 14 Ark. 603; Walpole *v.* Smith, 4 Blackf. (Ind.) 304; Cushenden *v.* Harman, 2 Tyler (Vt.) 431; Hopper *v.* Miller, 76 N. Car. 402. See Currier *v.* Ford, 26 Ill. 488; Tyler *v.* Freeman, 3 Cush. (Mass.) 261. See LIVERY STABLE KEEPERS, vol. 13. p. 962, as to the right of a person to maintain replevin for property on which he has a lien.

A being in the possession of chattels under a contract of sale by which they were to become his property on payment for them, assigned his interest in the contract to B on condition to have the chattels on payment of an amount advanced. A retained possession of the chattels and paid B the amount advanced, but the contract was not reassigned. The seller of the chattels afterwards took possession of them for an alleged breach of the contract of sale. *Held*, that the transaction between A and B did not prevent A from maintaining an action of replevin. Swett *v.* Boyce, 134 Mass. 381.

A mere possessory right may prevail against an absolute legal title where such title, and the right to the possession becomes separated and are held by different parties. Entsminger *v.* Jackson, 73 Ind. 144.

A constable levied an execution on certain goods of the debtor, and delivered them for safekeeping to the creditor. Before the return day, and while the goods were so situated, the execution of levy was set aside. The constable afterwards demanded the goods of the creditor, who refused to deliver them. It was held that the constable could not maintain replevin for the goods against the creditor for want of property in the goods. Walpole *v.* Smith, 4 Blackf. (Ind.) 304.

One who has the right to use property at will can maintain replevin for the property. Tandler *v.* Saunders, 56 Mich. 142.

A wholesaler who sent beer in his own barrels to a retailer to be paid for as sold, may bring replevin against an officer who levies on it as the property of the retailer. Meldrum *v.* Snow, 9 Pick. (Mass.) 441; 20 Am. Dec. 489. See Rogers *v.* Whitehouse, 71 Me. 222.

A town organized a fire department and allowed the members a room which was furnished partly by the town. The

has only an equitable title.[1] Some authorities, however, hold that a party having only a special property in the replevied goods must have had possession in order to maintain the action.[2] A symbolical delivery of goods to a person without putting him in

company afterwards disbanded and divided the furniture among themselves. It was held that the town could maintain replevin for the furniture. Brookline *v.* Sherman, 140 Mass. 1; 54 Am. Rep. 434. See also Bisbee *v.* Fadden, 140 Mass. 6; Perry *v.* Stowe, 111 Mass. 60.

A title which rests on an agreement within the Statute of Frauds because not in writing, but which is fully performed, will support replevin. Norton *v.* Simonds, 124 Mass. 19.

A person who takes up a stray but never posts it, has such a qualified ownership as will support replevin. Borron *v.* Landes, 1 Duv. (Ky.) 299. See Hicks *v.* Fluit, 21 Ark. 463.

In order for a mere lien to maintain replevin, the plaintiff must have the right to possession under it. M'Curdy *v.* Brown, 1 Duer (N. Y.) 101.

A party holding a bill of lading by the terms of which property is to be delivered to him, has sufficient title to the property to maintain replevin. Powell *v.* Bradlee, 9 Gill & J. (Md.) 142.

An auctioneer who sells and delivers goods, as the agent of the owner, on a condition which is not complied with, may maintain replevin therefor. Tyler *v.* Freeman, 3 Cush. (Mass.) 361.

A let B have some canvas for a sail under an agreement that it should be, and remain the property of A until paid for. B made the sail, furnished further materials for it, and then sold it without having paid for it. *Held*, that A could maintain replevin against the vendee to recover the sail. Eaton *v.* Monroe, 52 Me. 63.

When the plaintiff had put part of the machinery into a boat, for which he was to be paid when all was put in, and the master refused to pay for what was in, or let the rest be put in, he was allowed to replevy the part put in. Kidd *v.* Belden, 19 Barb. (N. Y.) 266.

See also Whitney *v.* Eaton, 15 Gray (Mass.) 225; Farlow *v.* Ellis, 15 Gray (Mass.) 229; Martin *v.* Watson, 8 Wis. 315; Dunkin *v.* McKee, 23 Ind. 447; Bartlett *v.* Goodwin, 71 Me. 350; Miller *v.* Le Piere, 136 Mass. 20; Bartels *v.* Arms, 3 Colo. 76; Peters *v.* Elliott, 78 Ill. 321.

1. Woodruff *v.* Clark, 42 N. J. L. 198; Vinson *v.* Ardis, 81 Ala. 271; Clapp *v.* Shepard, 2 Met. (Mass.) 127.

A trustee in bankruptcy can maintain replevin for property belonging to the bankrupt. Gordon *v.* Farrington, 46 Mich. 420; Coats *v.* Farrington, 46 Mich. 422.

Where the property was conveyed to a trustee to secure a debt due plaintiff, the action should be brought in the name of the trustee and not in the name of the beneficiary. Garrett *v.* Carlton, 65 Miss. 188.

It has been held in *Mississippi* that the action of replevin cannot be brought in the name of one person for the use of another, as such action involves only legal rights. The name of the usee may, however, be treated as surplusage, but a recovery can only be had where it is shown that the nominal plaintiff is entitled to recover. Myer *v.* Warner (Miss. 1887), 1 So. Rep. 837. See also Pearce *v.* Twichell, 41 Miss. 344; Peck *v.* Ingraham, 28 Miss. 246.

Kansas.—In *Kansas*, a wife who purchases personal property from her husband in good faith, for a sufficient consideration, is, in equity, the owner of such property; and if a subsequent creditor of her husband levies upon the same, she may recover it in the action of replevin. Going *v.* Orns, 8 Kan. 85.

Connecticut. — Under *Connecticut* Gen. Sts. tit. 1, § 327, an action of replevin may be maintained by a trustee to recover trust property which has been attached as his own, in an action brought against him individually. Jackson *v.* Hubbard, 36 Conn. 10.

2. Holliday *v.* Lewis, 15 Mo. 403; Hazard *v.* Hall, 5 Mo. App. 584; Gates *v.* Bennett, 33 Ark. 475; Garrett *v.* Carlton, 65 Miss. 188.

When a purchaser of land at a foreclosure sale is not entitled to the possession of the premises during the time allowed for redemption, he is not during that time entitled to the possession of logs cut on the land after the sale, and cannot bring replevin for them. Berthold *v.* Holman, 12 Minn. 335; 93 Am. Dec. 233.

actual possession is sufficient possession to enable him to maintain replevin.[1]

VI. Who May be Sued.—Any person who is tortiously or wrongfully in the possession of property may be proceeded against in replevin for the same by any person entitled to the immediate possession.[2] But the defendant must have had some

1. First Nat. Bank *v.* Dearborn, 115 Mass. 219; 15 Am. Rep. 92; Fifth Nat. Bank *v.* Bayley, 115 Mass. 228; Whipple *v.* Thayer, 16 Pick. (Mass.) 25; 26 Am. Dec. 626; Gibson *v.* Stevens, 8 How. (U. S.) 384. See Pratt *v.* Parkman, 24 Pick. (Mass.) 42.

The delivery by an owner of goods of a common carrier's receipt for them, not negotiable in its nature, as security for an advance of money, with the intention to transfer the property in the goods, is a symbolical delivery of them, and vests in the person making the advance a special property in the goods sufficient to maintain replevin against an officer who afterwards attaches them upon a writ against the general owner. First Nat. Bank *v.* Dearborn, 115 Mass. 219; 15 Am. Rep. 92.

2. 5 Wait's Actions & Defenses 486; Hall *v.* White, 106 Mass. 599; Leighton *v.* Harwood, 111 Mass. 67; 15 Am. Rep. 4; Rose *v.* Cash, 58 Ind. 278; Brewster *v.* Carmichael, 39 Wis. 456. See Nunn *v.* Home Ins. Co. (Neb. 1890), 47 N. W. Rep. 467.

Any person having the unlawful possession of personal property belonging to another is the proper party from whom to replevy the same, whether he claims it as owner, agent, administrator, trustee, custodian, or in any other capacity. Rose *v.* Cash, 58 Ind. 278.

The action of replevin may be brought against the agent of a party, if the property is actually in his possession. Stevenson *v.* Taylor, 2 Mich. N. P. 95.

One from whose possession the assignee of a bankrupt has taken goods claiming them *bona fide* as part of the bankrupt estate, may forthwith replevy them from the assignee on a writ issuing from the State court, notwithstanding that the bankrupt act (*United States* Sts. 1867, ch. 176, § 4) provides that "no one shall maintain an action against an assignee for anything done by him as such assignee, without giving him twenty days' notice." Leighton *v.* Harwood, 111 Mass. 67; 15 Am Rep. 4. *Compare In re* Vogel, 7 Blatchf. (U. S.) 18.

Replevin may be maintained against the receiver of an insolvent national bank by any person entitled to the possession of personal property in his hands as such receiver. Corn Exch. Bank *v.* Blye, 101 N. Y. 303.

Leave of the court appointing the receiver is not necessary to enable one to maintain replevin against the receiver. Hills *v.* Parker, 111 Mass. 508.

Where, in an action of replevin against two or more defendants, no goods are found in the possession of one of them, nor does he claim any of the goods, it is error to permit a verdict against him to stand. Hulett *v.* Patterson (Pa. 1887), 8 Atl. Rep. 917.

An officer who has taken a bond for the delivery of property levied upon, is, until it is shown to have passed out of his power and control, in constructive possession of the property, and both he and the execution plaintiff are liable to an action of replevin by the owner. Hadley *v.* Hadley, 82 Ind. 75.

The possession of one partner is, *prima facie*, the possession of the firm; therefore replevin may be maintained against one or all the members, when the article replevied is in the possession of one claiming to act for, and with the concurrence of all. Howe *v.* Shaw, 56 Me. 291.

Where one is interested, jointly with another, in the detaining and impounding of a cow taken *damage feasant* as a mode of recovering the damage done by her, his assent to such detention for that purpose is sufficient to make him liable in replevin. Riley *v.* Noyes, 44 Vt. 455.

A petition in insolvency was filed against a mortgagee of personal property, and an officer took possession of the property as messenger under a warrant which was void. Afterwards, the condition of the mortgage having in the meantime been broken, a valid warrant was issued and placed in the hands of the officer, and he delivered the property to the assignees of the mortgagee. *Held*, that replevin of it could not be subsequently maintained by the mortgagor against the officer, for he was no longer in possession of it; nor against

title in, or control over, or right to the possession of the property at the beginning of the action,[1] or must have wrongfully parted

the assignees, for they held, not under the officer, but under the assignment of the mortgagee's estate. Hall *v.* White, 106 Mass. 599.

In replevin against one who innocently acquired possession of the plaintiff's property from one who wrongfully took it from the plaintiff, the defendant has no greater rights against the plaintiff than had the original wrongtaker, except that the defendant is entitled to a demand. Surles *v.* Sweeney, 12 Oregon 21.

1. Swett *v.* Boyce, 134 Mass. 381; Richardson *v.* Reed, 4 Gray (Mass.) 441; 64 Am. Dec. 77; Hall *v.* White, 106 Mass. 599; Roberts *v.* Randel, 3 Sandf. (N. Y.) 707; King *v.* Orser, 4 Duer (N. Y.) 431; Mitchell *v.* Roberts, 50 N. H. 486; Rogers *v.* Davis, 21 Mo. App. 150; Davis *v.* Randolph, 3 Mo. App. 454; Feder *v.* Abrahams, 28 Mo. App. 454; Haeger *v.* Marcus, 5 Mo. App. 565; Crawshaw *v.* Wright, 5 Mo. App. 577; Bradley *v.* Gamelle, 7 Minn. 331; Ames *v.* Mississippi Boom Co., 8 Minn. 467; Hardin *v.* Palmerlee, 8 Minn. 450; Grace *v.* Mitchell, 31 Wis. 533; 11 Am. Rep. 613; Williams *v.* Morgan, 50 Wis. 548; Johnson *v.* Garlick, 25 Wis. 705; Timp *v.* Dockham, 32 Wis. 146; Aber *v.* Bratton, 60 Mich. 357; Gildas *v.* Crosby, 61 Mich. 413; Morrison *v.* Lumbard, 48 Mich. 548; Burt *v.* Burt, 41 Mich. 82; State *v.* Jennings, 14 Ohio St. 73; Flynn *v.* Jordan, 17 Neb. 518; McCormick *v.* McCormick, 40 Miss 760; Krosmopolski *v.* Paxton, 58 Miss. 581; Moses *v.* Morris, 20 Kan. 208; Davis *v.* Van De Mark, 45 Kan. 130; Haughton *v.* Newberry, 69 N. Car. 436; Myers *v.* Credle, 63 N. Car. 504; Coffin *v.* Giphart, 18 Iowa 256; Ramsdell *v.* Buswell, 54 Me. 546; Murphy *v.* Tindall, Hempst. (U. S.) 10.

Replevin will lie for personal property, not in the actual possession of the defendant, if it be under his control. Bradley *v.* Gamelle, 7 Minn. 331.

The *Missouri* Rev. St., § 2887, requires an averment that "the property is wrongfully detained." It was shown by the evidence that, at the commencement of the action, the defendant E, as sheriff, was in possession and control of the property through his deputy, on the promises of defendant C. *Held*, that the evidence showed actual possession by defendants, and a demurrer to the evidence was properly overruled. Crum *v.* Elliston, 33 Mo. App. 591.

It is not essential to the maintenance of replevin, that the property replevied be, at the time of the issuing or service of the writ, in the actual possession and under the immediate and exclusive care and control of the defendant personally. Howe *v.* Shaw, 56 Me. 291.

Restoration.—Before the service of the summons in the action of replevin, defendant's servants, by his direction, drove the plaintiff's horses, which had been upon defendant's premises, along the street to plaintiff's residence, and said to him there that they delivered the horses to him. Plaintiff did not authorize them to go upon his premises for the purpose of making a further delivery; and they left the horses there in the street, where they remained for some hours, and until after service of the summons. *Held*, that, as a matter of law, defendant had restored the property before the action was commenced. Kiefer *v.* Carrier, 53 Wis. 404.

An officer read to plaintiff in replevin, at her store, a writ of attachment against the property of a third person, and told her that he attached a certain hearse (which really belonged to her), and went into the room where the property was, but neither removed it nor took it into his possession nor control, nor served the writ on the attachment defendant, nor made return thereof. *Held*, that replevin would not lie against him for the hearse. Libby *v.* Murray, 51 Wis. 371.

Replevin will lie against the assignee of property, although he allows it to remain in the assignor's hands, unless he clearly makes known that he does not claim it. Coomer *v.* Gale Mfg. Co., 40 Mich. 691.

Replevin cannot be maintained against an officer who has not taken possession of the property, but has only taken a list thereof, and has left the property with the person in whose possession it was at the time of the levy, taking from such person a delivery bond therefor. Hove *v.* McHenry, 60 Iowa 227.

with it.[1] There is a conflict of authority as to whether replevin will lie against a plaintiff in an execution who directs the officer to levy upon chattels not the property of the defendant in execution, in favor of their real owner, but the doctrine which is better supported by principle seems to be that replevin will not lie in such a case.[2] Replevin in the *cepit* cannot be maintained

A sheriff levied an execution upon a warehouse, but his return was silent as to whether he took it into his possession. In replevin for the warehouse, brought against the sheriff by one claiming to be the owner, plaintiff testified that she had kept the key, and used, and permitted others to use the building, since the levy, and that the defendant could not get into it unless he broke the lock. *Held*, that no wrongful detention by the defendant was shown, and that there was no error in sustaining defendant's demurrer to the evidence. Brand *v.* Hedwick, 43 Kan. 131.

After an action to recover possession of specific personal property, and damages for its detention has been commenced by the service of summons, a voluntary taking of the property, not from the defendants themselves, but by plaintiff's picking it up where he chanced to find it, does not extinguish the right of action. Tracy *v.* New York, etc., R. Co., 9 Bosw. (N. Y.) 396.

Where defendants secure possession of the property by giving a forthcoming bond, they are estopped to deny that the property was found in their possession at the time of the levy of the writ. Benesch *v.* Waggner, 12 Colo. 534; Benesch *v.* Mitchelson, 12 Colo. 539; Austin *v.* Wauful, 59 Hun (N. Y.) 620.

Defendant assumed to levy on plaintiff's goods in its office, telling the agent in charge that they were "just the same as theirs, or in their hands," but he "could use it just the same." The agent, at defendant's request, receipted for the property. Notices of sale were not posted, and the property was not removed. *Held*, that a levy was made, so as to entitle plaintiff to maintain replevin, and recover nominal damages. Chicago, etc., R. Co. *v.* Reid, 74 Mich. 366.

Where defendant in replevin had confederated with others to detain the property from plaintiff, the owner, and deprive him of possession, it was held that judgment against defendant was not erroneous, though the property at the commencement of the action, was in the actual possession of a confederate, from whom, however, he could have obtained it. Meixell *v.* Kirkpatrick, 33 Kan. 282.

Where property has been replevied from an officer, and the action has been dismissed without judgment for a return, a second action of replevin will not lie against the officer where he refused to accept the goods when an offer of return in the first action was made. Calnan *v.* Stern (Mass. 1891), 26 N. E. Rep. 994; McHugh *v.* Robinson, 71 Wis. 565.

Where a constable, after levying upon household goods, did not remove the goods from the house, but left another officer in the house in charge of the goods, it was held that the question, whether the defendant had such charge of the goods as would support replevin, should have been submitted to the jury. O'Connor *v.* Gidday, 63 Mich. 630.

1. Brockway *v.* Burnap, 16 Barb. (N. Y.) 309; Nichols *v.* Michael, 23 N. Y. 264; 80 Am. Dec. 259; Dunham *v.* Troy Union R. Co., 1 Abb. App. Dec (N. Y.) 565; Latimer *v.* Wheeler, 3 Abb. App. Dec. (N. Y.) 35; Ellis *v.* Lersner, 48 Barb. (N. Y.) 539; Gildas *v.* Crosby, 61 Mich. 413; Timp *v.* Dockham, 32 Wis. 146; Grace *v.* Mitchell, 31 Wis. 533; 11 Am. Rep. 613; Gassner *v.* Marquardt, 76 Wis. 579; Washington *v.* Love, 34 Ark. 93; Sayward *v.* Warren, 27 Me. 453. See also Temple *v.* Alexander, 53 Cal. 3.

2. Richardson *v.* Reed, 4 Gray (Mass.) 441; 64 Am. Dec. 77. In this case the court by Metcalf, J., said: "The attaching creditor has no property in them, general or special; no right to the possession of them; and no right of action against a third person who may take them from the officer or destroy them. Ladd *v.* North, 2 Mass. 516. How then can the goods be returned, on a writ of return or reprisal to him who never had possession of them? Or how can he be entitled to damages for the taking and detaining

against any person who came lawfully into the possession of the property.[1] If the action is in the *detinet*, the fact that the defendant has parted with the possession since the action began, will not defeat it.[2]

VII. What May be Replevied—1. Generally.—All species of tangible personal property whether choses in possession or in action may be the subject of replevin,[3] but the action will not lie for prop-

of goods in which he had no property?" See also Mitchell *v.* Roberts, 50 N. H. 486; Brockway *v.* Burnap, 12 Barb. (N. Y.) 347; Bogan *v.* Stoutenburgh, 7 Ohio 133; Grace *v.* Mitchell, 31 Wis. 533; 11 Am. Rep. 613; Maxey *v.* White, 53 Miss. 80. *Compare* Allen *v.* Crary, 10 Wend. (N. Y.) 349; 25 Am. Dec. 566; Stewart *v.* Wells, 6 Barb. (N. Y.) 79; Knapp *v.* Smith, 27 N. Y. 277; Firedone *v.* Mishler, 18 Ind. 439; Hadley *v.* Hadley, 82 Ind. 75; Esty *v.* Love, 32 Vt. 744.

In an action of replevin against a sheriff to recover goods attached by him, it is proper to allow the plaintiff in the attachment suit to be made a co-defendant. Valle *v.* Cerre, 36 Mo. 575; 88 Am. Dec. 161.

1. Woodward *v.* Grand Trunk R. Co., 46 N. H. 524; Brown *v.* Campsall, 6 Har. & J. (Md.) 491; Steveson *v.* Ridgely, 3 Har. & J. (Md.) 281; Wright *v.* Armstrong, 1 Ill. 172; Simmons *v.* Jenkins, 76 Ill. 479; Johnson *v.* Prussing, 4 Ill. App. 675.

W stole a horse, which he exchanged with B for a horse of B's, and afterwards sold B's horse to C for a valuable consideration, and without notice on the part of C of the manner in which W had obtained him. It was held, in an action of replevin by B against C for this last horse, that B was not entitled to recover. Brown *v.* Campsall, 6 Har. & J. (Md.) 491.

2. Latimer *v.* Wheeler, 1 Keyes (N. Y.) 468; Dunham *v.* Troy Union R. Co., 3 Keyes (N. Y.) 543.

3. Eddy *v.* Davis, 35 Vt. 248; Graff *v.* Shannon, 7 Iowa 508; Roberts *v.* Dauphin Deposit Bank, 19 Pa. St. 75. See Harris *v.* Harris, 43 Ark. 535.

Bonds may be taken by replevin. Douglass *v.* Wolf, 6 Kan. 88.

A seal of a court, a book called a "fee book," a Webster's dictionary, a German-English dictionary, and a lot of revenue stamps have been taken by action of replevin. Flentge *v.* Priest, 53 Mo. 540.

Growing crops, raised by yearly labor, usually called *fructus industriales*, may be taken in replevin. Garth *v.* Caldwell, 72 Mo. 622; Salmon *v.* Fewell, 17 Mo. App. 118; Simpson *v.* De Haven, 93 Ind. 411; Matlock *v.* Fry, 15 Ind. 483.

But replevin will not lie for a specified number of bushels unless the corn is in condition to gather and deliver to the plaintiff. Jones *v.* Dodge, 61 Mo. 368. See Lacey *v.* Weaver, 49 Ind. 373; 19 Am. Rep. 683; Williams *v.* Smith, 7 Ind. 559.

A purchaser of land may maintain replevin for crops sown upon the land without his consent before he has obtained possession. Hall *v.* Durham, 117 Ind. 429; Salmon *v.* Fewell, 17 Mo. App. 118; Anderson *v.* Strauss, 98 Ill. 485; Jones *v.* Thomas, 8 Blackf. (Ind.) 428. *Compare* Hecht *v.* Dettman, 56 Iowa 679; 41 Am. Dec. 131; Woehler *v.* Endter, 46 Wis. 301.

Timber severed from land by the owners of the legal title may be taken in replevin by the equitable owner of the property. Brewer *v.* Fleming, 51 Pa. St. 102. See Cromelien *v.* Brink, 29 Pa. St. 522.

Boards made from trees cut on plaintiff's land may be replevied by him. Davis *v.* Easley, 13 Ill. 192.

Replevin may be maintained for promissory notes. Graff *v.* Shannon, 7 Iowa 508; Bush *v.* Groomes, 125 Ind. 14.

Replevin may be maintained by the maker of a promissory note which has been paid off, to recover the possession thereof. Savery *v.* Hays, 20 Iowa 25. Or by the acceptor of a bill of exchange rendered void by an alteration, to recover possession of it. Smith *v.* Eals (Iowa 1890), 46 N. W. Rep. 1110. See Goshen Nat. Bank of Bingham, 118 N. Y. 349.

Replevin may be maintained in the *United States* circuit court of *Massachusetts* for writings or documents of

erty affixed to the freehold and making part thereof.[1] But when a fixture constituting a part of the realty is tortiously severed

value unlawfully detained. Gibbs *v.* Usher. 1 Holmes (U. S.) 348.

The statutory substitute of *Georgia*, for the action of replevin, will lie to recover a tamed canary which has been taken or detained from its owner. Manning *v.* Mitcherson, 69 Ga. 447; 47 Am. Rep. 764. See also Haywood *v.* State, 41 Ark. 479.

Replevin will lie to regain possession of vouchers as to the cost of a building. Drake *v.* Auerbach, 37 Minn. 505.

Replevin will lie to gain possession of church records, even though lawfully taken by defendant. Baker *v.* Fales, 16 Mass. 147; Sawyer *v.* Baldwin, 11 Pick. (Mass.) 492; First Parish *v.* Stearns, 21 Pick. (Mass.) 148.

Replevin will lie to obtain possession of title deeds. Wilson *v.* Rybolt, 17 Ind. 391; 79 Am. Dec. 486.

In replevin to recover a deed its value must be proved. Flannigan *v.* Goggins, 71 Wis. 28.

Replevin will not lie for a coffin and its contents after the coffin has been buried, if the contents be a corpse. It is contrary to decency, and shocking to humanity to hold otherwise. Guthrie *v.* Weaver, 1 Mo. App. 136. See also CEMETERIES, vol. 3, p. 52.

Replevin is not the proper remedy to obtain possession of books or papers filed in a public office. Mandamus should be used. LaGrange *v.* State Treasurer, 24 Mich. 468.

Where timber is fraudulently cut upon lands, and made into saw-logs, the government may replevy such saw-logs even when they have reached the boom. Bly *v.* U. S., 4 Dill. (U. S.) 464. See U. S. *v.* Cook, 19 Wall. (U. S.) 591; Schulenberg *v.* Harriman, 21 Wall. (U. S.) 44.

As to replevin for a meteoric stone by the owner of the land on which it fell, see 24 Am. L. Review 471; 31 Cent. L. Jour. 154.

As to replevin for lost papers, see LOST PAPERS, vol. 13, p. 1062.

Choses in Action.—By choses in action, as used in the text, is meant not the chose itself but its representative or evidence: as, for example, a promissory note which is the evidence of the debt.

Value.—It is provided in some of the States that property to be replevied must be equal to or exceed a certain value. These provisions do not apply to property taken by distress.

In *Massachusetts*, the property must be of greater value than twenty dollars. Pub. Stats. *Massachusetts* 1882, p. 1063, ch. 184, § 10.

A similar provision exists in *Vermont*. Rev. Laws of *Vermont*, § 1230. See Pub. Stats. *Rhode Island* 188, p. 653, ch. 235, § 1, and p. 291, ch. 109, §§ 9–16.

1. Vausse *v.* Russel, 2 McCord (S. Car.) 329; Smith *v.* Stanford, 62 Ind. 392; Cresson *v.* Stout, 17 Johns. (N. Y.) 116; 8 Am. Dec. 373. ACCESSION, vol. 1, p. 58 and note.

Fence rails and stakes used by a wrongdoer in the construction of a fence upon his real property, become thereby, a part of such realty, and cannot be replevied by their owner as personal property, even though unlawfully taken and detained by the wrongdoer. Ricketts *v.* Dorrel, 55 Ind. 470.

The writ of replevin is not the proper action for the summary removal from a dwelling-house, of a tenant at will who has the right to retain possession thereof until removed by due process of law. Smith *v.* Grant, 56 Me. 255; McCormick *v.* Riewe, 14 Neb. 509.

The purchaser of land sold on execution may maintain an action of waste, or trover, or an action on the case in the nature of waste, against the execution defendant for cutting timber during the time he remains in possession subsequent to the sale, but the purchaser cannot maintain trespass or replevin in the *cepit* therefor. Rich *v.* Baker, 3 Den. (N. Y.) 79.

Where machinery attached to a building by the bailee, under a written contract providing that the bailor is to have the right to immediate possession of the property, on default by the bailor in payment of rent, and the bailor shall execute a bill of sale on the payment of an agreed price, before the expiration of the time named in the contract; and where, from the manifest intention of the parties, it appears that the machinery was not to become a part of the realty, replevin by the bailor will lie, on default of the bailee to pay the rent, and refusal to deliver up the property on demand. Ott *v.* Specht (Del. 1887), 12 Atl. Rep. 721.

therefrom, it becomes personalty and replevin may be maintained therefor so long as it is not permanently annexed to other realty,[1] and there is no adverse possession of the land, from which the property is severed, or the adverse possessor is a mere trespasser.[2] Replevin will not lie for money unless it is marked or designated in such a manner that it may be identified.[3] And the same is true of any property to be replevied. The plaintiff must identify the specific property as his own.[4] Property worn upon the

1. Ogden *v.* Stock, 34 Ill. 422, 85 Am. Dec. 332; Davis *v.* Easley, 13 Ill. 192; Salter *v.* Sample, 71 Ill. 430; Dorr *v.* Dudderar, 88 Ill. 107; Matzon *v.* Griffin, 78 Ill. 477; Harlan *v.* Harlan, 15 Pa. St. 507; 53 Am. Dec. 612; Brewer *v.* Fleming, 51 Pa. St. 102; Cresson *v.* Stout, 17 Johns. (N. Y.) 116; 8 Am. Dec. 373; Laflin *v.* Griffiths, 35 Barb. (N. Y.) 58; Johnson *v.* Elwood, 53 N. Y. 431; Kimball *v.* Lohmas, 31 Cal. 154; Huebschmann *v.* McHenry, 29 Wis. 655. See FIXTURES, vol 8, p. 61, and note. See Hull *v.* Hull, 1 Idaho 361.

A person claiming land as a pre-emptor cannot maintain replevin for timber cut thereon, before his right has been proved. Bower *v.* Higbee, 9 Mo. 259.

Where growing trees belong to one person, and the land to another, if the owner of the land enter upon it and cut the trees, the owner of the trees may maintain replevin in the *cepit* against him therefor. Warren *v.* Leland, 2 Barb. (N. Y.) 613.

The right to replevy fixtures detached is an incident to the right to the realty and the plaintiff must show that he was in the actual or constructive possession of the land. Johnson *v.* Elwood, 53 N. Y. 431.

A frame building erected upon and attached to the realty, and used as a tannery, held real estate, and not repleviable though there was an agreement for the sale of the building without the land which gave the purchaser or his assigns the right to enter upon the land, to sever the building therefrom, and remove it as personal property. Eddy *v.* Hall, 5 Colo. 576.

The owner of the legal title to uninclosed and unimproved land is in constructive possession, and may maintain replevin for timber wrongfully cut thereon. Weeks *v.* Martin, 57 Hun (N. Y.) 589.

A company after leasing land discovered building stone thereon, which they quarried, and, together with the lease, sold to the plaintiff. Defendant without right, but in collusion with plaintiff's agent, removed the stone. It was held that though quarrying the stone was waste, plaintiff could replevy it, if his possession was under *bona fide* claim of ownership. Reynolds *v.* Horton, (Wash. 1891) 26 Pac. Rep. 221.

2. Baker *v.* Campbell, 32 Mo. App. 529; Anderson *v.* Hapler, 34 Ill. 436; 85 Am. Dec. 318; Rathbone *v.* Boyd, 30 Kan. 485.

The law will not permit a party to assert his title to land in the action of replevin against an adverse possessor. Anderson *v.* Hapler, 34 Ill. 436; 85 Am. Dec. 318.

3. Sager *v.* Blaine, 44 N. Y. 445; Hamilton *v.* Clark, 25 Mo. App. 428; Skidmore *v.* Taylor, 29 Cal. 619.

4. McDaniel *v.* Allen, 99 N. Car. 135; Blakely *v.* Patrick, 67 N. Car. 40; Low *v.* Martin, 18 Ill. 286; Stanley *v.* Robinson, 14 Ill. App. 480; Hart *v.* Fitzgerald, 2 Mass. 509; 3 Am. Dec. 75; Scudder *v.* Worster, 11 Cush. (Mass.) 579; Buckley *v.* Buckley, 9 Nev. 373; Ellsworth *v.* Henshall, 4 Greene (Iowa) 417; Stanchfield *v.* Palmer, 4 Greene (Iowa) 23; Phipps *v.* Taylor, 15 Oregon 484; Welch *v.* Smith, 45 Cal. 230; Dillingham *v.* Smith, 30 Me. 370. See ACCESSION, vol. 1, p. 58, and note.

If the confusion were caused by the wrongful act of the defendant, the plaintiff could maintain replevin. Stanley *v.* Robinson, 14 Ill. App. 480; Low *v.* Martin, 18 Ill. 286; Gardner *v.* Dutch, 9 Mass. 427. See also CHATTEL MORTGAGES, vol. 3 p. 203. See dissenting note of editor of 9 Mass. 43, and cases cited. *Compare* Ames *v.* Mississippi Boom Co., 8 Minn. 467.

Where a storehouse and the goods therein were in possession of the sheriff by virtue of a writ of attachment, and the attachment defendant instituted an action of replevin, and in the writ and petition described the property as being "a certain storehouse, warehouse, and

person cannot be taken by writ of replevin, even though worn for the sole purpose of evading the writ.[1] Property not in existence at the time the writ was issued cannot be made the subject of an action of replevin.[2] A person may bring replevin for goods sold him if they have been identified, although he has not received them nor ascertained their quantity, provided the sale is completed.[3]

the goods therein contained, being the store in Council Bluffs known and designated as the store of your petitioner," it was held that the description was sufficiently certain. Ellsworth *v.* Henshall, 4 Greene (Iowa) 419.

In an action of replevin, the complaint, affidavit, and order indorsed, described the property simply as 400 sheep. *Held*, that the sheriff was justified in seizing the property. Lawrence *v.* Coyne, 62 Cal. 124.

Where grain belonging to different owners has been stored in a mass with their consent, each may maintain replevin for his share subject to deduction of his proportion of loss or waste occurring to it while so stored. Young *v.* Miles, 20 Wis. 615, *following* Kimberly *v.* Patchin, 19 N. Y. 330; Kaufman *v.* Schilling, 58 Mo. 218; Henderson *v.* Lauck, 21 Pa. St. 359; Sutherland *v.* Carter, 52 Mich. 471.

In Kimberly *v.* Patchin, 19 N. Y. 330, the court by Comstock, J., said: "Property can be acquired and held in many things which are incapable of specific identification. Articles of this nature are sold not by description which refers to and distinguishes the particular thing, but in quantities which are ascertained by weight, measure, or count, the constituent parts which make up the mass being undistinguishable from each other by any physical difference in size, shape, texture, or quality. . . . In respect to such things, the rule above mentioned must be applied according to the nature of the subject."

Where plaintiff's logs had been mixed with those of defendant, and there was no evidence that the former differed in description, quality or value from the latter, and the plaintiff was unable to identify his own, he was entitled to recover, in replevin, a quantity of logs, out of the common mass, equal to the quantity owned by him. Eldred *v.* Oconto Co., 33 Wis. 133.

If a writ commanding the officer to replevy a certain number of barrels of mackerel is served, with the assent of the defendant, by taking, in part, two half barrels as equivalent to one barrel, the defendant cannot afterwards claim a return thereof on the ground that the officer seized property not described in his writ. Gardner *v.* Lane, 9 Allen (Mass.) 492; 85 Am. Dec. 779.

In replevin, where the property has been taken by the sheriff and then returned to the defendant, according to the statute, the plaintiff, on proof of the unlawful taking and detention of the property described in the complaint, and of its value, may take judgment for such value, with damages for the detention, without showing the identity of the property seized by the sheriff with that taken by the defendant. Brewster *v.* Carmichael, 39 Wis. 456.

In a complaint in replevin, a description of the property as "a box of skins and furs marked J. Windors, Logansport, Indiana," is a sufficient identification. Minchrod *v.* Windoes, 29 Ind. 288.

1. Marham *v.* Day, 16 Gray (Mass.) 213; 77 Am. Dec. 409.

2. Burr *v.* Daugherty, 21 Ark. 559; Caldwell *v.* Fenwick, 2 Dana (Ky.) 333; Pettengill *v.* Merrill, 47 Me. 109.

A party residing abroad, contracted with a manufacturer in Massachusetts to have some machines built, which were to be delivered to such party's general agent in Massachusetts, by whom they were to be received and shipped and paid for out of funds furnished him for the purpose. A part of the machinery was accordingly manufactured and delivered to the agent, and the whole was thereupon paid for by him. *Held*, that the agent did not thereby acquire any such property in the articles not delivered, as would entitle him to maintain an action of replevin therefor against the manufacturer. Dixon *v.* Hancock, 4 Cush. (Mass.) 96.

3. Sandler *v.* Bresnaham, 53 Mich. 567.

2. Property Taken in Execution or by Attachment.—At common law, property in the custody of an officer was said to be *in custodia legis*, and if it were taken under a valid legal process, could not be retaken by replevin.[1] But in order for this rule to apply the property must have been taken under a valid process, so that if the law under which the first process was issued were unconstitutional,[2] or if the judgment were void,[3] replevin could be maintained. The rule now is, however, in most of the States, that an action of replevin may be maintained against an officer for goods taken by him in execution, by any person having property in the goods other than the defendant in execution;[4] and

1. Smith *v.* Huntington, 3 N. H. 76; 14 Am. Dec. 331; Ilsley *v.* Stubbs, 5 Mass. 283; Gardner *v.* Campbell, 15 Johns. (N. Y.) 401; Cooley *v.* Davis, 34 Iowa 128; Griffith *v.* Smith, 22 Wis. 646; 99 Am. Dec. 90; Goodrich *v.* Fritz, 4 Ark. 525; Buckley *v.* Buckley, 9 Nev. 373; Hogan *v.* Deuell, 24 Ark. 216; Powell *v.* Bradlee, 9 Gill & J. (Md.) 220; Cromwell *v.* Owings, 7 Har. & J. (Md.) 55; Tyson *v.* Bowden, 8 Fla. 61; 3 Rob. Pract. 477; Baltimore, etc., R. Co. *v.* Hamilton, 16 Fed. Rep. 181. See Allen *v.* Staples, 6 Gray (Mass.) 491.

Contempt.—The institution of an action of replevin by a defendant in execution was formerly considered contempt of court. Philips *v.* Harriss, 3 J. J. Marsh. (Ky.) 122; Cromwell *v.* Owings, 7 Har. & J. (Md.) 55; Fries *v.* Porch, 49 Iowa 351.

Goods released upon a replevy bond are still *in custodia legis*. McKinney *v.* Purcell, 28 Kan. 446.

Property replevied by the sheriff, and delivered to the plaintiff, who had thereupon given the usual bond required in such case, is not *in custodia legis*, and may be replevied from such possession. Hogan *v.* Deuell, 24 Ark. 216.

The levy of an execution upon mortgaged personal property, whether in the possession of mortgagor or mortgagee, is lawful, and the declaration of the officer that he intends to sell the absolute estate in the property does not render the taking unlawful and authorize the mortgagee to prosecute an action of replevin. Squires *v.* Smith, 10 B. Mon. (Ky.) 33; M'Isaacs *v.* Hobbs, 8 Dana (Ky.) 268.

A party who justifies in an action of replevin, under execution process, must show the judgment, execution, and levy. Truitt *v.* Revill, 4 Harr. (Del.) 71.

2. Cooley *v.* Davis, 34 Iowa 128; Armel *v.* Lendrum, 47 Iowa 535; Sullivan *v.* Stephenson, 62 Ill. 290; Cotter *v.* Doty, 5 Ohio 344.

3. White *v.* Jones, 38 Ill. 165; Campbell *v.* Williams, 39 Iowa 646; Beach *v.* Botsford, 1 Doug. (Mich.) 199; 40 Am. Dec. 45; Adams *v.* Hubbard, 30 Mich. 104.

Replevin lies for property seized upon an execution issued in void garnishment proceedings. Iron Cliffs Co. *v.* Lahais, 52 Mich. 394.

No judgment had been rendered against the execution defendant at the time of the commencement of an action of replevin for the recovery of property alleged to have been wrongfully taken under an execution issued by a justice of the peace. *Held*, that the subsequent entry of judgment would not have a retrospective operation, by which the right of possession would accrue under the levy. Campbell *v.* Williams, 39 Iowa 646. See also Balm *v.* Nunn, 63 Iowa 641.

4. Gross *v.* Bogard, 18 Kan. 288; Reiley *v.* Haynes, 38 Kan. 259; Stone *v.* Bird, 16 Kan. 488; Thompson *v.* Button, 14 Johns. (N. Y.) 84; Dunham *v.* Wyckoff, 3 Wend. (N. Y.) 281; 20 Am. Dec. 695; Clark *v.* Skinner, 20 Johns. (N. Y.) 465; 11 Am. Dec. 302; Hall *v.* Tuttle, 2 Wend. (N. Y.) 475; Crittenden *v.* Lingle, 14 Ohio St. 182; 84 Am. Dec. 370; 2 Greenleaf on Ev., § 560; 3 Rob. Pract. 477, *et seq.*; Faddis *v.* Woollomes, 10 Kan. 56; Dickson *v.* Randal, 19 Kan. 212; Going *v.* Orns, 8 Kan. 85; Hoisington *v.* Armstrong, 22 Kan. 110; Wilton Town Co. *v.* Humphrey, 15 Kan. 372; Missouri River, etc., R. Co. *v.* Wheaton, 7 Kan. 232; Rankine *v.* Greer, 38 Kan. 343; Hanselman *v.* Kegel, 60 Mich. 540; Tandler *v.* Saunders, 56 Mich. 142; Samuel *v.* Agnew, 80 Ill. 553; Wetsel *v.* Mayers,

91 Ill. 497; Philips *v.* Harriss, 3 J. J. Marsh. (Ky.) 122; Bouldin *v.* Alexander, 7 T. B. Mon. (Ky.) 424; Reynolds *v.* Sallee, 2 B. Mon. (Ky.) 18; Musgrave *v.* Hall, 40 Me. 498; Richards *v.* Kirkpatrick, 53 Cal. 433; Carpenter *v.* Innes (Colo. 1891), 26 Pac. Rep. 140; Dearmon *v.* Blackburn, 1 Sneed (Tenn.) 390; 60 Am. Dec. 160. See EXECUTIONS, vol. 7. p. 152, n. 1.

Angell *v.* Keith, 24 Vt. 371; Perry *v.* Richardson, 9 Gray (Mass.) 216; Ilsley *v.* Stubbs, 5 Mass. 280; Smith *v.* Montgomery, 5 Iowa 370; Gimble *v.* Acklex, 12 Iowa 27; Miller *v.* Bryan, 3 Iowa 58; Seaton *v.* Higgins, 50 Iowa 305; Ramsden *v.* Wilson, 49 Iowa 211; Crawford *v.* Burton, 6 Iowa 476; Prather *v.* Parker, 24 Iowa 26; Presnall *v.* Herbert, 34 Iowa 539; Allen *v.* McCalla, 25 Iowa 464; 95 Am. Dec. 56; Chinn *v.* Russell, 2 Blackf. (Ind.) 172; Schenck *v.* Long, 67 Ind. 579; Louisville, etc., Canal Co. *v.* Holborn, 2 Blackf. (Ind.) 267; Louthain *v.* Fitzer, 78 Ind. 449; Bruen *v.* Ogden, 11 N. J. L. 370; 20 Am. Dec. 593; Yarborough *v.* Harper, 25 Miss. 112; Gallagher *v.* Bishop, 15 Wis. 276; Whitney *v.* Swensen, 43 Minn. 337; Jones *v.* Ward, 77 N. Car. 337. See also Com. *v.* Kennard, 8 Pick. (Mass.) 133; Hadley *v.* Hadley, 82 Ind. 75; Monaghan *v.* Longfellow, 82 Me. 419.

Where property exempt from attachment is attached as the property of A and replevied by B as his property, and the officer defends the suit of B successfully by showing that the property belonged to A and thereupon receives the value of it of B, instead of the property replevied, such officer cannot, in an action against him by A for the same property, deny his title thereto. Foss *v.* Stewart, 14 Me. 312.

In Judd *v.* Fox, 9 Cow. (N. Y.) 259, it is held that replevin will not lie for property of the plaintiff, if at the time it was taken in execution it was in the possession of the defendant in execution.

The owner of property which has been seized in execution to satisfy a judgment against a third party may maintain an action of replevin against the officer, notwithstanding the property at the time of the commencement of the action is in the hands of his bailee. Ralston *v.* Black, 15 Iowa 47.

Replevin may be maintained for intoxicating liquor taken from the possession of A by virtue of an execution issued against B, even though A's possession was illegal. Monty *v.* Arneson, 25 Iowa 383.

In an action of replevin against a constable, the defendant may prove that he holds the property as a constable by virtue of a levy made thereon by him under an execution in his hands issued on a judgment against a third person, and that the property is owned by the plaintiff and such third person jointly as partners; and under such facts the plaintiff cannot recover. Branch *v.* Wiseman, 51 Ind. 1.

After judgment in replevin, a defendant in execution cannot sue out another writ of replevin to prevent the execution of the writ against himself and procure a restoration of the property. Tyson *v.* Bowden, 8 Fla. 61.

In *Connecticut*, it is held that the action should be against the creditor at whose suit the property is taken. McDonald *v.* Holmes, 45 Conn. 157; Bowen *v.* Hutchins, 18 Conn. 550; Hathaway *v.* St. John, 20 Conn. 343. See Hilton *v.* Osgood, 49 Conn. 110, decided under the statutes of 1875, which allow the action to be brought against the officer. See Howard *v.* Crandall, 39 Conn. 213; Smith *v.* Lyon, 44 Conn. 175; Tripp *v.* Leland, 42 Vt. 487.

The plaintiff in an attachment is a proper party defendant in an action of replevin to try the right of property levied upon under the attachment writ where he had assumed control of the writ and directed the officer as to its execution. Firestone *v.* Mishler, 18 Ind. 437.

In *Vermont*, it is held that a writ of replevin to replevy property attached, issued to and served by a constable is void. Ralston *v.* Strong, Brayt. (Vt.) 216.

Replevin will lie against an officer who has attached partnership property on a writ against one partner. Fay *v.* Duggan, 135 Mass. 242.

Both partners should be joined in such action. Fay *v.* Duggan, 135 Mass. 242.

The owner of personal property left in the possession of a third person, and which has been taken from the possession of such third person by writ of replevin, may by his own act regain possession of the property. Spencer *v.* M'Gowen, 13 Wend. (N. Y.) 256. See Merritt *v.* Miller, 13 Vt. 416.

In *Wisconsin* an officer having an execution valid upon its face, is not bound to inquire whether the judgment was

it may also be replevied by the owner from the vendee at the execution sale;[1] but the defendant cannot maintain it,[2] neither

properly given or whether the magistrate had jurisdiction. Grace *v.* Mitchell, 31 Wis. 533; 11 Am. Rep. 613.

A stranger to the lien suit cannot replevin products held by an officer, upon a writ under the *Mississippi* agricultural lien law of 1876, even though the writ names no defendant, nor contains any personal summons. Dogan *v.* Bloodworth, 56 Miss. 419.

A, being in the lawful possession of crops grown on the land of his children, as their custodian, could replevin them in his own name, without joining the children, from an officer who had seized them on execution against him. Rose *v.* Eaton, 77 Mich. 247.

Nebraska—In an action of replevin against the sheriff by a third party and stranger to the execution, who had the goods in his possession at the time of the levy by the sheriff, and where the sheriff justifies under such execution in order to maintain his possession, he must show by competent proof his authority for such seizure. In case he fails to do so, the plaintiff in the action will be entitled to judgment for the possession of the goods, and his damages. Schars *v.* Barnd, 27 Neb. 94; Williams *v.* Eikenberry, 25 Neb. 721.

In replevin against a sheriff for cattle, defendant alleged that they were the property of C, and were seized on execution against him. The plaintiff and C testified that C's sole interest therein was as plaintiff's agent. There was evidence for the defendant, that some time after the execution issued, plaintiff purchased one of the cattle not sold under the execution, from a man in whose charge it had been left; and that C sold one of the cattle, but it was shown that he accounted to the plaintiff for the proceeds. The evidence was held insufficient to support a verdict for defendant. Cosgrove *v.* Kohler, 45 Minn. 148.

1. Shearick *v.* Huber, 6 Binn. (Pa.) 2; 2 Browne (Pa.) 160; Ward *v.* Taylor, 1 Pa. St. 238; Coombs *v.* Gorden, 59 Me. 111; Dodd *v.* McCraw, 8 Ark. 83; 46 Am. Dec. 301.

2. Dunham *v.* Wyckhoff, 3 Wend. (N. Y.) 280; 20 Am. Dec. 695; Clark *v.* Skinner, 20 Johns. (N. Y.) 465; 11 Am. Dec. 302; Hall *v.* Tuttle, 2 Wend. (N. Y.) 475; Sharp *v.* Whittenhall, 3 Hill (N. Y.) 576; Thompson *v.* Button, 14 Johns. (N. Y.) 84; Gardner *v.* Campbell, 15 Johns. (N. Y.) 401; Morris *v.* De Witt, 5 Wend. (N. Y.) 71; 2 Greenl. on Ev., § 560; 3 Rob. Pract. 477, *et seq.*; Gist *v.* Cole, 2 Nott. & M. (S. Car.) 456; 10 Am. Dec. 616; Hawk *v.* Lepple, 51 N. J. L. 208; Musgrave *v.* Hall, 40 Me. 498; McGlothlin *v.* Madden, 16 Kan. 466; Westenberger *v.* Wheaton, 8 Kan. 169; Hoisington *v.* Armstrong, 22 Kan. 110; Funk *v.* Israel, 5 Iowa 438; Weir *v.* Allen, 47 Iowa 482; Fries *v.* Porch, 49 Iowa 351; Clay *v.* Caperton, 1 T. B. Mon. (Ky.) 10; 15 Am. Dec. 77. See Squires *v.* Smith, 10 B. Mon. (Ky.) 33; Bouldin *v.* Alexander, 7 T. B. Mon. (Ky.) 424; Morgan *v.* Craig, Hard. (Ky.) 108; Angel *v.* Keith, 24 Vt. 371; Ilsley *v.* Stubbs, 5 Mass. 280; Allen *v.* Staples, 6 Gray (Mass.) 491; Perry *v.* Richardson, 9 Gray (Mass.) 216; McCoy *v.* Reck, 50 Ind. 283; Dowell *v.* Richardson, 10 Ind. 573; Chinn *v.* Russell, 2 Blackf. (Ind.) 172.

New Hampshire.—The rule in *New Hampshire* is that goods in the custody of an officer taken from the possession of the judgment debtor, can never be replevied. Mitchell *v.* Roberts, 50 N. H. 486; Kellogg *v.* Churchhill, 2 N. H. 412; Smith *v.* Huntington, 3 N. H. 76; 14 Am. Dec. 337 (which holds that replevin can in no case be maintained for goods taken in execution by an officer); Melcher *v.* Lamprey, 20 N. H. 403; Sanborn *v.* Leavitt, 43 N. H. 473; Kittredge *v.* Holt, 55 N. H. 621; Carkin *v.* Babbitt, 58 N. H. 579; State *v.* Barrels of Liquor, 47 N. H. 369.

Estoppel.—Where the plaintiff in replevin has possession of property which he points out to an officer as the property of a defendant in execution, and the officer levies on it as such, the plaintiff is estopped from maintaining replevin for the property. Hardin *v.* Joice, 21 Kan. 318; Colwell *v.* Brower, 75 Ill. 516.

Arkansas.—In *Arkansas* the doctrine is that replevin will not lie in any case for goods in the hands of an officer. Goodrich *v.* Fritz, 4 Ark. 525; Spring *v.* Bourland, 11 Ark. 658; 54 Am. Dec. 243; Hogan *v.* Deuell, 24 Ark. 216; Hershy *v.* Clarksville Institute, 15 Ark. 130.

can it be maintained by a stranger who has no property in the goods, even though the levy were illegal.[1] It may be maintained, however, by the defendant in execution to recover property, exempt under the poor laws, which has been taken in execution,[2]

Execution Sale.—Replevin may be brought for property which has been sold under an execution against a defendant, not the owner of the property, by the real owner. Hicks *v.* Britt, 21 Ark. 422; Coombs *v.* Gorden, 59 Me. 111; Crittenden *v.* Lingle, 14 Ohio St. 182; 84 Am. Dec. 370.

In *Maryland* it is held that goods taken in execution cannot be replevied out of the officer's hands, either by the defendant in execution or by a third party whose goods have been taken. Cromwell *v.* Owings, 7 Har. & J. (Md.) 55; Powell *v.* Bradlee, 9 Gill & J. (Md.) 220. See Reeside *v.* Fischer, 2 Har. & G. (Md.) 320.

Pennsylvania.—A similar doctrine prevails in *Pennsylvania.* Gloss *v.* Black, 91 Pa. St. 418.

Mississippi.—The Code of *Mississippi* provides that replevin shall not be brought for goods in the hands of an officer under execution or attachment, when a remedy is given to claim the property in some mode prescribed by law. *Mississippi* Rev. Code, § 2633; Paine *v.* Hall Safe, etc., Co., 64 Miss. 175; Clark *v.* Clinton, 61 Miss. 337; Bernheimer *v.* Martin, 65 Miss. 486.

This section only applies to the property in the hands of an officer. It has no application to a controversy between private individuals, even though the defendant claims as a purchaser under a sale made by the officer. Armistead *v.* Bernard, 62 Miss. 180. See Ward *v.* Taylor, 1 Pa. St. 238; Talmadge *v.* Scudder, 38 Pa. St. 517.

In *Wisconsin* the doctrine is that goods in the custody of an officer cannot be taken in replevin. Watkins *v.* Page, 2 Wis. 92; Weinberg *v.* Conover, 4 Wis. 803; Griffith *v.* Smith, 22 Wis. 646; 99 Am. Dec. 90; Battis *v.* Hamlin, 22 Wis. 669; Union Lumbering Co. *v.* Tronson, 36 Wis. 126; Gerber *v.* Ackley, 37 Wis. 43; 19 Am. Rep. 751; Power *v.* Kindchi, 58 Wis. 539; 46 Am. Rep. 652.

Replevin will not lie against an officer who, having levied upon and taken goods in execution, receives from the defendant the amount due on the execution, and then refuses to redeliver the goods. Gardner *v.* Campbell, 15 Johns. (N. Y.) 401.

An action of replevin of personal property cannot be maintained by a mortgagor against a sheriff who has levied on the property by direction of the mortgagee upon an execution against both him and the mortgagor. Talbot *v.* DeForest, 3 Greene (Iowa) 586.

An execution which recites a judgment only against B, and is issued upon a judgment only against B, is no protection to an officer in levying upon the property of A, although it commands him to seize the property of A. Wilton Town Co. *v.* Humphrey, 15 Kan. 372.

Replevin lies for the property of the plaintiff, taken under a warrant issued by a court-martial. Mills *v.* Martin, 19 Johns. (N. Y.) 7.

Where personal property has been seized by virtue of an execution duly issued against the plaintiff in replevin, he cannot maintain his action to take the property from the possession of the officer upon the mere allegation that the judgment has been satisfied. Armel *v.* Lendrum, 47 Iowa 535.

Official Character.—To sustain a judgment in replevin in favor of an officer who claims the right of possession by virtue of a seizure under a judicial process, the proof must show his official character, and the proceedings and process under which he acted and claims possession. Arn *v.* Parker, 39 Kan. 338.

Where a judgment debtor is in possession of the property as guardian or trustee he may maintain replevin for the property levied upon in his possession by virtue of an execution against him, for the benefit of his ward or *cestui que trust.* Rose *v.* Eaton, 77 Mich. 247.

1. Wheeler *v.* Dixon, 51 Miss. 550.

2. Wilson *v.* McQueen, 1 Head (Tenn.) 17; Westenberger *v.* Wheaton, 8 Kan. 169; Watson *v.* Jackson, 24 Kan. 442; Wilson *v.* Stripe, 4 Greene (Iowa) 551; 61 Am. Dec. 138; Douch *v.* Rahner, 61 Ind. 64; Hartlep *v.* Cole, 101 Ind. 458; McCoy *v.* Reck, 50 Ind. 283; Miller *v.* Hudson, 114 Ind. 550;

Louisville, etc., R. Co. *v.* Payne, 103 Ind. 183; Keyser *v.* Waterbury, 7 Barb. (N. Y.) 650; Wallingsford *v.* Bennett, 1 Mackey (D. C.) 303. *Compare* Reynolds *v.* Sallee, 2 B. Mon. (Ky.) 18; Saffell *v.* Wash, 4 B. Mon. (Ky.) 92; Cromwell *v.* Owings, 7 Har. & J. (Md.) 55. See McGlothlin *v.* Madden, 16 Kan. 466.

The bailee or agent of an owner of property cannot maintain an action of replevin for the owner's goods on the ground that the property is exempt, when such goods have been taken in execution. Mickles *v.* Tousley, 1 Cow. (N. Y.) 114.

Neither can a third person take advantage of the fact that the property levied upon is exempt. Earl *v.* Camp, 16 Wend. (N. Y.) 562.

In replevin for property taken in execution and claimed by the plaintiff as exempt, it is not necessary specifically to set out the character of the property in the declaration so as to show the exemption. The exemption may be tried under the general form of declaration furnished by the statute. Elliott *v.* Whitmore, 5 Mich. 532.

Where property which is exempt from execution to a specified amount or value, is levied upon, the officer in order to protect himself from the consequences of an action for taking it, must cause an inventory and appraisement of the whole of such property belonging to the debtor to be made, and the amount exempt to be set out to the debtor. Elliott *v.* Whitmore, 5 Mich. 532. See also Douch *v.* Rahner, 61 Ind. 64.

Where a statute exempts a specified amount of a designated class or species of property, the sheriff may levy upon the whole property of that class or species, and he cannot be sued in replevin, before an appraisement, a selection by the owner of articles to the specified amount, and a demand for the articles so selected. Tullis *v.* Orthwein, 5 Minn. 377. See Lynd *v.* Picket, 7 Minn. 184; 82 Am. Dec. 79; Howland *v.* Fuller, 8 Minn. 57.

In an action of replevin to recover property levied on, it being claimed that it was exempt from execution, the burden is on the plaintiff to show that it was exempt. Thompson *v.* Ross, 87 Ind. 156.

If one who brings replevin against a constable for goods taken on an execution against him, is not in a situation to claim that they are exempt from levy, he cannot recover them or escape judgment for the amount called for by the execution, on the ground that the constable has neglected to make an inventory. Ferguson *v.* Washer, 49 Mich. 390.

Until an inventory is filed and an appraisement and a selection are made, replevin cannot be maintained against an officer for property which he has levied upon and which is claimed as exempt under § 521 of the civil code of *Nebraska*. Mann *v.* Wilton, 21 Neb. 541.

An officer who has seized property by virtue of an execution against a person, cannot question the truth of a proper schedule, duly verified, presented to him by the debtor in demanding that such property be exempted according to law. Douch *v.* Rahner, 61 Ind. 64.

Privilege Confined to Residents.—The privilege of replevying property, exempt under the poor laws, which has been taken in execution, is confined to residents of the State. Newell *v.* Hayden, 8 Iowa 140; Donnelly *v.* Wheeler, 34 Ark. 111.

In an action of replevin for property claimed as exempt from execution under the *Michigan* statute, the question of the occupation of the plaintiff relates only to the time of, and previous to, the taking; and his occupation at any subsequent time is immaterial. O'Donnell *v.* Segar, 25 Mich. 368.

Under the *Michigan* statutes, the tools of a dentist come within the meaning of "mechanical tools," and are therefore exempt from execution, and may be replevied from an officer who takes them in execution. Maxon *v.* Perrott, 17 Mich. 332; 97 Am. Dec. 191.

A defendant in execution prosecuting replevin against an officer to regain the possession of his only work beast, though he succeed, has no right to judgment for damages and costs. Saffell *v.* Wash, 4 B. Mon. (Ky.) 92.

A horse exempted under *Georgia* Code, § 2040, is for the wife and children as well as for the head of the family. Where, therefore, possession has been tortiously obtained from him, they may proceed by possessory warrant to recover the horse. Tucker *v.* Edwards, 71 Ga. 602.

Where exempt property is attached, the owner does not forfeit his right to it, nor estop himself from recovering by replevin, merely because he fails to

but the plaintiff in replevin must claim the property as exempt at or before the sale under the execution.[1] If the officer has parted with the property by sale, under a valid order after judgment rendered, he is not a proper party to an action of replevin for the property.[2] Property which has been attached may also be taken from the hands of the officer by writ of replevin by any person entitled thereto, save the attachment debtor[3] or the plaintiff in attachment.[4] Property which is alleged to have been stolen and which is held under orders of the court pending the trial of the accused person, cannot be replevied by the owner.[5] Where property has been replevied from an officer who held it by virtue of an execution, it has been held that the lien of the execution revived upon the death of the plaintiff in the action of

move for a dissolution of attachment or a release of the property. Wilson *v.* Stripe, 4 Greene (Iowa) 551; 61 Am. Dec. 138.

1. Russell *v.* Dean, 30 Hun (N. Y.) 242; Twinam *v.* Swart, 4 Lans. (N. Y.) 263.

2. Moses *v.* Morris, 20 Kan. 208.

3. Hopkins *v.* Drake, 44 Miss. 619; Samuel *v.* Agnew, 80 Ill. 553; Hawk *v.* Lepple, 51 N. J. L. 208; Caldwell *v.* Arnold, 8 Minn. 265; Keyser *v.* Waterbury, 7 Barb. (N. Y.) 650; Willis *v.* Reinhardt, 52 Ark. 128; Wangler *v.* Franklin, 70 Mo. 659; Seaton *v.* Higgins, 50 Iowa 305; Lewis *v.* Birdsey, 19 Oregon 164. See Laughlin *v.* Thompson, 76 Cal. 287.

Where goods under attachment were assigned by the owner, and were then again attached by the same officer, it was held that the delivery of the instrument of assignment was a sufficient delivery of the goods, and that the assignee having paid the claim of the first attaching creditor, might maintain replevin for the goods against the officer, upon giving him notice and demanding possession. Whipple *v.* Thayer, 16 Pick. (Mass.) 25; 26 Am. Dec. 626.

A mortgagee of goods who has been summoned as trustee on a writ against the mortgagor, under the *Massachusetts* Gen. Sts., ch. 123, §§ 67–71, cannot replevy them from the attaching officer during the continuance of the attachment. Furber *v.* Dearborn, 107 Mass. 122.

Under *New Mexico* Comp. Laws, 1884, § 1975, providing that "no cross-replevin, or replevin for property in the hands of an officer, shall be brought," property seized by an officer under attachment process cannot be recovered in replevin by a third person claiming the right of possession. Butts *v.* Woods, 4 N. Mex. 187.

When personal chattels have been seized under an attachment for rent, the remedy for one claiming title thereto is the replevin provided by § 1631 of the Code of 1871, and not the ordinary action of replevin provided by code 1871, ch. 16. Kendrick *v.* Watkins, 54 Miss. 495. See Maxey *v.* White, 53 Miss. 80.

It is a good defense to an action for the recovery of the possession of personal property, that it has been taken by the defendant, by virtue of a writ of attachment in his hands as sheriff against the property of a person not a party, who is the owner. Wiler *v.* Manley, 51 Ind. 169.

4. Vanneter *v.* Crossman, 39 Mich. 610. See also Vanneter *v.* Crossman, 42 Mich. 465. *Compare* Anchor Milling Co. *v.* Walsh, 20 Mo. App. 109.

5. Simpson *v.* St. John, 93 N. Y. 363. See also Weller *v.* Ely, 45 Conn. 547.

In Simpson *v.* St. John, 93 N. Y. 363, the court by Finch, J., said: "Very often the production and identification of the stolen articles are essential to the conviction of the thief, and if by claim of title they could be taken from the possession of the criminal court before trial of the offender, it would always be possible for him to put out of the way evidence necessary to his conviction. . . . The proceedings for the claim and delivery of personal property were not intended to repeal or render nugatory the police power of retention for purposes of public justice, and the owner's right of possession cannot be enforced while the circumstances justify such retention."

replevin, and that the sheriff was at liberty to retake the property and sell it by virtue of his former levy.[1]

3. **Property Seized For Taxes.**—In the case of property seized for a tax, the courts have gone further to uphold and protect the seizure than in any other.[2] The reason for this has been partly because of legislative enactments, which, in some States, have required the plaintiff in his affidavit for replevin, to swear that the property was not taken for any fine, tax, or amercement,[3] and partly for reasons growing out of the fact that it is necessary to the very existence of a government that the prompt collection of its revenue be not interfered with.[4] Replevin will not lie to try the validity or constitutionality of a law, under which property was taken from a person in payment of a tax.[5] The general rule on this subject seems to be that property taken in payment of a tax by virtue of a warrant not void on its face, cannot be taken by replevin by the defendant in the tax warrant from the officer so seizing it.[6] If, however, the warrant is void on its

1. Burkle *v.* Luce, 1 N. Y. 163.

2. Cobbey's Law of Replevin, p. 167.

3. McClaughry *v.* Cratzenberg, 39 Ill. 117; Evans *v.* Bouton, 85 Ill. 579; Campbell *v.* Head, 13 Ill. 122; O'Reilly *v.* Good, 42 Barb. (N. Y.) 521; Bringhurst *v.* Pollard, 6 Ind. 452; Bridges *v.* Layman, 31 Ind. 384; McKay *v.* Batchellor, 2 Colo. 591; Williams *v.* Gardner, 22 Kan. 122; Hill *v.* Graham, 72 Mich. 659; Phenix *v.* Clark, 2 Mich. 327.

An affidavit in the action of replevin, that the property was not taken for a tax is not conclusive of that fact. Kaehler *v.* Dobberpuhl, 60 Wis. 256.

4. McClaughry *v.* Cratzenberg, 39 Ill. 117.

5. McClaughry *v.* Cratzenberg, 39 Ill. 117; Mt. Carbon, etc., R. Co. *v.* Andrews, 53 Ill. 176; Coe *v.* Gregory, 53 Mich. 19.

In McClaughry *v.* Cratzenberg, 39 Ill. 117, the court, by Breese, J., said: "Disastrous, indeed, would be the consequences to the public was it allowed to every taxable inhabitant who may have conceived the notion that a law of general application, imposing taxes, is void, and, therefore, he shall be permitted to arrest its operation and thus break down the financial system of the State. If one may do it a whole community may, and ruin and disgrace would inevitably follow the extinction of our State credit thus brought about." *Compare* Morford *v.* Unger, 8 Iowa 82; Reed *v.* Chandler, 32 Vt. 285.

6. Chegaray *v.* Jenkins, 5 N. Y. 376; Hudler *v.* Golden, 36 N. Y. 446; Troy, etc., R. Co. *v.* Kane, 9 Hun (N. Y.) 506; People *v.* Albany C. P., 7 Wend. (N. Y.) 485; O'Reilly *v.* Good, 42 Barb. (N. Y.) 521; American Tool Co. *v.* Smith, 32 Hun (N. Y.) 121; Niagara Elevating Co. *v.* McNamara, 4 Thomp. & C. (N. Y.) 604; Hood *v.* Judkins, 61 Mich. 575: Leroy *v.* East Saginaw City R. Co., 18 Mich. 233; 10 Am. Dec. 162; Hill *v.* Wright, 49 Mich. 229; Hood *v.* Judkins, 61 Mich. 575; Hill *v.* Graham (Mich.), 72 Mich. 659; Bilbo *v.* Henderson, 21 Iowa 56; Buell *v.* Ball, 20 Iowa 282; Buell *v.* Schaab, 39 Iowa 293; Hershey *v.* Fry, 1 Iowa 593; 2 Desty on Taxation, p. 805; Enos *v.* Bemis, 61 Wis. 656; Power *v.* Kindschi, 58 Wis. 539; 46 Am. Rep. 652; Kaehler *v.* Dobberpuhl, 60 Wis. 256; Vocht *v.* Reed, 70 Ill. 491; Mt. Carbon, etc., R. Co. *v.* Andrews, 53 Ill. 176; McClaughry *v.* Cratzenberg, 39 Ill. 117; Heagle *v.* Wheeland, 64 Ill. 423; Adams *v.* Davis, 109 Ind. 10; Maple *v.* Vestal, 114 Ind. 325; Mowrer *v.* Helferstine, 80 Mo. 23.

Void Tax.—The statute of *Michigan*, which provides that replevin shall not lie for any property taken by virtue of any warrant for the collection of any tax assessment, or fine, in pursuance of any law of this State, must be construed as applying only to cases in which a valid tax might, by possibility, have been imposed and collected by regular and proper proceedings; and in cases where it is impossible for a valid tax to have been levied, the fact that the tax warrant was regular on its face affords no

face,[1] or if the property levied upon is that of a third person, replevin may be maintained.[2] It may also be maintained when the defendant in the tax warrant has tendered the amount of the taxes before bringing the action.[3] The tender must, however, be made before action brought.[4] Such an action may also be

protection to the officer making the levy. LeRoy *v.* East Saginaw City R. Co., 18 Mich. 233; 100 Am. Dec. 162; Adams *v.* Hubbard, 30 Mich. 104; McCoy *v.* Anderson, 47 Mich. 502.

Same doctrine sustained in Atlantic, etc., R. Co. *v.* Cleino, 2 Dill. (U. S.) 175. See also Stoddard *v.* Gilman, 22 Vt. 568.

A tax-book authenticated by the seal of the court, under which a tax collector is authorized by statute to seize and sell property to enforce the collection of taxes, is process, within the meaning of *Missouri* Rev. St. 1889 § 7479, which limits the right to bring an action of replevin to cases where the property "has not been seized under any process, execution or attachment against the property of the plaintiff." State *v.* Spiva, 42 Fed. Rep. 435.

1. Wright *v.* Briggs, 2 Hill (N. Y.) 77; Hill *v.* Wright, 49 Mich. 229; Atlantic, etc., R. Co. *v.* Cleino, 2 Dill. (U. S.) 175; Buell *v.* Ball, 20 Iowa 282; Dudley *v.* Ross, 27 Wis. 679; 2 Desty on Taxation, p. 804.

In *Wisconsin*, where property has been taken by virtue of a tax warrant void upon its face, it may be replevied, but the plaintiff cannot claim the immediate delivery of the property. Dudley *v.* Ross, 27 Wis. 679.

A tax payer cannot maintain replevin for personal property seized, for the payment of taxes, on the ground that part of the taxes were illegally assessed, if any portion of the unpaid taxes were properly assessed and due. Emerick *v.* Sloan, 18 Iowa 139; Brackett *v.* Whidden, 3 N. H. 17.

Where the plaintiff in replevin claimed that the seizure upon a tax warrant was void, for the reason that the amount of tax did not appear upon the warrant, the dollar sign not having been placed before the figures, it was held that the omission of the dollar mark did not invalidate the warrant. American Tool Co. *v.* Smith, 32 Hun (N. Y.) 121.

The fact that a levy is excessive and that it so appears upon the face of the tax warrant, does not entitle the person against whom it was made, to maintain replevin for the property levied upon. Mowrer *v.* Helferstine, 80 Mo. 23.

Property which has been levied upon for taxes, outside of the district in which the taxes were assessed, can be retaken by the action of replevin. McKay *v.* Batchellor, 2 Colo. 591.

If a collector of taxes keeps property, which he has seized on his warrant, beyond the time within which it could be sold, he thereby becomes a trespasser *ab initio;* and the owners may replevy it. Brackett *v.* Vining, 49 Me. 356; Farnsworth Co. *v.* Rand, 65 Me. 19.

2. Stockwell *v.* Vietch, 15 Abb. Pr. (N. Y.) 412; Neal *v.* O'Brien, 7 Hun (N. Y.) 371: Hallock *v.* Rumsey, 22 Hun (N. Y.) 89; Travers *v.* Inslee, 19 Mich. 98; Hill *v.* Wright, 49 Mich. 229; Daniels *v.* Nelson, 41 Vt. 161; 98 Am. Dec. 577.

The fact that a tax upon the property of the wife was assessed and entered upon the tax roll against her husband will not render unlawful the seizure of the property upon a tax warrant against the husband. Enos *v.* Bemis, 61 Mich. 656; Kachler *v.* Dobberpuhl, 61 Wis. 256; Maple *v.* Vestal, 114 Ind. 325.

Illinois.—The action does not lie in *Illinois* to recover property taken by virtue of a tax warrant, belonging to some person other than the defendant in the tax warrant. Vocht *v.* Reed, 70 Ill. 491. In this case a distinction is made between the two clauses of the *Illinois* statute relating to affidavits in the action of replevin; one of which reads, "and that the same has not been taken for any tax assessment or fine levied by virtue of any law of this State;" and the other, "nor seized under any execution or attachment against the goods and chattels of such plaintiff liable to execution or attachment." See also Treat *v.* Staples, 1 Holmes (U. S.) 1.

3. Miller *v.* McGehee, 60 Miss. 904. The plaintiff must show a continuous tender up to, and during the trial in order to recover. Miller *v.* McGehee, 60 Miss. 904.

4. Busby *v.* Noland, 39 Ind. 234;

maintained against one who purchases the property at a sale under the tax warrant.[1] The same rule applies to property levied for a tax due under an act of Congress as to that levied for State taxes.[2] The same rules of law are applicable to property taken for a fine as to that taken for taxes. The person upon whom the fine is assessed cannot replevin property taken in payment for the same,[3] but a party whose property has been sold in payment of a fine may contest the purchaser's title in an action of replevin.[4]

4. Property Distrained or Impounded.—Replevin may be maintained for impounded animals unless the proceedings by which they were placed and kept in the pound were regular and in accordance with the statutes relating to the impounding of animals.[5]

Ryan-Ream Cattle Co. *v.* Slaughter (Utah 1889), 21 Pac. Rep. 997.

1. Power *v.* Kindschi, 58 Wis. 539; 46 Am. Dec. 652.

2. O'Reilly *v.* Good, 42 Barb. (N.Y.) 521.

3. Martin *v.* Mott, 12 Wheat. (U. S.) 19.

4. Heagle *v.* Wheeland, 64 Ill. 423.

5. Anderson *v.* Worley, 104 Ind. 165; Clark *v.* Stipp, 75 Ind. 114; Barnes *v.* Tannehill, 7 Blackf. (Ind.) 604; Marx *v.* Woodruff, 50 Mich. 361; Bertwhistle *v.* Goodrich, 53 Mich. 457; Marx *v.* Woodruff, 51 Mich. 605; Morse *v.* Reed, 28 Me. 481; Holcomb *v.* Davis, 56 Ill. 413; Erlinger *v.* Boneau, 51 Ill. 94; Bills *v.* Kinson, 21 N. H. 448; Osgood *v.* Green, 33 N. H. 318; Kimball *v.* Adams, 3 N. H. 182; McIntire *v.* Marden, 9 N. H. 288; Brown *v.* Smith, 1 N. H. 36; Adams *v.* Adams, 3 Pick. (Mass.) 384; Armbruster *v.* Wilson, 43 Hun (N. Y.) 261. See IMPOUNDING, vol. 10, p. 194.

If a pound keeper drive from the pound to his barn or pasture, creatures which have been legally impounded, for the purpose of more conveniently furnishing them with food and drink, he thereby loses his legal control over them. Bills *v.* Kinson, 21 N. H. 448.

Cattle taken in the inclosure of a party cannot be impounded for the mere nominal trespass, and where cattle were impounded, and their appraiser, appointed under the provisions of the statute, decided that no damage was done, it was held that replevin against the impounder could be maintained for the cattle. Osgood *v.* Green, 33 N. H. 318.

Where cattle have been taken *damage-feasant*, if notice be not given as the statute requires, the omission is a nonfeasance, which does not render the first taking unlawful, but the subsequent detention of the cattle will be deemed unlawful. Kimball *v.* Adams, 3 N. H. 182.

An action of replevin will lie to recover cattle seized and held for the payment of damages done by them to crops upon inclosed land, if the fence through which they broke was not a lawful fence. Clark *v.* Stipp, 75 Ind. 114, Blizzard *v.* Walker, 32 Ind. 437. See Johnson *v.* Wing, 3 Mich. 163.

The question whether a distrainor had a lawful fence may be decided in an action of replevin brought against the distrainor for the animal distrained. Syford *v.* Shriver, 61 Iowa 155. See also Clark *v.* Stipp, 75 Ind. 114.

Where cattle were illegally distrained and the owner forcibly retook them, the distrainor could not maintain replevin for them. Taylor *v.* Welby, 36 Wis. 42.

If the distrainor's taking were legal he may maintain replevin for the property, if it be taken from him by the owner before his charges are paid. Ford *v.* Ford, 3 Wis 399.

The statute of *Michigan* giving a writ of replevin to one whose beasts are distrained or impounded, to obtain satisfaction for any damage alleged to have been done by them, provides for a special proceeding; and expressly negatives a remedy by replevin, in any other manner than is therein provided. Johnson *v.* Wing, 3 Mich. 163; Campau *v.* Konan, 39 Mich. 362; Hamlin *v.* Mack, 33 Mich. 103; Marx *v.* Woodruff, 50 Mich. 361.

A mere unfounded claim that they had been distrained in good faith will not defeat a general action of replevin. Campau *v.* Konan, 39 Mich. 362.

The action of replevin will lie to recover property taken by way of distress for rent, provided there is nothing whatever due.[1] In such an action, the tenant may maintain his suit by showing that there have been breaches of the covenant by the landlord which have caused damages equal to the amount of rent due.[2] Replevin will lie to recover property taken by way of distress, or animals taken *damage-feasant*, if tender of the rent[3] or of damages[4] is made before bringing the action. It will not lie when a stranger, having no title to the property, attempts to bring it upon the ground that the goods were not subject to distress.[5]

5. Property Replevied.—Replevin lies for property replevied at

Where a horse was impounded under a city ordinance against cattle running at large, the owner cannot maintain a possessory warrant against the city marshal. King *v.* Ford, 70 Ga. 628.

A general action of replevin is the proper remedy to recover possession of cattle distrained *damage-feasant* where defendant has not acted in good faith in making the distraint, but has himself given opportunity for the trespass by his failure to build his portion of a line fence according to agreement with plaintiff. Cox *v.* Chester, 77 Mich. 494.

An action of replevin cannot be maintained against an impounder, to obtain the restoration of animals, lawfully impounded, under the act relating to the restraining of swine, but which, without his knowledge, the pound-keeper, after a tender of the poundage fees, unlawfully detains. The pound keeper, in such a case, is not the agent of the impounder. Hall *v.* Hall, 24 Conn. 358.

The defendant's agent took two of the plaintiff's cattle into custody under ch. 193 of the Laws of 1872. The next day, and before the defendant had any knowledge of the same, he being twelve miles away, the plaintiff's agent demanded of the defendant's agent the surrender of the cattle; and tendered to the defendant's agent at the time, a sufficient amount of money to pay all damages and legal charges, and the defendant's agent refused the surrender of the cattle upon the ground that he had no authority to surrender them. On that same day, the defendant was informed by his agent in respect to what had happened. The defendant gave no notice to the plaintiff's agent, or to the plaintiff with respect to the matter, and did not within five days thereafter, or at any other time, commence any action for damages. Six days after the cattle were taken up the plaintiff demanded the cattle of the defendant, and he in effect, though not in specific words, refused to surrender the cattle, except upon a condition which was not in law any excuse or justification for keeping them; and afterwards the plaintiff commenced an action of replevin to recover the cattle. *Held*, that the action might be maintained. Johns *v.* Head, 41 Kan. 282.

1. Hare *v.* Stegall, 60 Ill. 380; 1 Chit. Pl. (16th Am. ed.) 184; Towns *v.* Boarman, 23 Miss. 186.

Replevin will not lie for chattels distrained for rent in arrear and sold by the bailiff, after an election and appraisement under the Debtor's Act of 1842. The remedy of the claimants is against the party depriving them of their rights. Bonsall *v.* Comly, 44 Pa. St. 442.

The provision of *Kentucky* Rev. Stat., Ch. 56, art. 2, § 28, that a distress for rent may be replevied for three months, etc., is not repealed by the Civil Code, §§ 721, 722. Dean *v.* Ball, 3 Bush (Ky.) 502.

In *Mississippi* a special form of proceeding in replevin is provided for the case of goods taken by way of distress for rent. Kendrick *v.* Watkins, 54 Miss. 495; Maxey *v.* White, 53 Miss. 80.

2. Lindley *v.* Miller, 67 Ill. 244.

3. Helson *v.* Blain, 2 Bailey (S. Car.) 168.

4. Nelson *v.* Smith, 26 Ill. App. 57.

Defective Fence.—It will also lie if the close upon which the cattle trespassed were inclosed by a defective fence. Cox *v.* Chester, 77 Mich. 494.

5. Wheeler *v.* Dixon, 51 Miss. 550.

the suit of any person other than the defendant in the first suit.[1] The defendant, however, cannot maintain it while the action is pending.[2] When the property has been delivered to the plaintiff in the first action, it may be taken from him by a third person claimant in the action of replevin.[3] The fact that a judgment has been rendered in favor of a plaintiff will not hinder a stranger to the first action from maintaining another suit against the successful party.[4] An action of replevin not tried on the merits, which is not decided for the plaintiff, is no bar to a second action between the same persons for the property.[5] Where the property has been taken by writ of replevin, it cannot be levied upon by judicial process.[6]

1. Ilsley *v.* Stubbs, 5 Mass. 280; Kelleer *v.* Clark, 135 Mass. 45; Dearmon *v.* Blackburn, 1 Sneed. (Tenn.) 390; 60 Am. Dec. 160; Hogan *v* Deuell, 24 Ark. 216; Davis *v.* Gambert, 57 Iowa 239. See also Powell *v.* Bradlee, 9 Gill & J. (Md.) 220. See Andrews *v.* McLeod, 66 Miss. 348.

One whose property has been replevied by a writ against his agent or bailee, can retake it by replevin from the plaintiff in the first action, even during the pendency of that action. White *v.* Dolliver, 113 Mass. 400; 18 Am. Rep. 502.

While an appeal in a replevin suit is pending, the plaintiff in the suit cannot take the property from the possession of the sheriff by an action of replevin. Pollard *v.* Stovall, 60 Miss. 266.

2. Bonney *v.* Smith, 59 N. H. 411; Hines *v.* Allen, 55 Me. 114; Morris *v.* De Witt, 5 Wend. (N. Y.) 71; Cromwell *v.* Owings, 7 Har. & J. (Md.) 55; Dearmon *v.* Blackburn, 1 Sneed (Tenn.) 390; 60 Am. Dec. 160; Hogan *v.* Deuell, 24 Ark. 216.

No person deriving title from the defendant in the action of replevin, made after the property has been replevied from him, can maintain replevin against the plaintiff in the first suit during its pendency. Hines *v.* Allen, 55 Me. 114; 92 Am. Dec. 574.

In Hines *v.* Allen, 55 Me. 114; 92 Am. Dec. 574, the court by Kent, J., referring to the rule stated in the text, said: "The reasons for this rule are obvious. Such a course would lead to confusion, multiplicity of suits, and unnecessary complications. It cannot be necessary to vindicate the rights of either party. Those rights can be fully determined in the first suit."

B brought suit in replevin against F, who was a member of a firm, and N, who was its agent, and in possession of the property replevied. The firm then brought replevin against B for the same property delivered to him on the first writ, and joined three other defendants with him, and the only question in either suit was whether B or the firm were the owners of the property. *Held*, that the second suit was a cross replevin and could not be maintained, and that the parties in the second suit not being identical with those in the first is not important, unless the new parties claim some interest in the property or right to the same differing from or independent of the parties to the first suit. Fisher *v.* Busch, 64 Mich. 180.

3. Sanborn *v.* Leavitt, 43 N. H. 473.

4. Frank *v.* Jenkins, 22 Ohio St. 597.

5. Daggett *v.* Robins, 2 Blackf. (Ind.) 415; 21 Am. Dec. 752; Walbridge *v.* Shaw, 7 Cush. (Mass.) 560; Morton *v.* Sweetser, 12 Allen (Mass.) 134; Hackett *v.* Bonnell, 16 Wis. 471.

Replevin does not lie for a horse, when the plaintiff has previously replevied him in a suit which was dismissed for a defect in the replevin bond, but no judgment for return was ever rendered, and the plaintiff returned the horse to the defendant's agent, unless the defendant authorized such return, or subsequently recognized and approved of it. Way *v.* Barnard, 36 Vt. 366.

6. Goodheart *v.* Bowen, 2 Ill. App. 578; Milliken *v.* Selye, 6 Hill (N. Y.) 623; Acker *v.* White, 25 Wend. (N. Y.) 614. See People *v.* Superior Court, 19 Wend. (N. Y.) 701; EXECUTIONS, vol. 7, p. 129, n. 6.

VIII. JURISDICTION.—At common law, the original writ in an action of replevin issued out of a court of chancery, and could be sued out only at Westminster. In order to do away with this inconvenience, the statute of Marlbridge was enacted which allowed the sheriff to take the property in replevin without the necessity of proceeding by original writ.[1] In the *United States*, it is usually provided by statute before what tribunal the action shall be brought, and the statutory provisions must be strictly observed.[2] Want of jurisdiction must be specially

1. 5 Wait's Actions and Defenses 458.

2. Anderson *v.* Hapler, 34 Ill. 436; 85 Am. Dec. 318; Baker *v.* Dubois, 32 Mich. 92; Parsell *v.* Genesee Circuit Judge, 39 Mich. 542; *New York* Code Civ. Proc., § 2919; Williams *v.* Welch, 5 Wend. (N. Y.) 290; Rev. Code *Mississippi*, § 2634. See JUSTICE OF THE PEACE, vol. 12, p. 492.

In *Mississippi* orginal jurisdiction in replevin is with a justice and not with the circuit court, if the property claimed does not exceed $150 in value. That the damages allowed for the detention carry the verdict above $150 makes no difference. And presumably the value is that found by the verdict. Higgins *v.* Deloach, 54 Miss. 498; Stephens *v.* Eiseman, 54 Miss. 535.

But if the case shows that plaintiff had reason to believe and did believe, and alleged that the value was above $150, the jurisdiction of the circuit court may be sustained,notwithstanding a verdict for less than $150. Stephen *v.* Eiseman, 54 Miss. 535; Fenn *v.* Harrington, 54 Miss. 733.

The Code of *South Carolina* gives jurisdiction to justices of the peace in actions to recover personal property the value of which does not exceed one hundred dollars. Dillard *v.* Samuels, 25 S. Car. 318.

The territorial statute of *Wisconsin* on the subject of replevin requires the process in that action to be issued in the name of the United States; if not so issued no jurisdiction is acquired. Roach *v.* Moulton, 1 Chand. (Wis.) 187.

Illinois.—In replevin before a justice of the peace, there must be an affidavit sworn to or affirmed, containing all the statutory requirements, to give the justice jurisdiction to issue the writ, and this must affirmatively appear, as nothing can be presumed in favor of his jurisdiction. Evans *v.* Bouton, 85 Ill. 579.

Minnesota.—In *Minnesota*, in an action of replevin before a justice, the defendant, by answering without objecting to defects in the writ, or in the papers on which it is sued, waives such objections, and gives the justice jurisdiction to try the action. McKee *v.* Metraw, 31 Minn. 429. See St. Martin *v.* Desnoyer, 1 Minn. 41.

An informality not sufficient to render void the affidavit required as the foundation of a replevin suit in a justice's court, will not prevent the taking of jurisdiction. Carlson *v.* Small, 32 Minn. 492.

Wisconsin.—If the affidavit upon which a writ of replevin issues from a justice's court, fails to state the value of the property or states it over $200, the justice takes no jurisdiction, whatever the value may in fact be, and the proceeding is *coram non judice.* Darling *v.* Conklin, 42 Wis. 478.

Vermont.—A justice of the peace has jurisdiction in *Vermont*, in replevin for goods and chattels unlawfully taken or detained of value not exceeding $20. Tripp *v.* Leland, 39 Vt. 63. See Glover *v.* Chase, 27 Vt. 533.

Massachusetts.—In *Massachusetts* a justice has jurisdiction of all actions of replevin where the value of the property claimed does not exceed twenty dollars. Sackett *v.* Kellogg, 2 Cush. (Mass.) 88. The superior court has no jurisdiction of an action of replevin, the parties to which have indorsed upon the writ an agreement that the value of the property replevied is less than twenty dollars. Leonard *v.* Hannon, 105 Mass. 113; King *v.* Dewey, 11 Cush. (Mass.) 218. The actual value of the property at the time of the suing out of the writ determines the jurisdiction. Davenport *v.* Burke, 9 Allen (Mass.) 116.

Michigan.—If a writ of replevin is sworn out in a justice's court for less than one hundred dollars the justice may give judgment for the full value of

pleaded.[1] When the jurisdiction depends upon the value of the property, it is the value alleged in the writ and not the actual value, which determines the jurisdiction.[2] The damages claimed in such

the property although it may exceed that sum. Henderson *v.* Desborough, 28 Mich. 170; Humphrey *v.* Bayn, 45 Mich. 565. See also Hecklin *v.* Ess, 16 Minn. 51.

Replevin for a fox-skin worth one dollar and a half will not lie in the circuit court. Kittridge *v.* Miller, 45 Mich. 478.

Indiana. — In *Indiana* the justice has jurisdiction in replevin of goods which do not exceed $200 in value, or where not more than $200 damages are claimed. Harrell *v.* Hammond, 25 Ind. 104; Deam *v.* Dawson, 62 Ind. 22. See Perkins *v.* Smith, 4 Blackf. (Ind.) 299.

Where, in an action of replevin commenced before a justice of the peace, the property is removed to another county before service of the writ, this does not affect the jurisdiction of the justice before whom the action was commenced. Craft *v.* Franks, 34 Iowa 504. *Compare* St. Martin *v.* Desnoyer, 1 Minn. 41.

Kansas. — Where an action of replevin is commenced before a justice by a resident of the county against a non-resident, and defendant is properly served in the county where the action is commenced, but the property is not obtained, and has never been wrongfully detained in that county, but has been and is wrongfully detained by the defendant in the county where he resides, the court has jurisdiction to determine the case as one for damages only under *Kansas* Comp. Laws, § 4622, providing for such trial when the property has not been taken. Huckell *v.* McCoy, 38 Kan. 53.

The 11th section of the Judiciary Act of 1789, says: "Nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless the suit might have been prosecuted in such court, to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange." This clause has no application to the case of a suit by the assignee of a chose in action to recover possession of the thing in specie, or damages for its wrongful caption or detention. Therefore, where an assignee of a package of bank notes brought an action of replevin for the package, the action can be maintained in the circuit court, although the assignor could not himself have sued in that court. Deshler *v.* Dodge, 16 How. (U. S.) 622.

1. Keller *v.* Miller, 17 Ind. 206; Tyler *v.* Bowlus, 54 Ind. 333.

2. Chilson *v.* Jennison, 60 Mich. 235; Burt *v.* Addison, 74 Mich. 730; Henderson *v.* Desborough, 28 Mich. 170; Eldred *v.* Wollaoer, 46 Mich. 241; Darling *v.* Conklin, 42 Wis. 478; Merrill *v.* Butler, 18 Mich. 294; Dinnen *v.* Baxter, 18 Mich. 457; Carew *v.* Matthews, 41 Mich. 576; Matlack *v.* Brown, 2 Miles (Pa.) 15; Gray *v.* Jones, 1 Head (Tenn.) 542; Gottschalk *v.* Klinger, 33 Mo. App. 410. See JUSTICE OF THE PEACE, vol. 12, p. 427.

Where it appeared that the plaintiff in an action of replevin had shortly before bringing the suit, bought the property for more then $100, and defendant had taken it from his possession without his consent; it was held, that the plaintiff might well have estimated his cause of action as beyond the jurisdiction of a justice, and so brought suit in the circuit court, though the appraisal placed value at $90. Eldred *v.* Woolaver, 46 Mich. 241.

On appeal from the judgment of a justice in an action of replevin, the jury not having found the value of the property, the value stated in the affidavit must govern in determining whether there shall be a trial *de novo* in the circuit court. Bradley *v.* Morse, 21 Wis. 680.

The jurisdiction of the action of replevin is made, by the *Massachusetts* statute to depend, not upon the allegations of the writ, or the estimate of the appraisers, but upon the actual value of the goods. Davenport *v.* Burke, 9 Allen (Mass.) 116. See also Sandford *v.* Scott, 38 Conn. 244.

In an action of replevin, the plaintiff may fix an estimate of value upon the property at a less sum than the real value, and within the jurisdiction of a justice of the peace. But he is bound by this valuation voluntarily made, and if the property is not restored to his possession by the writ, he cannot recover, on the trial, a greater amount than the value thus fixed and laid in the warrant. Gray *v.* Jones, 1 Head (Tenn.) 542.

cases are not part of the value.[1] Property in the custody of the United States marshal cannot be taken by the sheriff of a State court under process from that court, although the possession of the marshal be wrongful and not by virtue of a proceeding *in rem*.[2] A third party claiming the property as his own is in no better position in this respect than the defendant in the execution.[3] But when the consent of the Federal court is obtained to the taking of the property by the State officers, it may be replevied from the custody of the marshal.[4] Replevin will also lie from the State courts to recover property wrongfully seized on Federal process, if its value is below the jurisdictional limit of the Federal court.[5] When authorities under a State and Federal process

Missouri.—In a replevin suit before a justice of the peace, the value alleged in the plaintiffs statement and affidavit is conclusive as to the jurisdiction of the justice. Gottschalk *v.* Klinger, 33 Mo. App. 410, *Missouri* Rev. Stats., § 2895.

1. Annis *v.* Bigney, 28 Mo. 247.

In an action of replevin before a justice of the peace, the property was seized by the constable, and appraised at less than $200, but the plaintiff failing to give a replevin undertaking within the time provided by law, the property was returned to the defendant. The action "proceeded as one for damages only" to trial, to the justice without a jury, who found the value of plaintiff's interest in the property to be $260; and upon plaintiff's remitting from her damages, judgment was rendered in her favor for $200. This judgment was affirmed on error. Hill *v.* Wilkinson, 25 Neb. 103. This case was decided under § 1039 of the Code of *Nebraska*, which provides that "whenever the appraised value of the property so taken shall exceed $200, the justice shall certify the proceeding upon the said writ to the district court of his county," etc.

2. Smith *v.* Bauer, 9 Colo. 380; Hannebutt *v.* Cunningham, 3 Ill. App. 353; Munson *v.* Harroun, 34 Ill. 422; 85 Am. Dec. 316; Freeman *v.* Howe, 24 How. (U. S.) 450; Feusier *v.* Lammon, 6 Nev. 209; Williams *v.* Chapman, 60 Iowa 57. See also Lewis *v.* Buck, 7 Minn. 104; 82 Am. Dec. 73.

See Davidson *v.* Weldron, 31 Ill. 120; 83 Am. Dec. 206, as to the competency of State court to decide upon the validity of such proceeding.

If the property has been taken from the marshal by writ of replevin the State court has jurisdiction to render judgment for a return of the property to the marshal. Feusier *v.* Lammon, 6 Nev. 209; Lewis *v.* Buck, 7 Minn. 104; 82 Am. Dec. 73; Booth *v.* Ableman, 16 Wis. 485; Booth *v.* Ableman, 18 Wis. 495; Booth *v.* Ableman, 16 Wis. 460. See Collamer *v.* Page, 35 Vt. 387.

Where a seizure was made under the eleventh section of the embargo act of April, 1808, it was determined that no power is given by law to detain the cargo if separated from the vessel and that the owner had a right to take the cargo out of the vessel, and to dispose of it in any way not prohibited by law, and in case of its detention, to bring an action of replevin therefor in the State court. Slocum *v.* Mayberry, 2 Wheat. (U. S.) 1. See 1 Kent. Com. 410.

The rule which protects property in the hands of the United States marshal from being taken by writ of replevin in the hands of a State officer does not prevent the marshal from surrendering an illegal levy voluntarily. Weber *v.* Henry, 16 Mich. 399.

Replevin will be against a United States marshal, in the State courts, for goods taken by him on execution which were exempt by the State law. Gilman *v.* Williams, 7 Wis. 329; 76 Am. Dec. 219.

3. Covell *v.* Heyman, 111 U. S. 176; Munson *v.* Harroun, 34 Ill. 422; 85 Am. Dec. 316.

Compare Heyman *v.* Covell, 44 Mich. 332; 38 Am. Dec. 272; Cooper *v.* Tompkins, 43 Mich. 406; Gilman *v.* Williams, 7 Wis. 329; 76 Am. Dec. 219.

4. Smith *v.* Bauer, 9 Colo. 380; Mitchell *v.* Smith, 13 Colo. 170; Smith *v.* Jensen, 13 Colo. 213.

5. Carew *v.* Matthews, 41 Mich. 576.

on which property has been seized, conflict, the question as to which authority shall for the time prevail depends upon the question which jurisdiction had first attached.[1]

When the amount for which the writ of replevin is to be issued exceeds the jurisdiction of a justice, he cannot approve the bond, issue the writ, or take any other action in the premises.[2] The fact that an officer holds property under process issued by the circuit court, will not deprive the district court of jurisdiction in an action of replevin against the officer.[3] When the judgment of a justice in the action of replevin is reversed, it is competent to the superior court to award the possession of the property to the party entitled thereto.[4]

IX. Venue in Actions of Replevin—(See also VENUE).—The general rule as to the venue of actions is, that actions concerning real property, whether for title, or for injuries to the possession or property, as by trespass, or by nuisances, are local; while transitory actions embrace all personal actions, the principal facts of which might have been supposed to happen anywhere.[5] Replevin, though it might seem to come within the latter part of the rule, has been held a local action in most of these States,[6]

1. Freeman *v.* Howe, 24 How. (U. S.) 450; Peck *v.* Jenness, 7 How. (U. S.) 612. See JURISDICTION, vol. 12, p. 292.

The defendant, the sheriff of Rock Island county, Illinois, seized a certain horse by virtue of a writ of attachment issued out of the State court. The plaintiff instituted a suit of replevin for the horse in the Federal court. The defendant pleaded property in another and the case was tried on its merits and the issue was found for the plaintiff. *Held*, that after trial it was too late to deny the jurisdiction of the Federal court, on the ground that the State court had acquired prior jurisdiction. Gilman *v.* Wheelock, 10 Biss. (U. S.) 430.

2. Caffrey *v.* Dudgeon, 38 Ind. 512; 10 Am. Rep. 126; Darling *v.* Conklin, 42 Wis. 478; Rosen *v.* Fischel, 44 Conn. 371.

He can only render judgment for costs. Jacobs *v.* Parker, 7 Baxt. (Tenn.) 434. See also Burdett *v.* Doty, 38 Fed. Rep. 491.

When a court has adjudged without appeal being taken, that it has no jurisdiction of a replevin suit, its order that the property replevied be returned is void. Elder *v.* Greene (S. Car. 1891), 13 S. E. Rep. 323.

3. Ramsden *v.* Wilson, 49 Iowa 211; Seaton *v.* Higgins, 50 Iowa 305.

Where goods are taken under an attachment issued from the superior court of Cook county, Illinois, which belong to one not a party to the attachment, the owner being entitled to their possession, may bring replevin for them in either the superior or circuit court of that county, as he may choose. Samuel *v.* Agnew, 80 Ill. 553.

When a vessel has been seized under an act for the protection of clams and oysters, and the proceeding is pending before the two justices, and the vessel is replevied by the owner by writ out of the circuit court, a plea to the jurisdiction of such circuit court is proper. Day *v.* Compton, 37 N. J. L. 514.

4. Peebles *v.* Morris, 77 Ga. 536.

5. 4 Min. Insts. (2nd ed.) 1061; 1 Chit. Pl. (16th Am. ed.) 281.

6. Atkinson *v.* Holcomb, 4 Cow. (N. Y.) 45; Williams *v.* Welch, 5 Wend. (N. Y.) 290; Emmett *v.* Briggs, 21 N. J. L. 53; Robinson *v.* Mead, 7 Mass. 353: Sleeper *v.* Osgood, 50 N. H. 331; Strong *v.* Lawler, 37 Conn. 177. See Gardner *v.* Humphrey, 10 Johns. (N. Y.) 53.

If a defendant in replevin omits to plead *non cepit*, or *non cepit in alio loco*, but pleads property in himself or another, the place of taking the goods is not material. Emmett *v.* Briggs, 21 N. J. L. 53.

Georgia.—In *Georgia* the action may be brought in any county in which the

and also in *England.*[1] This is especially true when the action is brought for property distrained for rent,[2] and some of the

property is found. Jordan *v.* Owen, 67 Ga. 616.

Where the affidavit of a possessory warrant alleged that the defendant was resident in a certain county, and that he had possession of the property claimed, it was held that it would be presumed that the property was in said county. Clanton *v.* Ganey, 63 Ga. 331.

Pennsylvania.—In replevin for articles not distrained, it is sufficient if the taking be laid in the county. Muck *v.* Folkroad, 1 Browne (Pa.) 60.

Missouri. — The action must be brought in the county in which the property is found. Allen *v.* St. Louis, etc., R. Co., 38 Mo. App. 294. See Crocker *v.* Mann, 3 Mo. 472; 26 Am. Dec. 684.

Indiana.—The action may be brought in any county where the defendant resides. Hodson *v.* Warner, 60 Ind. 214. And before any justice in that county without reference to the fact that the defendant may reside in another township. Test *v.* Small, 21 Ind. 127; Beddinger *v.* Jocelyn, 18 Ind. 325. See also Jocelyn *v.* Barrett, 18 Ind. 128. It is not necessary that the place where the property is detained be proved by direct evidence, but it may be inferred from circumstances. Louthain *v.* May, 77 Ind. 109.

In *Georgia* the action may be brought in any county in which the property is found. Jordan *v.* Owen, 67 Ga. 616.

Iowa.—An action of replevin may be brought either in the county where the defendant resides or where the property is situated, at the election of the plaintiff, but the venue cannot properly be laid in a county other than one of these, upon an allegation that the property was wrongfully removed therefrom by the defendant. Hibbs *v.* Dunham, 54 Iowa 559.

Evidence offered in support of a motion for change of venue, must be admitted. Parker *v.* Norris, 56 Iowa 295.

The language of § 3853 of the *Iowa* Rev. Code, providing that actions of replevin may be commenced in any county and township wherein any portion of the property is found, is construed to relate to the location of the property at the time the action is commenced, and not to that where the property is found when seized under the writ. Craft *v.* Franks, 34 Iowa 504. See also Porter *v.* Dalhoff, 59 Iowa 459.

Where an action of replevin is begun in the county where the property is, but against a defendant residing in another county, a failure to secure the property under the writ does not defeat the jurisdiction of the court; and in such case the defendant is not entitled to have the cause removed to the county of his residence. Laughlin *v.* Main, 63 Iowa 580.

Kansas.—Where an action of replevin is commenced before a justice of the peace by a resident of the county against a non-resident, if the defendant is properly served with summons in the county where the action is commenced, although the property is not obtained, and has never been wrongfully detained in the county where the action is commenced, but has been and is wrongfully detained by the defendant in the county where the defendant resides, the court has jurisdiction to hear and determine the case as one for damages only. Huckell *v.* McCoy, 38 Kan. 53.

Wisconsin.—The action of replevin is transitory in *Wisconsin*, except where the property has been distrained. Young *v.* Lego, 38 Wis. 206.

Mississippi. — Replevin may be brought in the county in which the goods are found, without regard to the county of the residence of the defendant. Ellison *v.* Lewis, 57 Miss. 588.

The action may be instituted in the circuit court of any county or in the justice's court of any district, where the defendant or the goods may be found, and all proper process may be issued to other counties, or districts, as the case may be. Code of *Mississippi*, § 2634. See Turner *v.* Lilly, 56 Miss. 576.

Under the foregoing section a justice of the peace of one district cannot issue a writ of replevin for property held by a defendant in another district returnable before a justice in such district. Richardson *v.* Davis, 59 Miss. 15.

Maine.—Replevin must be brought in the county where the original taking was, or where the chattel is detained. Pease *v.* Simpson, 12 Me. 261.

1. 1 Saund. 347, note (1); 1 Chit. Pl. (16 Am. ed.) 281.

2. Strong *v.* Lawler, 37 Conn. 177.

older authorities held that the close upon which the distress was levied must be described by name or by abuttals,[1] but such is not the modern doctrine.[2] An allegation of venue in the complaint is necessary to the jurisdiction in an action of replevin,[3] but the venue is sufficiently laid, if it appear in the margin of the statement filed with the justice.[4]

X. Proceedings in the Action.—See INSTRUCTIONS, vol. 11, p. 236; OPEN AND CLOSE, vol. 17, p. 205.

1. Demand.—See DEMAND, vol. 5, p. 528*h*.

2. Affidavit in Replevin—(See AFFIDAVITS).[5]—At common law the writ of replevin was issued out of the court of chancery, and could be sued out only at Westminster. The statute of Marlbridge, however, directed that the sheriff, immediately upon plaint to him made, should proceed to replevy the goods.[6] The affidavit of the modern statutes is the same thing as the plaint mentioned in the statute of Marlbridge.[7] In cases where the object of the action is to obtain a delivery of the goods, an affidavit complying in terms with the statutes is a condition precedent,[8] but where the immediate possession at the beginning of

The reasons for this rule are not satisfactory, and it should not be extended. In a declaration in replevin for cattle impounded it is sufficient to allege the town where they were taken. Strong *v.* Lawler, 37 Conn. 177.

1. Potten *v.* Bradley, 2 M. & P. 78; 17 E. C. L. 203.

Where the defendant in avowry states the precise house or place, the plaintiff may traverse the place in the avowry, though not described with certainty in his declaration, but where the plaintiff does not traverse the place, but joins issue on the tenancy, the *locus in quo* is rendered immaterial, and the plaintiff may show the taking of the goods in another place than the house demised, especially where the goods were removed from such house, leaving the rent unpaid, and were seized within thirty days thereafter. Gardner *v.* Humphrey, 10 Johns. (N. Y.) 53.

2. Strong *v.* Lawler, 37 Conn. 177. See also Gipson *v.* Bump, 30 Vt. 175.

The declaration in an action of replevin stated the taking of the property to be from the dwelling house of the plaintiff in Gay street. *Held*, that evidence of the defendant's having taken the property in Gay street was sufficient, without proving that he took it from the dwelling house of the plaintiff. Faget *v.* Brayton, 2 Har. & J. (Md.) 350.

No venue is necessary to a demise in an avowry for a distress, etc., in an action of replevin. Davis *v.* Tyler, 18 Johns. (N. Y.) 490.

3. Stiles *v.* James, 2 Wash. Ter. 194; Stoker *v.* Crane, 46 Mo. 264.

But where the sheriff's return shows the property to be within the jurisdiction, the omission in the pleading is cured. Stiles *v.* James, 2 Wash. Ter. 194.

4. Stoker *v.* Crane, 46 Mo. 264.

5. Vol. 1, p. 307.

6. 3 Bl. Com. 146; Cobbey's Law of Replevin 279.

7. Bardwell *v.* Stubbert, 17 Neb. 485; Anderson *v.* Hapler, 34 Ill. 436; 85 Am. Dec. 318.

8. Bardwell *v.* Stubbert, 17 Neb. 485; Wibur *v.* Flood, 16 Mich. 40; 93 Am. Dec. 203; Milliken *v.* Selye, 6 Hill (N. Y.) 623; Berrien *v.* Westervelt, 12 Wend. (N. Y.) 194; Payne *v.* Bruton, 10 Ark. 53; Kehoe *v.* Rounds, 69 Ill. 351; McClaughry *v.* Cratzenberg, 39 Ill. 117; Carlon *v.* Dixon, 12 Oregon 144; Catterlin *v.* Mitchell, 27 Ind. 298; 89 Am. Dec. 501; Dowell *v.* Richardson, 10 Ind. 573; Cure *v.* Wilson, 25 Iowa 205.

The present statutes of *Michigan* contemplate the issuing of the writ of replevin before any affidavit is made. Baker *v.* Dubois, 32 Mich. 92.

In an action of replevin before a justice of the peace, there is no necessity

the action is not asked, the affidavit is not a condition precedent.[1] It is usually made by the plaintiff in replevin, but any one acquainted with the facts may make it on his behalf.[2] The affidavit is required for the benefit of the defendant, and if he does not elect to take advantage of its absence or irregularity, the plaintiff is estopped from so doing. Its absence renders the proceedings voidable only, and not void.[3] The affidavit, as its name imports, must be sworn to or affirmed, in order to sustain proceedings in the action;[4] but it has been held that signing by the plaintiff is not necessary to its validity.[5] Where the defendant does not object to the affidavit before going to trial on the merits, he is not allowed to do so on appeal.[6] The form of

it seems for the plaintiff's affidavit, as such, to state that he claims a judgment for the possession of the property or that he claims damages for the detention thereof, though these statements will not vitiate the affidavit. Eddy *v.* Beal, 34 Ind. 159.

1. Catterlin *v.* Mitchell, 27 Ind. 298; 89 Am. Dec. 501; Hodson *v.* Warner, 60 Ind. 214; Eads *v.* Stephens, 63 Mo. 90; Hamilton *v.* Clark, 25 Mo. App. 428; Bingham *v.* Morrow, 29 Mo. App. 448; Lamont *v.* Williams, 43 Kan. 558; Batchelor *v.* Walburn, 23 Kan. 733; Jarman *v.* Webb, 67 N. Car. 32.

2. Anderson *v.* Hapler, 34 Ill. 436; 85 Am. Dec. 318; Cutler *v.* Rathbone, 1 Hill (N. Y.) 204; Carlon *v.* Dixon, 12 Oregon 144; Nichols *v.* Standish, 48 Conn. 321.

Under §§ 2942–43 of the code of *Alabama*, of 1876, which provide for the bringing of a suit for the recovery of personal chattels *in specie*, and for the making of an affidavit by the plaintiff, his agent or attorney, that the property sued for belongs to the plaintiff, and for the giving by the plaintiff of a bond for costs and damages, as prerequisites to the making of an order for the seizure of the property, an affidavit, in such a suit by the United States, in the circuit court of the United States made by a special agent of the general Land Officer, in which he swears, to the best of his knowledge, information and belief, that the property sued for belongs to the United States, is sufficient. U. S. *v.* Bryant, 111 U. S. 449.

3. Nichols *v.* Standish, 48 Conn. 321.

Appearance and pleading operates as a waiver of the irregularity in issuing a writ of replevin without a sufficient affidavit, as required by the *Illinois* replevin act of 1839. Frink *v.* Flanagan, 6 Ill. 35; Smith *v.* Emerson, 16 Ind. 355; Hyde *v.* Patterson, 1 Abb. Pr. (N. Y.) 248.

The defendant waives an objection to the sufficiency of the plaintiff's affidavit, upon which the property was taken, by giving an undertaking and obtaining a redelivery to himself. Wisconsin M. & F. Ins. Co. Bank *v.* Hobbs, 22 How. Pr. (N. Y.) 494.

4. Kehoe *v.* Rounds, 69 Ill. 351; Cure *v.* Wilson, 25 Iowa 205; Berrien *v.* Westervelt, 12 Wend. (N. Y.) 194.

5. Crist *v.* Parks, 19 Tex. 234; Bloomingdale *v.* Chittenden, 75 Mich. 305.

An affidavit to a petition in replevin, signed "G. W. and R. H.," and sworn to by both plaintiffs, is not objectionable. Hoover *v.* Rhoads, 6 Iowa 505.

An affidavit to a petition and for writ of replevin, signed "F. D. and Co., Per. P. B. M., Agent,' but otherwise in proper form, while the names of the principals should have been omitted, is sufficient. Hershiser *v.* Delone, 24 Neb. 380.

He must sign it in *Connecticut*. Spencer *v.* Bidwell, 49 Conn. 61.

6. Eddy *v.* Beal, 34 Ind. 159; Perkins *v.* Smith, 4 Blackf. (Ind.) 299.

After defendants had obtained a return of the property, the court refused their motion to set aside all the proceedings for insufficiency of plaintiff's affidavits. Nicoll *v.* Pinner, 10 How. Pr. (N. Y.) 376.

The court will refuse a motion by defendant to set aside replevin proceedings because of the alleged insufficiency of the plaintiff's affidavit for obtaining a delivery of the property, where defendant has made no objection to the affidavit until his time to answer has expired, and where his

affidavit in replevin, and what it should contain, is provided by the statutes of the respective States, and they must be strictly followed.[1] The facts upon which the plaintiff rests his action

notice of motion does not specify accurately and closely any irregularity in the affidavit, as required by rule of court 37. Paddock *v.* Guyder, 55 Hun (N. Y.) 612.

1. Westenberger *v.* Wheaton. 8 Kan. 169; Bliss' *New York* Annotated Code, §§ 1694, *et seq.*

Kansas.—The fourth clause of section 177 of the code of *Kansas* requires that the affidavit in replevin to recover the immediate possession of personal property shall state that the property sought to be replevied "was not taken in execution on any order or judgment against said plaintiff, or for the payment of any tax, fine or amercement assessed against him, or by virtue of an order of delivery issued in an action of replevin, or any other mesne or final process issued against said plaintiff." All these facts must be sworn to exist before the order of delivery can be made; and, unless they do exist as facts, the action of replevin cannot be maintained, except in the case of exempt property. Westenberger *v.* Wheaton, 8 Kan. 169; Paul *v.* Hodges, 26 Kan. 225.

An affidavit for an order of delivery in replevin which states that the property in question "was not taken in execution, or under a judgment against the plaintiff," will not be held insufficient because it does not follow the language of the statute in alleging that said property "was not taken in execution on an order or judgment against the plaintiff." Auld *v.* Kimberlin, 7 Kan. 601; Williams *v.* Gardner, 22 Kan. 122.

The affidavit of a plaintiff in replevin is no part of the pleadings, and the facts set forth therein form no part of the issues in the case. Crawford *v.* Furlong, 21 Kan. 698; Hoisington *v.* Armstrong, 22 Kan. 110.

In an action of replevin in a justice's court the plaintiff may, if he chooses, and with the permission of the justice, use and treat his affidavit for the summons and order of delivery as a bill of particulars, if unchallenged. Starr *v.* Hinshaw, 23 Kan. 532.

But if challenged as not being a bill of particulars, it will not suffice. Casterline *v.* Day, 26 Kan. 306.

Wisconsin.—When the affidavit for replevin contains all the averments required by § 135, ch. 120, *Wisconsin* Rev. Stat., it is sufficient; and although it may be necessary for the plaintiff to prove that he has an interest in the property, in order to establish his right to the possession, yet he need not state in the affidavit the nature of such interest. Hass *v.* Prescott, 38 Wis. 146; *overruling* Child *v.* Child, 13 Wis. 17.

In a suit before a justice of the peace to recover personal property, the plaintiff need not prove the averments in his affidavit, that it "had not been taken by virtue of any tax, etc., nor seized under any execution, etc. Carney *v.* Doyle, 14 Wis. 270.

Oregon.—The affidavit in an action forms no part of the pleadings in *Oregon.* Moser *v.* Jenkins, 5 Oregon 447.

Under the *Oregon* statute the affidavit is the foundation of jurisdiction in an action for the recovery of personal property. Carlon *v.* Dixon, 12 Oregon 144.

Illinois.—In *Illinois* the affidavit in the action of replevin should state that the property had not been distrained for taxes assessed. Campbell *v.* Head, 13 Ill. 122.

An affidavit in replevin stated that the plaintiff "being duly sworn, says on oath, that he is lawfully entitled to the possession of 500 barrels of prime mess pork, for which he brings suit in replevin against Horace Burton, and which is about to be replevied, and which said pork is wrongfully detained from this deponent by the said Horace Burton," etc. This was held sufficient. Burton *v.* Curyea, 40 Ill. 320; 89 Am. Dec. 350.

In replevin, the affidavit need not allege that the property claimed was unlawfully taken or detained. Whisler *v.* Roberts, 19 Ill. 274.

Before a writ of replevin can issue, in *Illinois*, the plaintiff, or some one for him, must make affidavit that "the plaintiff in such action is the owner of the property," etc.; and an affidavit made by an agent should be as positive as when made by the plaintiff himself. Frink *v.* Flanagan, 6 Ill. 35.

In replevin for a steam saw-mill and its appurtenances, the affidavit must aver that the property in question is personal estate. Chatterton *v.* Saul, 16 Ill. 149.

Indiana.—In an action of replevin

where the affidavit of the plaintiff did not state whether or not it had been seized under an attachment against his property, the affidavit was held bad. Bridges *v.* Lyman, 31 Ind. 384.

The statute requires that the affidavit should state in what county the affiant believes the property is detained, but it is not necessary to the validity of the verdict that this statement should be sustained by any evidence. Cox *v.* Albert, 78 Ind. 241; Buck *v.* Young, 1 Ind. App. 538.

In order for the plaintiff to get the possession of his property in an action of replevin, he must file an affidavit showing that it was not taken for a tax. Adams *v.* Davis, 109 Ind. 10. See also Dowell *v.* Richardson, 10 Ind. 573; Deacon *v.* Powers, 57 Ind. 489. *Compare* Bringhurst *v.* Pollard, 6 Ind. 452.

An affidavit for the possession of personal property which alleges that the property is wrongfully instead of unlawfully detained, as required by the statute, and does not charge that the detention is by the defendant, is bad. Louisville, etc., R. Co. *v.* Payne, 103 Ind. 183.

Minnesota.—In an action brought in a justice's court of *Minnesota*, a replevin affidavit, which states in the statute language that the property in question was not taken from the plaintiff "by any process legally or properly issued against him, or, if so taken, it was exempt from seizure on such process," is not invalid on account of the retention of the alternative clause, and substantially states that the property was exempt whether taken under lawful process or not. Carlson *v.* Small, 32 Minn. 492.

Michigan.—The affidavit required in actions of replevin to be annexed to the writ before it can be executed, must contain the statement, "that the property was not taken for any assessment levied by virtue of any law of this State," also "that it was not seized under any execution against the goods and chattels of the plaintiff liable to execution." Those averments are made necessary by the statute, without regard to the nature of the property replevied. Phenix *v.* Clarke, 2 Mich. 327.

In a replevin suit, the description of the property in the affidavit and writ as "one sewing machine and one pool table" is sufficiently specific. Proper *v.* Conkling, 67 Mich. 244.

The justice may attach his jurat to the affidavit in replevin at any time after it was made and before the return day of the writ. Peterson *v.* Fowler, 76 Mich. 258.

Connecticut. — An affidavit in replevin is sufficient if it follows the form given by statute, and describes the goods described in the complaint, although it does not state in so many words that the goods described are those which it is desired to replevy. Brown *v.* Poland, 54 Conn. 313.

The general statutes of *Connecticut*, tit. 19, ch. 17, pt. 15, with regard to replevin, provide that no writ shall be issued until the plaintiff or some credible person shall subscribe an affidavit that the affiant believes that the plaintiff is entitled to the immediate possession of the goods sought to be replevied, which affidavit shall be annexed to the writ. In a replevin suit brought jointly by a husband as trustee of his wife and by the wife in her own right, the affidavit, which was signed by the husband, stated that he believed that he as trustee of his wife or his wife in her own right was entitled to the immediate possession of the property. *Held*, to be insufficient. Spencer *v.* Bidwell, 49 Conn. 61

New Mexico.—Section 50 of the *New Mexico* law relating to justices of the peace requires the affidavit in replevin, in actions before justices, to state the value of the property, but the form prescribed by § 124 contains no such statement. *Held*, that the statement is necessary, and the writ should be quashed for its omission. The defect would not be cured by verdict. Barruel *v.* Irwin, 2 N. Mex. 223.

Kentucky.—Since the act of 1842, it is not necessary to file an affidavit of the value of property sued for in replevin. Aulick *v.* Adams, 12 B. Mon. (Ky.) 104.

New York.—The affidavit to be delivered to the sheriff must particularly describe the chattel to be replevied, and must contain the following allegations: 1st, that the plaintiff is the owner of the chattel, or is entitled to the possession thereof by virtue of a special property therein, the facts with respect to which must be set forth; 2nd, that it is wrongfully detained by the defendant; 3rd, the alleged cause of the detention thereof, according to the best knowledge, information and belief of the person making the affidavit; 4th, that it has not been taken by virtue of

must be shown in the affidavit that the court can pass upon the right of action.[1] The affidavit must be taken by some officer

a warrant against the plaintiff for the collection of a tax, assessment, or fine issued in pursuance of a statute of the State, or of the United States, or if it has been taken under color of such a warrant, either that the taking was unlawful by reason of defects in the process, or other causes specified, or that the detention is unlawful by reason of facts specified which have subsequently occurred; 5th, that it has not been seized by virtue of an execution or warrant of attachment against the property of the plaintiff, or of any person from or through whom the plaintiff has derived title to the chattel since the seizure thereof, or if it has been so seized, that it was exempt from seizure by reason of facts specified, or that its detention is unlawful by reason of facts specified which have subsequently occurred; 6th, its actual value. Bliss' *New York* Ann. Code, § 1695.

But where the affidavit is made after the service of the summons, the allegations required to be inserted therein by subdivisions first and second of the last section must be to the effect that the plaintiff at the time of the commencement of the action was the owner of the chattel, or was entitled to the possession thereof by virtue of a special property therein, and that it was then wrongfully detained by the defendant as prescribed in those subdivisions. Bliss' *New York* Ann. Code, § 1696.

Where the affidavit describes two or more chattels of the same kind, it must state the number thereof, and where it describes the chattel in bulk, it must state the weight, measurement or other quantity. Where it describes two or more chattels to be replevied, it may, at the election of the plaintiff, state the aggregate value of all, or separately the value of any chattel, or of any class of chattels, and the aggregate value of the remainder, if any. Where it states separately the value of one or more chattels, or class of chattels, the defendant may require, as prescribed in the following provisions of this article, the return of any or all of the chattels, or classes of chattels, the value of which is thus stated, or of a portion thereof which has been replevied. If he procures such a return, the remainder must be delivered to the plaintiff, except as is otherwise prescribed in this article. Bliss' *New York* Ann. Code, § 1697.

Where an affidavit, required by the statute to be delivered to a sheriff with a writ of replevin, is entitled as of a suit pending in court, it will be treated as a nullity, there being no suit pending until it is entered in court. Milliken *v.* Selye, 3 Den. (N. Y.) 54.

The affidavit of a plaintiff in an action of replevin must "show" if the property has been seized under execution, "that it is exempt from such seizure" by a detailed statement of facts. Spalding *v.* Spalding, 3 How. Pr. (N. Y.) 297. See Lange *v.* Lewi, 58 N. Y. Super. Ct. 265.

Nebraska.—A statute requiring a plaintiff in replevin to swear that the goods were not taken in execution on any order or judgment against him is not satisfied by an affidavit that they were taken on execution against him on a void judgment. Plaintiff cannot question the validity of the judgment in that manner. Wilson *v.* Macklin, 7 Neb. 50. See Vinnedge *v.* Nicholai, 28 Neb. 133.

1. Depew *v.* Leal, 2 Abb. Pr. (N. Y.) 131.

An affidavit made to obtain an order of delivery in a replevin suit, which omits to aver that plaintiff is entitled to the immediate possession of the property, is fatally defective. Paul *v.* Hodges, 26 Kan. 225.

The affidavit in replevin containing an averment that the plaintiff was the owner, and entitled to the immediate possession of the property constituting the subject of the action was *primæ facie* good as an allegation of absolute ownership, notwithstanding such ownership was alleged to have been based upon a chattel mortgage, when attacked by a motion in the nature of a demurrer. Vinnedge *v.* Nicholai, 28 Neb. 133. See Xenia Twine Co. *v.* Hoover (Ohio). 25 Week. L. Bull. 10.

Where an affidavit for the replevin of a mare described her as a blazed-face, cream-colored mare, eight or nine years old, while she is described in a mortgage of record to plaintiff as a cream-colored mare seven years old, the variance is immaterial. King *v.* Connevy, 52 Ark. 115.

An affidavit containing no averment of possession of the plaintiff, or that

having power to administer oaths or to take affidavits.[1] The original affidavit in replevin may be amended if the application is seasonably made.[2]

3. Writ—*a.* ISSUE.—The issuing of the writ of replevin is a ministerial act and may be performed by the clerk in term time without an order of court.[3] If a person issues the writ without authority, he is a trespasser.[4] The writ must specify the property to be taken,[5] but the description is sufficient if the officer

the property was taken from him unlawfully and without his consent, is fatally defective. McArthur *v.* Hogan, Hempst. (U. S.) 286.

Where an affidavit is filed in an action of replevin by the plaintiff, his agent or attorney, that the defendant at the time and before the commencement of the action was a deputy sheriff in the county where such suit was instituted, and took the property described in the petition in his capacity as deputy sheriff of said county, such affidavit shows that the sheriff is interested in the case. Cassidy *v.* Fleak, 20 Kan. 54.

1. Berrim *v.* Westervelt, 12 Wend. (N. Y.) 194.

2. Meyer *v.* Lane, 40 Kan. 491; Cassidy *v.* Fleak, 20 Kan. 54; Depew *v.* Leal, 2 Abb. Pr. (N. Y.) 131; Applewhite *v.* Allen, 8 Humph. (Tenn.) 697; Frink *v.* Flanagan, 6 Ill. 35; Lewis *v.* Connolly, 29 Neb. 222.

An amendment to the affidavit in an action of replevin may be made by another agent of plaintiff than the agent who made the original affidavit. Colborn *v.* Barton, 14 Ill. App. 449.

Under Gantt's *Arkansas* Dig., § 4616, an affidavit in replevin may, on appeal from a justice to the circuit court, be amended so as to enlarge the damages. Hanf *v.* Ford, 37 Ark. 544.

3. Pennington *v.* Streight, 54 Ind. 376; Easter *v.* Traylor, 41 Kan. 493.

Where a writ of replevin is improperly executed in *Arkansas*, the clerk can issue an *alias* without any order of court. Pool *v.* Loomis, 5 Ark. 110.

A writ of replevin in *Massachusetts* may be issued by the clerk of the courts in one county, returnable in another. Judson *v.* Adams, 8 Cush. (Mass.) 556.

4. Graves *v.* Shoefelt, 60 Ill. 462.

But if the defendant takes a change of venue to some tribunal having jurisdiction he waives all objections to the manner in which the writ was issued. Graves *v.* Shoefelt, 60 Ill. 462.

5. Snedeker *v.* Quick, 11 N. J. L. 179; Magee *v.* Siggerson, 4 Blackf. (Ind.) 70; Stevens *v.* Osman, 1 Mich. 92; 48 Am. Dec. 696; Paterson *v.* Parsell, 38 Mich. 607; State *v.* Welch, 37 Wis. 196.

On a writ of replevin for about 400 tons of bog ore, the sheriff is not authorized to deliver to the plaintiff 720 tons. It seems that the sheriff would have been justifiable in refusing to execute a writ thus vaguely describing the property. De Witt *v.* Morris, 13 Wend. (N. Y.) 496.

A description in the affidavit annexed to the writ is not sufficient. Paterson *v.* Parsell, 38 Mich. 607.

The description, "two yearlings, red and white in color," is sufficient in a writ of replevin. Kelso *v.* Saxton, 40 Mich. 666.

A writ which described the property as six oxen, was held sufficient. Farwell *v.* Fox, 18 Mich. 166.

The property was described in the writ as "one sewing machine and one pool table." *Held*, sufficient. Proper *v.* Conkling, 67 Mich. 244.

"A quantity of corn consisting of about two hundred bushels, and a quantity of rye consisting of about one hundred bushels," is not a sufficient description of the property to maintain replevin. Stevens *v.* Osman, 1 Mich. 92; 48 Am. Dec. 696.

An order of delivery directing the officer to replevy bales of cotton gives him no authority to seize seed cotton. Chandler *v.* Smith, 34 Ark. 527.

Where a writ of replevin commanded the sheriff to replevy all the "goods, stock and fixtures in store at Johnston, at a place called Dry Brook, occupied by said L, the defendant, of the value of eight hundred dollars, and books of account and evidence of indebtedness showing the indebtedness of persons to said L, of the value of $50," it was held on demurrer that the property directed to be replevied was described with sufficient particu-

can identify the property with the aid of third persons.[1] The writ of replevin need not contain a command to summon the defendant;[2] but when it contains a summons, it should be served.[3] When a separate summons is issued, it need not contain a description of the property.[4] The writ need not show that the affidavit required by statute has been made.[5] An omission in

larity. Waldron *v.* Leach, 9 R. I. 588.

In replevin for stacked wheat, the description in the writ of the land upon which it grew, as given in the writ, differed from the description in the chattel mortgage as given in the record. *Held*, reversible error. Coman *v.* Thompson, 43 Mich. 389.

A writ called for wheat of the "Fultz" variety, and proof showed that the wheat taken was of the "Clawson" variety. It was held that where the writ fully identified the wheat as that grown upon plaintiff's farm, and the testimony showed that no wheat of the "Fultz" variety was grown on plaintiff's farm, the variance was immaterial. Wattles *v.* Dubois, 67 Mich. 313.

Where the writ has been quashed on motion of the defendant in replevin, as void for not describing the property seized, the defendant cannot have an assessment of damages. Parsell *v.* Genesee Circuit Judge, 39 Mich. 542.

A writ of replevin commanded the officer to replevy "the goods and chattels following, viz.: the contents of a grocery store," described the store, and stated the person by whom the goods were taken and held. *Held*, that the description was sufficient under the *Massachusetts* Gen. Sts., ch. 143, § 11, and was not so vague and indefinite as to be bad on demurrer. Litchman *v.* Potter, 116 Mass. 371.

The fact that an animal described in the writ as a heifer, is described in the certificate of appraisement as a cow, is no ground for dismissing the writ. Pomeroy *v.* Trimper, 8 Allen (Mass.) 398; 85 Am. Dec. 714.

Where a storehouse and the goods therein were in possession of the sheriff by virtue of a writ of attachment, and where the attachment defendant instituted an action of replevin, and in the writ and petition described the property as being "a certain storehouse, warehouse, and the goods therein contained, being the store in Council Bluffs, known and designated as the store of your petitioner," it was held that the description was sufficiently certain. Ellsworth *v.* Henshull, 4 Greene (Iowa) 417.

1. Sexton *v.* McDowd, 38 Mich. 148; Lea *v.* Terry, 15 La. Ann. 159.

2. West Publishing Co. *v.* Bottineau, 34 Minn. 239.

In some States the writ and summons are issued separately. See Kennedy *v.* Beck, 15 Kan. 555.

3. Swann *v.* Shemwell, 2 Har. & G. (Md.) 283.

Objection to failure of sheriff to serve copy of order of delivery upon defendant must be taken before trial; afterwards it is too late. Baker *v.* Daily, 6 Neb. 464.

Where the sheriff took the property in an action of replevin and delivered it to the plaintiff, without serving the defendant with summons, it was held that the defendant had a right at once to give notice of his appearance, and except to the bail. Clinton *v.* King, 3 How. Pr. (N. Y.) 55.

If the sheriff neglects to serve the summons and the defendant voluntarily appears in court, and defends the suit, the omission by the sheriff to summon him is thereby cured. Swann *v.* Shemwell, 2 Har. & G. (Md.) 283. See also Clinton *v.* King, 3 How. Pr. (N. Y.) 53.

Where the property has been seized on the original writ of replevin and turned over to the plaintiff, but there has been a failure of personal service for any reason during the lifetime of the original writ, an *alias* writ may be issued, by order of court, for the purposes of personal service merely. Bell *v.* Judge, 26 Mich. 414.

The sheriff received a plaint in replevin, on which he delivered the property; but omitted to summon the defendant, till after the next term. The common pleas set aside the summons as irregular. *Ex parte* Johnson, 7 Cow. (N. Y.) 424.

4. Finehout *v.* Crain, 4 Hill (N. Y.) 537.

5. Magee *v.* Siggerson, 4 Blackf. (Ind.) 70.

the writ to state in what court the action was brought, is only an irregularity, and not fatal to its validity.[1] The writ need not allege the value of the goods replevied.[2] When it is defective, it may be amended.[3] A bond is required from the plaintiff before the writ issues,[4] but the writ will not be quashed because the officer has taken a bond for a larger sum than it demanded.[5] A replevin suit begins as soon as a writ, taken out in good faith and sworn to, is ready for execution.[6] Where the

1. State *v.* Wilson, 24 Kan. 50.

2. Blake *v.* Darling, 116 Mass. 300; Litchman *v.* Potter, 116 Mass. 371; Pomeroy *v.* Trimper, 8 Allen (Mass.) 398; 85 Am. Dec. 714; State *v.* Welch, 37 Wis. 196.

3. Jacques *v.* Sanderson, 8 Cush. (Mass.) 271; Poyen *v.* McNull, 10 Met. (Mass.) 291; McCourt *v.* Bond, 64 Wis. 596; Parks *v.* Barkham, 1 Mich. 95.

The writ may be amended at the trial so as to contain the proper valuation of the property. Briggs *v.* Wiswell, 56 N. H. 319.

An omission in a replevin writ of the words "original writ" from the statutory form, "provided the same is not taken upon original writ," etc., is amendable, and, therefore, may not be taken advantage of by the plaintiff in replevin. Goodell *v.* Bates, 14 R. I. 65.

Where the petition contains nearly all the allegations required by *Nebraska* Code Civil Proc., § 182, but the verification is insufficient because made on the belief of plaintiff, the writ of replevin issued thereon is voidable, and not void, and the court on such terms as may be just, may permit a proper affidavit to be made and filed as of the date of the commencement of the action. Lewis *v.* Connolly, 29 Neb. 222. See Jewell *v.* Lamoreaux, 30 Mich. 155.

4. Hannum *v.* Norris, 21 Kan. 114; Maxey *v.* White, 53 Miss. 80.

It is not essential, however, to the regularity of the process, that the bond required by statute should appear at length on the face of the writ. Watson *v.* Watson, 9 Conn. 140; 23 Am. Dec. 324.

If an officer has served a replevin writ, the legal presumption is, that he complied with the law by taking a replevin bond, although his return does not expressly state that fact. Shorey *v.* Hussey, 32 Me. 579.

If the sheriff replevies property without taking a bond in a sufficient penalty to protect the defendant in case a return is awarded, he will be liable to the defendant upon his official bond, to the extent of the damage sustained. He must ascertain the value of the property, independently of the affidavit of the plaintiff, and fix the amount of the bond accordingly. People *v.* Core, 85 Ill. 248.

The delivery of a replevin bond to the officer who serves the writ is a sufficient delivery thereof to the defendant, even if the officer neglects to make due return of it with the writ into court. Smith *v.* Whiting, 97 Mass. 316.

In *Massachusetts* a writ of replevin may be delivered to an officer, and he may commence the service thereof, before taking a bond from the plaintiff; but he cannot deliver the property to the plaintiff, nor do anything more than is necessary to effect an appraisement of the property, until the plaintiff has given the bond required by the statute. Wolcott *v.* Mead, 12 Met. (Mass.) 516.

The bond required by the statute in actions of replevin, is a prerequisite to the execution of the writ; and if the sheriff takes the property into possession without the bond, he is not bound to deliver it to the plaintiff, but should restore it to the defendant. State *v.* Stephens, 14 Ark. 264.

The officer is authorized to seize the property and hold it a reasonable time for the plaintiff to give the bond required by the statute, and if the plaintiff neglect or refuse to give the replevin bond required by the statute, the officer should redeliver the property to the person from whose possession it was taken. Morris *v.* Baker, 5 Wis. 389.

5. Clap *v.* Guild, 8 Mass. 153.

6. McMillan *v.* Larned, 41 Mich. 521.

Reasonable delay in delivering the writ to the officer for execution does not postpone the date of beginning

defendant in an action of replevin is improperly served or not served at all, a new writ must issue.[1] Where only part of the property is taken by the writ, an *alias* writ followed by a *pluries*, if necessary, may issue to obtain possession of the residue.[2] The plaintiff is not bound to accept part of the property, but may cause the defendant to be arrested.[3]

b. SERVICE.—The writ of replevin may be served by any person having authority to serve the usual processes in an action at law.[4] The manner of executing a writ of replevin

suit. McMillan *v.* Larned, 41 Mich. 521.

The date of a writ of replevin is not conclusive evidence of the time when the action was commenced; and if the cause of action had not accrued on the day of the date, but did accrue before the commencement of the service thereof, and there is no evidence of the time when the writ was given to the officer, the action may properly be considered as having been commenced after the cause of action accrued. Federhm *v.* Smith, 3 Allen (Mass.) 119.

If the writ is sued out in time for the pleadings to be perfected at or before the next term ensuing the distress, it is within time. Luther *v.* Arnold, 7 Rich. (S. Car.) 397.

1. O'Brien *v.* Haynes, 61 Ill. 494.

2. Snow *v.* Roy, 22 Wend. (N. Y.) 602.

Where an *alias* writ of replevin was issued for the remainder of certain goods described in the first writ, and the plaintiff recovered judgment, held that even were the writ invalid, the subsequent proceedings, up to the judgment, must be sustained, as being in accordance with the provisions of the statute; and that the defendant could not complain, since it was the same judgment which would have been rendered had no *alias* writ been issued. Maxon *v.* Perrott, 17 Mich. 332; 97 Am. Dec. 191.

An *alias* writ of replevin may be issued and directed to the sheriff of a county other than that in which suit is brought. Hiles *v.* McFarlane, 4 Chand. (Wis.) 89.

In replevin, according to statute (Thompson's Dig. 389, 457), the Supreme Court of *Florida* has authority to issue a *pluries* writ. Branch *v.* Branch, 6 Fla. 314.

3. Snow *v.* Roy, 22 Wend. (N. Y.) 602; Lowrey *v.* Mansfield, 3 How. Pr. (N. Y.) 88. See IMPRISONMENT, vol. 10, p. 205 and note.

The defendant cannot be arrested where any part of the property has been taken upon the writ. Lowrey *v.* Mansfield, 3 How. Pr. (N. Y.) 88. See *New York* Code Civ. Proc., § 549; Fitch *v.* McMahon, 103 N. Y. 690.

Imprisonment on an execution on a replevin suit does not fall within the prohibition either of the constitution (art. 6, § 33) or of the non imprisonment act of 1839 (2 *Michigan* Comp. Laws, ch. 166). Fuller *v.* Bowker, 11 Mich. 204.

4. Rev. Laws *Vermont*, § 1245; Rev. Stats. *Illinois*, ch. 119, § 6; Pub. Stats. *Massachusetts*, ch. 1841, §§ 2, 11. See Pub. Stats. *Rhode Island*, ch. 235, § 2.

Defendant in replevin, who was under-sheriff, appeared generally to the action, went to trial on the merits, without objecting to the service of process upon him by the sheriff, instead of by a constable, otherwise than by stating in his answer by what officer it was made. *Held*, that the irregularity (if any) in the service was waived, and the court had jurisdiction. Krueger *v.* Pierce, 37 Wis. 269.

A writ to replevy goods, taken by attachment, is not an adversary suit, but a mandatory precept, and ought to be directed to the officer who served the attachment. Denison *v.* Raymond, Kirby (Conn.) 274.

In *Iowa* when a writ of replevin is properly served, it is immaterial whether it is served by a sheriff or by a constable. Smith *v.* Eals (Iowa 1890), 46 N. W. Rep. 1110.

A replevin writ may be served by a deputy sheriff. Douglass *v.* Gardner, 63 Me. 462.

A writ of replevin, in an action in which the sheriff was party was delivered to and executed by the coroner, although addressed to the sheriff. A motion was made to quash the writ, but the court permitted the plaintiff to amend the writ by substituting the word "coroner" for "sheriff" in the address.

is prescribed by the statutes of the various States.[1] The officer is not empowered to take the property from the possession of any person except the one named in the writ.[2] The time of service of the writ of replevin is different in the various States,[3] and so also is the time of return.[4] When property is

Held, in this there was no error. Simcoke *v.* Frederick, 1 Ind. 54.

A writ of replevin of attached property, directed to and served by a constable, is void, in *Vermont.* Ralston *v.* Strong, Brayt. (Vt.) 216.

1. Arkansas.—In *Arkansas* the writ of replevin is executed by reading it to the defendant, or delivering him a copy, or leaving a copy at his usual place of abode. Pool *v.* Loomis, 5 Ark. 110.

Vermont.—A writ of replevin is a writ of summons, not attachment, and service upon the defendant must conform to the provisions of the statute as to the service of writs of summons. Delivery of a copy to the agent of the defendant, the latter being out of the State, is not sufficient. Gaffield *v.* Avery, 43 Vt. 668.

Massachusetts. — In *Massachusetts* the writ of replevin shall be served in the same manner that other writs are served. Pub. Stats. *Massachusetts*, ch. 184, §§ 2 and 11.

New York.—If any chattel, described in the affidavit, is found in the possession to the defendant or his agent, the sheriff to whom an affidavit, requisition, and undertaking are delivered, as prescribed in the foregoing section to this article, must forthwith replevy it by taking it into possession. He must thereupon without delay, serve on the defendants a copy of the affidavit, requisition and undertaking by delivering the same to him personally if he can be found within the county; or, if he cannot be so found, to his agent, if any, from whose possession the chattel is taken. Or, if neither can be found within the county, by leaving the copy at the usual place of abode of either with a person of suitable age and discretion. Bliss' *New York* Ann. Code 1700.

Illinois.—The prime object of an action of replevin is to put the plaintiff in possession of the property, and when a writ is sued out and proper bond given. it is the first duty of the officer to seize the property and then read the writ to the defendant, if he can be found, etc. It is not a compliance with his duty to merely read the writ to the defendant. Whether the defendant may feel disposed to deliver up the property or not, is of no consequence to the officer; it is his imperative duty to seize the property if it can be found. People *v.* Wiltshire, 9 Ill. App. 374.

Wisconsin.—The statutes of *Wisconsin* provide that the summons shall be served on defendant personally, or, when he cannot be found, by leaving a copy at his usual place of abode with his wife, or some person of proper age. Abrams *v.* Jones, 14 Wis. 806.

The officer must replevy the goods and deliver them to the plaintiff in the action. Weinberg *v.* Conover, 4 Wis. 803.

Kansas.—The officer, in executing a writ of replevin, has authority to take into possession the property therein mentioned before delivering a copy of the order to the person charged with the unlawful detainer of the property, or leaving the copy at his usual place of residence. State *v.* Wilson, 24 Kan. 50.

2. State *v.* Jennings, 14 Ohio St. 73. An officer in serving a writ of replevin may search the property of a stranger to the writ on the latter's invitation, and for any unwillful injury will be liable only for actual damages. Bruce *v.* Ulery, 79 Mo. 322.

3. A writ of replevin, returnable before a justice of the peace, is to be "duly served not less than seven nor more than sixty days before the day therein appointed for trial." Lord *v.* Poor, 23 Me. 569.

A writ of replevin conveys no authority to an officer to take property on Sunday. Bryant *v.* State, 16 Neb. 651.

4. In *Wisconsin* the writ must be returned immediately after the service thereof. Hutchinson *v.* McClellan, 2 Wis. 17.

The objection in a replevin suit that the return day of the writ was Sunday, is held to be waived by the defendant appearing, pleading to the merits, and going to trial without objection. Pierce *v.* Rehfuss, 35 Mich. 53.

replevied, the sheriff should take an inventory and an invoice of the property and a receipt from the plaintiff, which he should return with his writ.[1] The officer's return should show that he delivered to the defendant a true copy of the writ.[2] In some States, the defendant is allowed to retain the property upon giving bond to have it forthcoming at the time and place of trial.[3]

A writ of replevin tested at one term and returnable at the next term, but one (an entire term intervening) is voidable. *Semble*, it may be amended, but not unless the defect appear to have arisen from mistake, and all suspicion be removed that the long return day was a trick to postpone the trial. Cayward *v.* Doolittle, 6 Cow. (N. Y.) 602.

Under *Nebraska* Gen. St. 265, § 9, the summons, in all cases of replevin in county courts, must be returnable not more than twelve days from its date. Roggencamp *v.* Moore, 9 Neb. 105.

When service of a writ is set aside after the return day, it operates as a discontinuance. Forbes *v.* Judge, 23 Mich. 497.

1. People *v.* Core, 85 Ill. 248.

In *Arkansas* the sheriff must return the names and place of residence of the securities on a replevin bond. Pirani *v.* Barden, 6 Ark. 81.

The failure of a sheriff to return the value of property replevied, as required by section 3 of the *Kentucky* act of 1830, is no cause for quashing the writ. Fryer *v.* Fryer, 6 Dana (Ky.) 54.

2. Bent *v.* Bent, 43 Vt. 42.

Arkansas.—The return must show that the officer received the bond required before executing the writ. It must also show that the writ was executed by reading it to the defendant, or delivering him a copy or leaving a copy at his usual place of abode. Pool *v.* Loomis, 5 Ark. 110.

3 **Defendant's Replevin Bond—New York.**—*New York* Code Civ. Proc., § 1704. M'Cann *v.* Thompson, 13 How. Pr. (N. Y.) 380. It is no objection to such an undertaking that it is made to the plaintiff instead of the sheriff. Slack *v.* Heath, 4 E. D. Smith (N. Y.) 95.

The sheriff or other officer is required to retain the property in his possession, during the three days allowed the defendant, within which to elect to retain the property by giving bond. Graham *v.* Wells, 18 How. Pr. (N. Y.) 376. The time within which the defendant's sureties may justify, is not limited. Graham *v.* Wells, 18 How. Pr. (N. Y.) 376. The bond is not operative, and no liability is incurred thereon until the justification of the sureties. O'Connell *v.* Kelly, 15 Daly (N. Y.) 513.

Personal property which has been redelivered by the sheriff to the defendant in replevin, cannot be retaken by the plaintiff. Hunt *v.* Mootry, 10 How. Pr. (N. Y.) 478.

If the defendant gives an undertaking to reclaim the property, with an affidavit by the sureties annexed, and on notice, the sureties duly justify in the aggregate amount of twice the sum stated as the value of the property the sheriff is bound to deliver the property to defendant. The fact that a smaller amount was specified in the affidavit accompanying the undertaking when delivered to the sheriff, is immaterial. Such affidavit is not required by law, and is unnecessary to the validity of the undertaking. Grant *v.* Booth, 21 How. Pr. (N. Y.) 354.

Where the plaintiff's affidavit to replevy chattels, states only the aggregate value thereof, and a part only is taken, the defendant, to retain the same, is not required to give an undertaking conditioned for the delivery of all the chattels sued for. If all the chattels have been taken, the undertaking should of course so recite; and if a part only has been taken, the recitals should be so modified as to conform to the fact, and the undertaking should be for the return of the articles actually replevied. Weber *v.* Manne, 11 Civ. Pro. Rep. (N. Y.) 64.

Estoppel.—A defendant who has given bond and procured the delivery to him of property taken by the sheriff is estopped to deny that he had possession of the property at the beginning of the action. Diossy *v.* Morgan, 74 N. Y. 11.

Minnesota.—In *Minnesota*, the sheriff should retain the property three days in order to enable the defendant to make a bond and regain possession of the property. Vanderburgh *v.* Bassett, 4 Minn. 242.

Arkansas.—The bond executed by the defendant in replevin is insufficient, of

The defendant in replevin is not bound to assist the officer in the execution of his writ.[1]

4. Pleadings in Replevin—*a.* DECLARATION.—In some of the States, the declaration is called a complaint,[2] but in the treatment of the subject they will be considered together, the principles of law governing them being the same. The declaration in replevin must allege that the plaintiff is the owner of the property.[3] This must be alleged as a fact, and the evidence

itself, to prove the redelivery to him of the property in controversy. Jatton *v.* Smead, 29 Ark. 372.

Iowa.—In *Iowa* the defendant retains the property upon giving a receipt. Davis *v.* Bayliss, 51 Iowa 435.

Indiana.—The defendant in replevin can waive his right to execute a replevin bond. Hartlepp *v.* Cole, 120 Ind. 247.

Georgia.—See Bush *v.* Rawlins, 80 Ga. 583.

Nevada.—See McBeth *v.* Van Sickle, 6 Nev. 134.

Kansas.—See Kennedy *v.* Brown, 21 Kan. 171; Boyd *v.* Haffaker, 39 Kan. 525.

Pennsylvania.—See Bradford *v.* Frederick, 101 Pa. St. 445.

California.—Coburn *v.* Smart, 53 Cal. 742.

Tennessee.—Harris *v.* Taylor, 3 Sneed (Tenn.) 536; 67 Am. Dec. 576.

Third Party Claimant—New York.—At any time before the chattel which has been replevied is actually delivered to either party, if a person not a party to the action claims, as against the defendant, a right to the possession thereof existing at the time it was replevied, an affidavit may be made and delivered to the sheriff in his behalf, stating that he makes such a claim, specifying the chattel or chattels to which it relates, if two or more chattels have been replevied, and the claim relates only to part of them, and setting forth the facts upon which his right of possession depends. In that case, the sheriff may, in his discretion, before he delivers the chattel to the plaintiff, serve on the plaintiff's attorney, a copy of the affidavit, with a notice that he requires indemnity against the claim; if the indemnity is not furnished within a reasonable time, after the plaintiff becomes entitled to the delivery of chattel, the sheriff may, in his discretion, deliver it to the claimant without incurring any liability to the plaintiff by reason of so doing. *New York* Code Civ. Proc., § 1709. See also Pelham Hod Elevating Co. *v.* Baggaley, 12 N. Y. Supp. 218.

Arkansas.—See Harris *v.* Harrison, 40 Ark. 50.

1. Horr *v.* People, 95 Ill. 169; People *v.* Wiltshire, 9 Ill. App. 374; Yott *v.* People. 91 Ill. 11.

2. Adams *v.* Corriston, 7 Minn. 456; Stickney *v.* Smith, 5 Minn. 486.

3. Adams *v.* Corriston, 7 Minn. 456; Carlson *v.* Small, 32 Minn. 492; Oleson *v.* Merrill, 20 Wis. 462; Daniels *v.* Cole, 21 Neb. 156; Johnson *v.* Neale, 6 Allen (Mass.) 227; Bond *v.* Mitchell, 3 Barb. (N. Y.) 304; Vandenburgh *v.* Van Valkenburgh, 8 Barb. (N. Y.) 117; Pattison *v.* Adams, 7 Hill (N.Y.) 126; 42 Am. Dec. 59; Scofield *v.* Whitelegge, 49 N. Y. 259; 12 Abb. Pr. N. S. (N. Y.) 320; Baker *v.* Cordwell, 6 Colo. 199; Vaiden *v.* Bell, 3 Rand. (Va.) 448; Sturman *v.* Stone, 31 Iowa 115; Stoker *v.* Crane, 46 Mo. 264; Bosse *v.* Thomas, 3 Mo. App. 472; Bailey *v.* Troxell, 43 Ind. 432.

It is not sufficient for the plaintiff to say that the goods were taken by the defendant out of his possession and that he was entitled to the possession of them. Bond *v.* Mitchell, 3 Barb. (N. Y.) 304; Vandenburgh *v.* Van Valkenburgh, 8 Barb. (N. Y.) 217; Pattison *v.* Adams, 7 Hill (N. Y.) 126; 42 Am. Dec. 59

In an action of replevin before a justice of the peace when the affidavit also takes the place of a complaint it is not necessary for the plaintiff to prove an averment therein, that the property "had not been taken by virtue of any tax," etc., "nor seized under any execution" etc. Carney *v.* Doyle, 14 Wis. 270.

A declaration in replevin by husband and wife should show specially the wife's interest in the goods. Gentry *v.* Bargis, 6 Blackf. (Ind.) 261.

The complaint in replevin need not contain an express averment that plaintiff is entitled to the possession of

merely of that fact is not sufficient.[1] In replevin for property taken in execution, upon the ground that it is exempt, the plaintiff must allege all the facts which show it to be exempt.[2] The

the property claimed, if facts are stated which, if true, entitle him to the possession. Gage *v.* Wayland, 67 Wis. 566.

In replevin by a sheriff for chattels attached by him and taken from his possession by defendant, the complaint must state facts showing that such chattels were liable to seizure by virtue of the attachment; or it is bad on demurrer. Tronson *v.* Union Lumbering Co., 38 Wis. 202.

Section 3225 of *Iowa* Code requires the plaintiff to state the extent of his interest in the property. If he states that he is the absolute owner he cannot show himself to be a mortgagee. Kern *v.* Wilson, 73 Iowa 490.

The ownership of personal property will be implied from an allegation of sale and delivery. In an action to recover its possession no further allegation of ownership is necessary. Morrison *v.* Lewis, 49 N. Y. Super. Ct. 178.

An allegation in a complaint, that the plaintiffs were possessed of personal property "as of their own proper goods," is equivalent to an allegation of ownership and possession. Stickney *v.* Smith, 5 Minn. 486.

A demurrer to the complaint, on the ground that the one to whom the bond was payable was not made a party plaintiff, is properly overruled, where the complaint alleges that such payee has no interest in the controversy. Kellar *v.* Carr, 119 Ind. 127.

In replevin by a chattel mortgagee against an attaching creditor of the mortgagor, an allegation in the complaint of the non-payment of the mortgage is not necessary. Stevenson *v.* Lord, 15 Colo. 131.

1. Bond *v.* Mitchell, 3 Barb. (N. Y.) 304; Vandenburgh *v.* Van Valkenburgh, 8 Barb. (N. Y.) 217.

Where a complaint, in an action to recover personal property, contains the usual allegations of such a pleading under the statute, and adds specific facts exhibiting the nature of the plaintiff's title, the specific facts will be looked to as determining the plaintiff's right to recover. Reynolds *v.* Copeland, 71 Ind. 422.

The allegation in a declaration in replevin "that the defendants have become possessed of, and wrongfully detain from the plaintiff, the following goods and chattels of the plaintiff" (describing them) sufficiently alleges that the ownership of the property described is in the plaintiff. Van Der Minden *v.* Elsas, 36 N. Y. Super Ct. 66.

A petition in an action of replevin which states facts showing that the plaintiff is the general owner of the property sought to be recovered sufficiently describes his ownership, although his interest is erroneously denominated in the petition as a "special property." Robinson *v.* Fitch, 26 Ohio St. 659.

2. O'Donnell *v.* Segar, 25 Mich. 368.

Plaintiff's petition in replevin against a sheriff to recover possession of goods levied upon, but claimed as exempt from levy, alleged the official character of defendant, wrongful detention of certain goods, the property of the plaintiff, by defendant under an execution, that such goods were exempt from levy, the residence of plaintiff in the State of *Nebraska*, that he was the head of a family, was engaged in agriculture, and had neither lands, town-lots nor houses subject to exemption as a homestead. *Held*, that the petition sufficiently showed that the property was exempt under the *Nebraska* statute. Johnson *v.* Neal (Neb. 1891), 48 N. W. Rep. 897.

A complaint in replevin against a sheriff by an execution defendant, alleging a taking by levy of the writ, "though the plaintiff filed a schedule," and the property was of less value than $600, but failing to show that the judgment on which the execution issued was founded on contract, and that the schedule was such as the law requires, is bad. Newcomer *v.* Alexander, 96 Ind. 453.

Michigan.—In replevin for property taken in execution, and claimed by the plaintiff as exempt, it is not necessary specifically to set out the character of the property in the declaration so as to show the exemption. The exemption, or any other question that is triable in an action of replevin, may be tried under the general form of declaration furnished by the statute. Elliott *v.* Whitmore, 5 Mich. 532. See also Furman *v.* Tenny, 28 Minn. 77.

declaration must allege that the defendant unlawfully detains the property from the plaintiff.[1] And if the action is in the *cepit*, it must show a wrongful taking.[2] The declaration need not contain a valuation of the property;[3] but damages must be laid.[4]

Property Distrained.—A declaration otherwise sufficient is not demurrable because brought against a landlord by his tenant, for property seized for rent, unless that fact is set out in it. Johnson *v.* Holmes (S. Car. 1890), 11 S. E. Rep. 208.

1. Gould *v.* O'Neal, 1 Ind. App. 144; Draper *v.* Ellis, 12 Iowa 316; Gist *v.* Loring, 60 Mo. 487; Staley House Furnishing Co. *v.* Wallace, 21 Mo. App. 128; Wilhite *v.* Williams, 41 Kan. 288; Daniels *v.* Cole, 21 Neb. 156.

It is not necessary to allege in the declaration that the defendant unlawfully obtained possession of the property described therein. Ross *v.* Menefee, 125 Ind. 432.

It is not necessary to allege that the property is detained in the county in which the suit is brought. Gould *v.* O'Neal, 1 Ind. App. 144.

Where an officer levies, by virtue of an execution, upon personal property which has been mortgaged, but which remains in the possession of the mortgagor, the money not being due, and replevin is brought against him for asserting his claim under the levy, and refusing to surrender the property after the mortgage money has become due, the plaintiff must declare for the detention, and not for the taking of the property. Randall *v.* Cook, 17 Wend. (N. Y.) 53.

The averment prescribed in the 30th section of the *Arkansas* replevin law, for the declaration in the *detinet*, that the defendant received the property from the plaintiff, or some other person, to be redelivered on request, is a mere fiction of law, and need not be sustained by proof. Beebe *v.* De Baum, 8 Ark. 510.

An allegation in a complaint that plaintiff is entitled to the possession of the property, which defendant has possession of without right, and unlawfully detains from plaintiff, is sufficient to entitle plaintiff to maintain an action for the possession of the property, although it is not averred, as required by § 1267 of *Indiana* Rev. St., that the property had not been seized on execution, or, if so, was exempt. Turpie *v.* Fagg, 124 Ind. 476; Daniels *v.* Cole, 21 Neb. 156.

A complaint in a suit to recover personal property, alleging a cause of action existing more than four years before the suit, and not at that time, is bad. Afflerbach *v.* McGovern, 79 Cal. 268

2. Childs *v.* Hart, 7 Barb. (N. Y.) 370.

Joinder of Counts.—Counts in the *cepit* and in the *detinet* may be joined in replevin, but in such case, in *Arkansas*, the plaintiff must support each count by affidavit. Cox *v.* Grace, 10 Ark. 86.

Trover.—Where part of the property claimed in a writ of replevin, cannot be found, and there is personal service, the plaintiff may add a count in trover. Dart *v.* Horn, 20 Ill. 212; Karr *v.* Barstow, 24 Ill. 580. See also Nashville Ins., etc., Co. *v.* Alexander, 10 Humph. (Tenn.) 378; JOINDER, vol. 11, p. 986.

The action of replevin is not changed into one for conversion by plaintiff omitting to claim an immediate delivery under § 132. ch. 66, *Minnesota* Gen. St. 1878; Benjamin *v.* Smith, 43 Minn. 146.

3. Schaffer *v.* Faldwesch, 16 Mo. 337; People *v.* Core, 85 Ill. 248. *Compare* Root *v.* Woodruff, 6 Hill (N. Y.) 418; State *v.* Welch, 37 Wis. 196.

Where the allegation of value in the petition in an action of replevin, is not controverted in the answer, a failure to deny the allegation will not admit its truth, and it is submitted that the jury should determine the value upon the evidence. Chicago, etc., R. Co. *v.* Northwestern, etc., Co., 38 Iowa 377.

An allegation in the declaration in replevin, of the value of property, is a matter of form in pleading, and not an admission by the plaintiff in an inquiry by the jury as to its value. Bailey *v.* Ellis, 21 Ark. 488; Hawkins *v.* Johnson, 3 Blackf. (Ind.) 46. See O'Neal *v.* Wade, 3 Ind. 410.

The objection that a complaint in replevin does not allege the value of the property, is cured by a verdict assessing damages to the plaintiff for the detention thereof. Bales *v.* Scott, 26 Ind. 202.

4. Faget *v.* Brayton, 2 Har. & J. (Md.) 350.

The declaration must describe the property claimed with a reasonable degree of certainty.[1] The complaint, if it contains

Damages may be recovered under the ordinary form of complaint. Riley *v.* Littlefield, 84 Mich. 22.

A complaint in replevin which alleges that the plaintiff was owner and in possession of certain goods of the value of $4,000, is not deficient for containing no *ad damnum* clause. Woods *v.* Berry (Mont.), 14 Pac. Rep. 758.

Special damages for the detention may be proved and recovered without being alleged in the declaration. Clark *v.* Martin, 120 Mass. 543. *Compare* Burrage *v.* Melson, 48 Miss. 237.

1. Standard Foundry Co. *v.* Schloss, 43 Mo. App. 304; Entsminger *v.* Jackson, 73 Ind. 144; Malone *v.* Stickney, 88 Ind. 594; Buck *v.* Young, 1 Ind. App. 558; Fordice *v.* Rinehart, 11 Oregon 208; Ruck *v.* Morris, 28 Pa. St. 245; Root *v.* Woodruff, 6 Hill (N. Y.) 418. See Bilby *v.* Townsend, 29 Neb. 220.

A complaint in replevin which alleges that the defendants unlawfully and wrongfully took from the plaintiffs and converted to their own use the following described personal property, etc., shows with sufficient certainty, at least after verdict, that the property was taken without leave and had not been returned. Roberts *v.* Porter, 78 Ind. 130.

The sheriff is entitled to the defendant's help in identifying the property, when called upon to serve a writ of *retorno habendo.* Ruch *v.* Morris, 28 Pa. St. 245.

After trial in replevin and verdict for the defendant, the plaintiff will not be permitted to avail himself of any uncertainty in his declaration., Wilson *v.* Gray, 8 Watts (Pa.) 25.

The description of the property in a complaint in replevin as "one white shoat of the value of fourteen dollars," has been held sufficiently specific. Onstatt *v.* Ream, 30 Ind. 259.

Where property sought to be recovered in an action of claim and delivery, is a certain undivided fractional part of a certain quantity of property, uniform in quality and value, and susceptible of a fair and equal division by count, measurement, or weight (as, for instance, grain in bulk), the description and proof of the property sought to be recovered as such undivided fractional part of the specified quantity, is sufficiently specific. Ellingboe *v.* Brakken, 36 Minn. 156.

The description in a complaint in an action of replevin for a horse, which describes the property as "one gray horse, six years old this spring, about 16¼ hands high, with a small knot about half-way between the right nostril and right eye, near the front of face or nose, with collar mark on top of neck, dark mane and tail, with top end of tail light in color," is sufficient. Wood *v.* Darnell, 1 Ind. App. 215.

An exhibit containing a description of the property in replevin must be attached to the complaint in order to become part thereof. It is not sufficient to file the same as a separate paper, though it is referred to in the complaint as part thereof. Riley *v.* Pearson (Oregon, 1891), 26 Pac. Rep. 849.

Bill of Particulars.—A bill of particulars is not necessary in an action of replevin commenced in the county court when the value of the property is within the jurisdiction of a justice of the peace. Coombs *v.* Brinklander, 29 Neb. 586.

In an action of replevin for six oxen, the writ and declaration described them merely as "six oxen." *Held*, to be sufficient. Farwell *v.* Fox, 18 Mich. 166.

In replevin, "fifteen hundred pounds of seed cotton" is sufficiently descriptive of the article and of the quantity. Hill *v.* Robinson, 16 Ark. 90.

Property was described in the affidavit and original petition in replevin as "seven head of horses," marked by certain brands set out. In an amended petition, the property was described as "three mares," "three horses," and "one colt," the brands being set out as in the original petition. *Held*, that there was no departure. Nollkamper *v.* Wyatt, 27 Neb. 565.

Property was described in a complaint in replevin as "one lot of seed cotton, about 6,000 pounds, twelve stacks of fodder, one load of corn, about fifteen bushels, of the total value of $250." *Held*, insufficient, and that a demurrer to it should be sustained. It is not aided by a verdict for plaintiff which follows the description contained in the petition, with the exception of the value. Lockhart *v.* Little, 30 S. Car. 326.

the statutory requisites and is verified, may subserve the double purpose of complaint and affidavit.[1] The declaration must be filed within a prescribed time,[2] and the writ must have been returned before the plaintiff can regularly declare.[3] Where the defendant came rightfully into the possession of property, a demand for it must be alleged in the complaint.[4] When the declaration presents a good cause of action, though imperfectly, every reasonable presumption will be made in its favor.[5]

b. PLEA OR AVOWRY—(See also COGNIZANCE, vol. 3, p. 306; PLEADING, vol. 18, p. 538).—The plea of *non cepit* only puts the taking in issue and does not authorize a judgment of return,[6]

The description of the property, in a statement in replevin before a justice of the peace, as "nine head of fat hogs, mostly black," is sufficiently definite. Crum *v.* Elliston, 33 Mo. App. 591.

1. Louisville, etc., R. Co. *v.* Payne, 103 Ind. 183; Cox *v.* Albert, 78 Ind. 241; Stephens *v.* Scott, 13 Ind. 515; Minchrod *v.* Windoes, 29 Ind. 288; Turpie *v.* Fagg, 124 Ind. 476; Hanner *v.* Bailey, 30 Ark. 681.

2. **Wisconsin.**—It must be filed within ten days from the day on which the writ is returned, whether that be the return day mentioned in the writ or a previous day. Hutchinson *v.* McClellan, 2 Wis. 17; Elmore *v.* Garvey, 4 Wis. 152.

Illinois.—It is not cause for dismissing an action of replevin, in *Illinois*, that no declaration was filed at the first term; the cause in such case should be continued at the plaintiff's costs. Amos *v.* Sinnott, 5 Ill. 440.

3. Wilson *v.* Williams, 18 Wend. (N. Y.) 581.

Where a year elapsed after the return of a writ of replevin, under which three-fourths of the property was delivered, and nothing else was done by the plaintiff except to sue out *alias* and *pluries* writs, which were not enforced—held, that third persons, standing in the relation of assignees to the defendants, might rule the plaintiff to declare and proceed to judgment of *non prosequitur* although special bail had not been filed. Snow *v.* Roy, 22 Wend. (N. Y.) 602.

A plaintiff in replevin may include in his declaration articles omitted in his summons. Finehout *v.* Crain, 4 Hill (N. Y.) 537. *Compare* Sanderson *v.* Marks, 1 Har. & G. (Md.) 252.

4. Scofield *v.* Whitelegge, 49 N. Y. 259; Campbell *v.* Jones, 38 Cal. 507.

A complaint in an action of replevin which states facts sufficient to show that in law the defendant's holding of the property is unlawful, may be sustained after judgment, notwithstanding the complaint omits to allege a demand of the property before suit brought. That defect is cured by proof of the fact, by the report of the referee finding the fact of a demand, and by the judgment. Fullerton *v.* Dalton, 58 Barb. (N. Y.) 236.

Where the defendant pleads and attempts to show property in himself, it excuses non-pleader of demand in the declaration. Raper *v.* Harrison, 37 Kan. 243; Bogle *v.* Gordon, 39 Kan. 31; Bank of Glen Elden *v.* Farmers, Bank, 46 Kan. 376. See DEMAND, vol. 5, p. 528 *f*.

5. Wadley *v.* Harris, 25 Ark. 36.

6. Vose *v.* Hart, 12 Ill. 378; Anderson *v.* Talcott, 6 Ill. 365; Chandler *v.* Lincoln, 52 Ill. 74; Galusha *v.* Butterfield, 3 Ill. 227; Bourk *v.* Riggs, 38 Ill. 321; Miller *v.* Gable, 30 Ill. App. 578; Mattson *v.* Hanisch, 5 Ill. App. 102; Rowland *v.* Mann, 6 Ired. (N. Car.) 38; Mackinley *v.* McGregor, 3 Whart. (Pa.) 369; 31 Am. Dec. 522; Ringo *v.* Field, 6 Ark. 43; Wilson *v.* Royston, 2 Ark. 315; Carroll *v.* Harris, 19 Ark. 237; Moulton *v.* Bird, 31 Me. 296; Vickery *v.* Sherburne, 20 Me. 34; Hopkins *v.* Burney, 2 Fla. 42; Ely *v.* Ehle, 3 N. Y. 506; People *v.* Niagara, C. P., 4 Wend. (N. Y.) 217; Harper *v.* Baker, 3 T. B. Mon. (Ky.) 421; Bonner *v.* Coleman, 3 B. Mon. (Ky.) 464; Gray *v.* Parker, 38 Mo. 160; Trotter *v.* Taylor, 5 Blackf. (Ind.) 431; Simpson *v.* M'Farland, 18 Pick. (Mass.) 427; 29 Am. Dec. 602; Whitwell *v.* Wells, 24 Pick. (Mass.) 25.

The plea of *non cepit* does not admit the property to be in the plaintiff, when the plea is accompanied by a statement denying that fact. Dillingham *v.* Smith, 30 Me. 370; Moulton *v* Bird, 31

nor for damages.[1] The plea of *non detinet* admits the right of property to be in the plaintiff,[2] and it also fails to justify a judgment of return.[3] The defendant cannot, in the same action claim the return of property not mentioned by the complaint.[4] The title of the plaintiff is put in issue by formally traversing his allegation of title, or by specially pleading property in some person other than the plaintiff.[5] Such a plea must traverse the

Me. 296; Cooper *v.* Bakeman, 32 Me. 192.

If such statement merely alleges property in the defendant it leaves the burden of proof upon him. Cooper *v.* Bakeman, 32 Me. 192

It is incumbent on the plaintiff when the issue is *non cepit* to prove that the defendant had the goods. Gray *v.* Parker, 38 Mo. 160.

Objection to the maintenance of replevin by all of several plaintiffs, because only one of them has given the bond required by *Maine* Rev. Stat. ch. 69, §§ 1-2, cannot be taken under the plea of *non cepit*. The plea of *non cepit* admits the capacity of all the plaintiffs. Pope *v.* Jackson, 65 Me. 162.

The plea of *non cepit* compels the plaintiff to prove an unlawful taking. If the evidence shows that the property came into the defendant's possession by the plaintiff's consent, a nonsuit should be granted. Carter *v.* Piper, 57 N. H. 217.

1. Mitchell *v.* Roberts, 50 N. H. 486; Hopkins *v.* Burney, 2 Fla. 42.

2. Ingalls *v.* Bulkley, 15 Ill. 224; Chandler *v.* Lincoln, 52 Ill. 74; Bourk *v.* Riggs, 38 Ill. 321; Mattson *v.* Hanisch, 5 Ill. App. 102; Van Namee *v.* Bradley, 69 Ill. 299; Miller *v.* Gable, 30 Ill. App. 578.

Under ch. 145, § 34, Gould's Dig., the plea of *non detinet* puts in issue the plaintiff's right of property. Patterson *v.* Fowler, 22 Ark. 396.

Evidence is allowable under the plea of *non detinet*, that the defendant levied upon the property in dispute by virtue of an execution. Oaks *v.* Wyatt, 10 Ohio 344.

The question of title to the property replevied is in issue under the plea of *non detinet* in *Ohio*. Ferrell *v.* Humphrey, 12 Ohio 113.

3. Chandler *v.* Lincoln, 52 Ill. 74; Bourk *v.* Riggs, 38 Ill. 321; Mattson *v.* Hanisch, 5 Ill. App. 102; Johnson *v.* Howe, 7 Ill. 342; Hinchman *v.* Doak, 48 Mich. 168; Gallagher *v.* Bishop, 15 Wis. 276.

The answer, in an action of replevin, denied that the goods were the property of the plaintiff, admitted that they were in the defendant's possession at the time of the replevin, substantially alleged that such possession was lawfully acquired and rightfully continued, also alleged that they "were" property of A B, deceased, and that C D "is" his administrator, and further denied that the defendant took and detained them. Judgment was ordered for the defendant on the ground that the plaintiff failed to show property in the goods. *Held*, that the defendant was *prima facie* entitled to a return of them. Bartlett *v.* Brickett, 98 Mass. 521.

In an action to recover personal property, where the plaintiff has obtained possession by a proceeding in the nature of a replevin, the answer must set up that change of possession, in order that there may be proper averments on which a judgment for a return or the value can be based. Gould *v.* Scannell, 13 Cal. 430.

Arkansas.—*Non detinet* is never a proper plea in *Arkansas*. Tyner *v.* Hays, 37 Ark. 599.

4. Lovensohn *v.* Ward, 45 Cal. 8.

5. (See *infra*, this title, *Evidence in Actions of Replevin*.) Chandler *v.* Lincoln, 53 Ill. 74; Reynolds *v.* McCormick, 62 Ill. 412; Constantine *v.* Foster, 57 Ill. 36; Van Namee *v.* Bradley, 69 Ill. 299; Atkins *v.* Byrnes, 71 Ill. 326; Pope *v.* Jackson, 65 Me. 162; Landers *v.* George, 40 Ind. 160; Riddle *v.* Parke, 12 Ind. 89; Ingraham *v.* Hammond, 1 Hill (N. Y.) 353; Williams *v.* Mathews, 30 Minn. 131.

Such a plea is a good plea in bar and completes the issue without a reply. Landers *v.* George, 40 Ind. 160; Darter *v.* Brown, 48 Ind. 395.

An answer in an action of replevin, which avers that the defendant was and is the owner of the property replevied, and denies the plaintiff's right to maintain the action, puts in issue the plaintiff's title to the property. Chase *v.* Allen, 5 Allen (Mass.) 599.

right of the plaintiff to the property.[1] It has been held that there is no inconsistency between the pleas of *non cepit* and property in defendant,[2] or in a stranger.[3] The court will not allow special matter of justification to be given in evidence under the plea of *non cepit*.[4] When the action is in the *cepit*, the plea of *non detinet* is inappropriate.[5] The plea of *cepit in alio loco* does not admit the taking as laid in the declaration.[6] When the

Acts *Alabama* 1882–83, p. 31, provide that in suits where plaintiff's title is derived from a mortgage, defendant may put in issue the amount due thereon, and that, should the verdict be for plaintiff, then on payment of such amount and costs, defendant may retain the property. Under this provision, a suggestion by defendant that plaintiffs derive title from a mortgage admits that plaintiffs have title, unless it has been divested by payment of the debt, leaving as the only issue what amount, if any, is due on such debt. Thompson *v.* Greene, 85 Ala. 240.

Iowa.—The common law pleadings in replevin do not exist under the statute, and a denial of the allegations of the petition putting them in issue is sufficient, and the answer does not have the technical effect which it has at common law. Jansen *v.* Effey, 10 Iowa 227.

Not Guilty.—The plea of not guilty, in the action of replevin, puts in issue the right of the plaintiff to the possession of the property replevied, and also the wrongful taking and detention thereof. Holliday *v.* McKinne, 22 Fla. 153.

In an action of replevin, where the defendant pleads property in a stranger, or where the evidence shows property in a stranger, it is not necessary that such person should be made defendant in the action. Thompson *v.* Sweetser, 43 Ind. 312.

1. Rogers *v.* Arnold, 12 Wend. (N Y.) 30. *Compare* Pringle *v.* Phillips, 1 Sandf. (N. Y.) 292.

2. Cummings *v.* Gann, 52 Pa. St. 484; Smith *v.* Morgan, 8 Gill (Md.) 133; Shuter *v.* Page, 11 Johns. (N. Y.) 196; Simpson *v.* M'Farland, 18 Pick. (Mass.) 427; 29 Am. Dec. 602; Whitwell *v.* Wells, 24 Pick. (Mass.) 25; Dickson *v.* Mathers, Hempst (U. S.) 65. See also Davis *v.* Calvert, 17 Ark. 85; Sprague *v.* Kneeland, 12 Wend. (N. Y.) 161; Susquehanna Boom Co. *v.* Finney, 58 Pa. St. 200.

In Stibbard *v.* Glover, Barnes 364, *non cepit*, property in a stranger, and *liberum tenementum* were allowed to be pleaded together in replevin. Shuter *v.* Paige, 11 Johns. (N. Y.) 196.

An action of replevin was brought against a sheriff who had levied upon the property in controversy. The sheriff, by his answer to the plaintiff's petition, denied generally the allegations of the petition, and also pleaded affirmatively his official character, and justified the seizure under an order of attachment, alleging the ownership of the property to be in the attachment defendant. The defenses were held not to be inconsistent, and the decision of the trial court, in overruling a motion to require defendant to elect upon which of the defenses set up in his answer he would proceed to trial, was held correct. Williams *v.* Eikenbury, 22 Neb. 210.

A mortgagor, in replevin by the mortgagee against him, set up a counter-claim for the breach of a contract by the mortgagee to buy the goods and pay the difference between the amount of the mortgage and the price of the goods. *Held*, not inconsistent with a paragraph of the answer which alleged that the mortgage was void from beginning. Deford *v.* Hutchinson, 45 Kan. 318.

3. Smith *v.* Morgan, 8 Gill (Md.) 133.

Under the plea of property in a stranger, the defendant, who held as deputy sheriff by virtue of a writ against the stranger, is entitled to a return. Quincy *v.* Hall, 1 Pick. (Mass.) 357; 11 Am. Dec. 198.

4. M'Farland *v.* Barker, 1 Mass. 153; Hopkins *v.* Burney, 2 Fla. 42. See Susquehanna Boom Co. *v.* Finney, 58 Pa. St. 200.

5. Davis *v.* Calvert, 17 Ark. 85.

The plea of *non detinet* admits the fact of the wrongful taking alleged in a declaration in replevin. Simmons *v.* Jenkins, 76 Ill. 479.

6. Williams *v.* Welch, 5 Wend. (N. Y.) 290.

When such plea is filed, the plaintiff is bound to show his right to recover, in the same manner as if the

action is for the unlawful detainer, *non detinet* should be pleaded.[1] A plea of property in the defendant is a good plea in bar to the action of replevin.[2] A plea which alleges the right of possession in the defendant, is defective unless it sets out the grounds of his right.[3] The plea must not state merely a conclusion of law.[4] An avowry which justifies the taking of property under process, must aver that it was the property of the defendant under the

plea of *non cepit* had been interposed. Williams *v.* Welch, 5 Wend. (N. Y.) 290.

1. Walpole *v.* Smith, 4 Blackf. (Ind.) 304. See Guille *v.* Wong Fook, 13 Oregon 577.

The answer in replevin denied that at the time stated in the complaint, or at any other time, the property described in the complaint came into defendant's possession, or that the same was or remained in his possession at the commencement of this action, as alleged in said complaint." *Held*, a sufficient denial of possession. Roberts *v.* Johannas, 41 Wis. 616. See also Martin *v.* Porter, 84 Cal. 476.

In an action of replevin for property claimed by plaintiff as vendee, an answer averring that defendant had taken possession of the property as assignee of the vendor, and objecting to the jurisdiction of the court in an action brought against him as such assignee, but which does not deny plaintiff's ownership or right to possession of the property sued for, or that defendant's detention of the property is wrongful, is insufficient. Martz *v.* Putnam, 117 Ind. 377.

An answer to a replevin suit denying unlawful detention and plaintiff's right of possession and claiming salvage under the act of 1883 for saving the property, held, to set out a good defense, though failing to allege compliance with the Salvage Act. Burlington, etc., R. Co. *v.* Young Bear, 17 Neb. 668.

In replevin against two, each may plead *non detinet* separately; and a plea of property in one is good upon general demurrer. Boyd *v.* McAdams, 16 Ill. 146.

2. Dermott *v.* Wallach, 1 Black (U. S.) 96; Edwards *v.* McCurdy, 13 Ill. 496; Martin *v.* Ray, 1 Blackf. (Ind.) 291; Hall *v.* Henline, 9 Ind. 256; Landers *v.* George, 40 Ind. 160; Darter *v.* Brown, 48 Ind. 395; Chambers *v.* Hunt, 18 N. J. L. 339; Harrison *v.* M'Intosh, 1 Johns. (N. Y.) 380; Ingraham *v.* Mead, 1 Hill (N. Y.) 353. See Mikesill *v.* Chaney, 6 Ind. 52.

Such a plea is sustained by proof of a special property in the goods replevied, such as a lien for services upon the goods claimed. Darter *v.* Brown, 48 Ind. 395.

Defendant in his answer denied the plaintiff's ownership and right of possession, "admitted" that defendant owned the property, alleged that defendant was unlawfully deprived of it by plaintiff, and that he had sustained damage by reason thereof. *Held*, a sufficient allegation of ownership, although not expressly averred in terms. McIntire *v.* Eastman (Iowa 1889), 41 N. W. Rep. 162.

Under an issue upon a general plea of property in the defendant, in an action of replevin, the defendant may show any legal title to the property, no matter how derived. O'Connor *v.* Union Line, etc., Co., 31 Ill. 230.

A who owned land, left it, and B entered without his consent and took possession and sowed crops of grain. A sold the land to C, who took possession and issued a landlord's warrant for the grain. B sued C in replevin, to which C avowed rent in arrears, and B replied *non tenuit*. On the trial C amended his plea by adding that of property. *Held*, that C could recover on his plea of property, that he was not estopped to plead property after his avowry, and that B had also pleaded and proven his non-tenancy. Hellings *v.* Wright, 14 Pa. St. 373.

3. McTaggart *v.* Rose, 14 Ind. 230. See Carew *v.* Matthews, 41 Mich. 576.

The defendant in an action of replevin, pleaded generally property in himself, and specially that the goods replevied were delivered by the plaintiff to the defendant as a pledge, to be retained until the plaintiff should pay, etc., which he had not done. Upon demurrer the plea was held good. Amos *v.* Sinnott, 5 Ill. 440.

4. Spahr *v.* Lartt 23 Ill. App. 420

process and subject to the process,[1] and the facts by which it was so subject.[2] Such an avowry is sufficient to entitle the defendant to a return.[3] In an avowry under a distress for rent, the avowant must set forth his title and allege the estate of which he is seised;[4] a failure to do so is not cured by the plain-

See also Moorhouse *v.* Donaca, 14 Oregon 430.

1. Dillon *v.* Wright, 4 J. J. Marsh. (Ky.) 254.

In replevin against a sheriff, a plea that defendant took the goods by virtue of an execution against one A, in favor of a third party, with an averment that the goods were the property of said A, is no more than a plea of property in a stranger, and does not amount to an avowry. Simcoke *v.* Frederick, 1 Ind. 54.

Under *California* Prac. Act, § 65, a pleading by the defendant in replevin which admits the taking but justifies under legal process, and prays judgment for restitution or for the value, contains only matters of confession and avoidance, and is deemed controverted by the plaintiff. Stringer *v.* Davis, 35 Cal. 25.

A plea in an action of replevin averred that the defendant, as city collector, seized the property "by virtue of a certain warrant, duly issued and directed by the proper authority of the said city to the said defendant, as such collector, directing and commanding him, the said defendant, to collect certain taxes theretofore duly assessed" against the said plaintiff, etc. *Held*, this was a sufficient averment respecting the process, without setting out the warrant in full. Mt. Carbon Coal, etc., Co. *v.* Andrews, 53 Ill. 176.

2. Whittington *v.* Deering, 3 J. J. Marsh. (Ky.) 684.

The defendant's answer in a replevin suit set forth fully the process of law whereby he held the property, stating the date of the writ, in whose favor the amount claimed by attaching creditors, the nature of the claim, and the return thereon. *Held*, that this setting forth was sufficient, without appending copies of the attachments. Kingsbury *v.* Buchanan, 11 Iowa 387.

To an action of replevin for taking mules and horses, being the property of the plaintiff, out of his possession, the defendant avowed the taking by virtue of a writ of attachment which was delivered to him as sheriff of the county of Morgan. To the avowry the plaintiff pleaded that the defendant was not sheriff on the day of the issuing of the attachment and at the time of the levy thereof. The defendant demurred to the plea. *Held*, that the plea was bad, because it attempted to put in issue the fact whether the defendant was sheriff on the day of the issuing of the writ, which was wholly immaterial. If the defendant was sheriff at the day of the levy, it was sufficient. James *v.* Dunlap, 3 Ill. 481.

3. Brackett *v.* Whidden, 3 N. H. 17.

In *New York*, an avowry in replevin, showing a conclusive bar to the action, is a perfect pleading requiring an answer; and, although it follows immediately after a plea of property in a stranger, it is not to be considered as matter pleaded to induce a return of the property, a party under such plea being entitled to a return without avowry or cognizance. People *v.* New York C. P., 2 Wend. (N. Y.) 644.

4. Harrison *v.* M'Intosh, 1 Johns. (N. Y.) 380; Hopkins *v.* Hopkins, 10 Johns. (N. Y.) 369. *Compare* Gipson *v.* Bump, 30 Vt. 175.

An avowant, in an action of replevin, cannot take cognizance, as bailiff of his father, for rent in arrear due to his father where the distress had been made in the name and in the right of the avowant, notwithstanding he had authority from his father to make the distress. Swearingen *v.* Magruder, 4 Har. & M. (Md.) 347.

In replevin, where the defendant put in two avowries to one count in a declaration, one of which was held good and the other bad on demurrer, the one held good establishing his right to distrain, he was considered to prevail upon the whole record, and to be entitled to his damages and costs. The plaintiff was held to be entitled to recover his costs of the demurrer to the avowry adjudged bad, and the costs of the issues of fact found in his favor. Wright *v.* Williams, 2 Wend. (N. Y.) 632.

In replevin, the defendant may avow generally for rent in arrear; but, if he state the lease specially, he must state

tiff's pleading over.[1] The avowry need not state the exact amount of rent in arrear,[2] but an avowry for a part of a periodical rent must show that the residue has been paid.[3] An avowry justifying the taking of cattle *damage-feasant* is sufficient without justifying the detention.[4]

c. REPLICATION.—The replication is the third stage of the pleadings in replevin, and when it is in answer to the defendant's avowry or cognizance it is called a plea.[5] For cases where no

it truly. Taylor *v.* Moore, 3 Har. (Del.) 6. See also Tice *v.* Norton, 4 Wend. (N. Y.) 663.

An avowry for rent due need not show that a warrant, founded on oath, had been taken out before making the distress; nor that the goods distrained belonged to the tenant; nor need it set out the particulars of the landlord's title. Wright *v.* Mathews, 2 Blackf. (Ind.) 187.

Plaintiff and Third Party Distinguished.—In replevin, the defendant avowed the taking of the goods and chattels, etc., by virtue of an attachment against certain non-resident debtors, averred that said goods were the goods of the said debtor, and not of the plaintiffs, and prayed a return. *Held*, that there is an obvious distinction between the case where the defendant, an officer holding process, justifies or avows under that process, as taking the goods of the plaintiff in replevin, and where the process is against a third person, not the plaintiff in replevin. If of the plaintiff in replevin, the plaintiff in such case may deny the writ by *nul tiel record*, or he may traverse the matter of mere fact alleged in the plea or avowry. But if the process is against a third person not the plaintiff, the denial of the property becomes the material allegation, and the plaintiff will not be permitted to pass by this traverse and deny the matters in the introductory part of the plea, although set out in the form of avowry. Brown *v.* Bissett, 21 N. J. L. 267. See also Hawk *v.* Lepple, 51 N. J. L. 209.

1. Bain *v.* Clark, 10 Johns. (N. Y.) 424.

2. The amount unpaid is not descriptive of the identity of the obligation, out of which arises the right to a redelivery of the goods distrained. Barr *v.* Hughes, 44 Pa. St. 516; Phipps *v.* Boyd, 54 Pa. St. 342.

Mississippi.—In replevin for a slave distrained for rent, the landlord must avow and prove that the rent distrained for was due and in arrear. Lavigne *v.* Russ, 36 Miss. 326.

3. Shepherd *v.* Boyce, 2 Johns. (N. Y.) 446.

4. Osgood *v.* Green, 30 N. H. 210.

Pound Keeper.—It is not necessary to give the name of the pound keeper, in an avowry which alleges that the animal replevied was taken *damage-feasant*, and impounded in a public pound by the defendant. Gipson *v.* Bump, 30 Vt. 175.

An avowry which set forth the impounding of cattle, and averred that "within twenty-four hours thereafter the defendant gave legal notice of the said impounding," was held sufficient upon demurrer, although it did not state the manner in which the notice was given. Keith *v.* Bradford, 39 Vt. 34.

Good Count.—A defendant in replevin is entitled to judgment if his avowry contains one good count going to the whole action, although his other counts are bad. Nichols *v.* Dusenbury, 2 N. Y. 283.

5. The plaintiff in replevin may plead several pleas to the cognizance of the defendant. Roberts *v.* Tennell, 4 Litt. (Ky.) 289.

In replevin for goods distrained, the plaintiff may plead, in bar of the avowry, matter which shows the defendant a trespasser *ab initio*. Kimball *v.* Adams, 3 N. H. 182.

A plea to an avowry or cognizance, in replevin, need not allege any place of taking. It is enough that it refers to the property mentioned in the declaration and avowry. Judd *v.* Fox, 9 Cow. (N. Y.) 259.

A plea of *non tenure*, to an avowry for rent setting forth seisin in A B and deducing title from him to the avowant, and also showing a reversionary interest in the avowant after the termination of the demise under which the distress was made, admits the seisin and the demise to the avowant from the tenant of the freehold; it only puts

replication was deemed necessary, see note 1. The replication must present a complete answer to the defendant's plea,[2] and must not contain merely an argumentative denial thereof.[3]

5. Evidence in Replevin—(See generally EVIDENCE, vol. 7, p. 42).—In replevin as in all other actions, the evidence should correspond to the allegations[4] and be confined to the point in

in issue the demise under which the distress was taken.

Riens en arriere is *quasi* a general issue when pleaded in bar of an avowry. The general issue strictly speaking puts in issue every material averment; not so the plea of *riens en arriere;* it admits the title of defendant as stated in the avowry, which, therefore, need not be proved, unless the plea be accompanied by a plea of *non tenure.* Bloomer *v.* Juhel, 8 Wend. (N. Y.) 448.

In replevin, a plea of tender to an avowry or recognizance need not say *tout temps prist*, nor make a profert of the money in court. Hunter *v.* LeConte, 6 Cow. (N. Y.) 728.

Where an avowry in replevin alleges a tenancy, a plea which does not show a determination of the tenancy by the expiration of the lease, and how it determined, is not a good plea. Whitney *v.* Carle, 8 B. Mon. (Ky.) 171.

See also generally Moore *v.* Stevens, 42 N. H. 404; Mt. Carbon Coal, etc., Co. *v.* Andrews, 53 Ill. 176; McCarty *v.* Hudson, 24 Wend. (N. Y.) 291.

1. In an action to recover possession of personal property, an answer of property in a stranger, or in the defendant, in effect, denies the property or ownership of the plaintiff, and is a good plea in bar, and completes the issue without a reply. Landers *v.* George, 42 Ind. 160.

An allegation, in answer to a suit in replevin, that the defendant "is rightfully entitled to the property and to the possession thereof," following a denial of all the averments in the plaintiff's petition, is cumulative of these denials, and is not new matter requiring a denial. Hunt *v.* Bennett, 4 Greene (Iowa) 512. See also Ferrell *v.* Humphrey, 12 Ohio 112.

2. Harrison *v.* M'Intosh, 1 Johns. (N. Y.) 380; Hopkins *v.* Hopkins, 10 Johns. (N. Y.) 369; Foshay *v.* Riche, 2 Hill (N. Y.) 247; Nichols *v* Dusenbury, 2 N. Y. 283; Phillips *v.* Townsend, 4 Mo. 101; Powell *v.* Triplett, 6 B. Mon. (Ky.) 420; Dixon *v.* Thatcher, 14 Ark. 141; Boies *v.* Witherell, 7 Me. 162.

Where a plaintiff replies a claim of property to a plea justifying a taking of goods under a plaint in replevin, he must designate the time of the claim with precision, so that issue can be taken upon it. Lisher *v.* Pierson, 2 Wend. (N. Y.) 345; 20 Am. Dec. 612.

Where a defendant in replevin pleads property in a third person, traversing plaintiff's right, the plaintiff should accept the issue tendered, reaffirm his title and conclude to the country. Prosser *v.* Woodward, 21 Wend. (N. Y.) 205.

Where the defendant in replevin avows the taking under a vote of the town to raise a sum of money to be expended upon a certain highway, a replication, that the highway in question was never legally laid out, is sufficient. Stoddard *v.* Gilman, 22 Vt. 568.

In replevin, if the avowry alleges that a sum of money was in arrear for rent, and the plaintiff replies, that he did not owe it at the time of the distress, it is a sufficient issue. Turberville *v.* Self, 4 Call (Va.) 580. See Pattison *v.* Adams, Hill & D. Supp. (N. Y.) 426; Hurlburt *v.* Goodsill, 30 Vt. 146.

Duplicity.—In replevin the plaintiff may put in a double replication. Cotter *v.* Doty, 5 Ohio 394. See People *v.* Schoharie Co., 6 Wend. (N. Y.) 505.

3. Riddle *v.* Parke, 12 Ind. 89.

4. Krug *v.* Herod, 69 Ind. 78; Baer *v.* Martin, 2 Ind. 229; Wilkes *v.* Gates, 68 Miss. 263; Smith *v.* Graves, 25 Ark. 458; Lothrop *v.* Locke, 59 N. H. 532; Bardwell *v.* Stubbert, 17 Neb. 485; Taylor *v.* Riddle, 35 Ill. 568. See Cassel *v.* Western, etc., Co., 12 Iowa 47; Waterman *v.* Robinson, 5 Mass. 303; Kerron *v.* North Pac. Lumbering, etc., R. Co., 1 Wash. 241; Deford *v.* Hutchison, 45 Kan. 318; Guthrie *v.* Olson, 44 Minn. 404; Stein *v.* Hastings, 45 Minn. 196; Johnson *v.* Neal (Neb. 1891), 48 N. W. Rep. 897; Warder *v.* Ingli (S. Dak. 1890), 46 N. W. Rep. 181; Stone *v.* Barrett, 34 Mo. App. 15.

Evidence of property in a third person may be received under the general denial in replevin. Lane *v.* Sparks, 75 Ind. 278.

Evidence of forcible taking may be given in replevin, though the issue be formed exclusively on the plea of property. This evidence is admissible upon the ground that all the circumstances of the transaction are proper for the consideration of the jury in determining the right of property. Moore *v.* Shenk, 3 Pa. St. 13; 65 Am. Dec. 618.

Where plaintiff in the action of replevin, claims the entire interest in goods, he cannot recover on proof of ownership in three-fourths only of the goods replevied. Eakin *v.* Eakin, 63 Ill. 160.

The affidavit for obtaining a writ of sequestration stated the value of the property, as did also the defendant's bond for replevying it, but it was held that, in the absence of an allegation of the value in the plaintiff's petition for the recovery of the property, it was error to admit evidence of the value against the objection of the defendant. Gillies *v.* Wofford, 26 Tex. 76.

Where the ownership of cattle impounded at a certain time is in question, and evidence has been introduced tending to show that the same, together with other cattle described, were at that time in the possession of the plaintiff in replevin, evidence of a sale by the plaintiff of such other cattle, at a subsequent time, is not competent to prove ownership of the cattle impounded at the time of impounding. Edmunds *v.* Leavitt, 27 N. H. 198.

Under a plea of property in himself the defendant may avail himself of the defense that the conveyance under which the plaintiff claims was fraudulent and void as to the defendant. Mullen *v.* Noonan, 44 Minn. 541.

An offer by the plaintiff to prove that the defendant has taken the benefit of the insolvent laws of the State, will be rejected as irrelevant. Basford *v.* Mills, 6 Md. 385.

Plaintiffs, in an action for certain personal property, alleged ownership, and introduced a chattel mortgage of it to them by third persons, to secure a debt not yet due, containing the usual provisions against removal or disposition. The property had never been in their possession, but was delivered to defendant by mortgagors shortly before the action. *Held*, a fatal variance not to be cured by amendment under Code *Washington Territory*, § 108, providing that plaintiffs, in such action, failing to establish ownership, may prove a right of possession by virtue of a special property, and amend. Silsby *v.* Aldridge, 1 Wash. 117.

In an action of claim and delivery, each party alleging general ownership and right of possession in himself, where the defendant, in support of his claim, introduces in evidence what purports to be a bill of sale from plaintiff, the latter may prove in rebuttal that there had never been in fact any sale or delivery of the property; that the bill of sale had been signed to be placed in escrow until a proposed trade had been completed; and that the person named as vendee therein had fraudulently and unlawfully obtained possession of it. Grinnell *v.* Young, 41 Minn. 186.

Where three defendants in replevin avow for rent in arrear, and a fourth makes cognizance, proof of a demise by one is not sufficient to support the issue. Ewing *v.* Vanarsdall, 1 S. & R. (Pa.) 370.

Proof under the possessory warrant act, that the complainant was, before it issued, in the peaceable possession of the property, and that it was afterwards found in the possession of the defendant, makes out a *prima facie* case; and the defendant must show that the possession was changed by consent or authority of law. Marchman *v.* Todd, 15 Ga. 25.

The defendant in an action of replevin commenced before a justice of the peace, and taken by appeal to the circuit court, may, by the statute of *Indiana*, prove property in himself or a stranger without pleading it. Lewis *v.* Masters, 6 Blackf. (Ind.) 243.

Though an attorney, in his opening statement to the jury, in replevin, claims for his client a special property only, in a chattel, evidence of a general property is admissible. Frederick *v.* Gaston, 1 Greene (Iowa) 401.

Where the complaint in the action of replevin serves the double purpose of affidavit and complaint, it is not necessary for the plaintiff to prove the averment in his affidavit, that the property "had not been taken by virtue of any tax, etc., nor signed under any execution," etc. Carney *v.* Doyle, 14 Wis. 270.

An allegation in a declaration in replevin, following a description of the goods, "being an invoice sold to

issue.[1] As in other actions, the best evidence of which the case in

E. T. A. and Co., of . . ." is mere description; and the declaration is not objectionable on proof that the goods were sold to "E. T. A." Caldwell *v.* Bowen, 80 Mich. 382.

An allegation in the complaint "that heretofore, in Umatilla county, Oregon, to wit, on the third day of November, 1884, plaintiff was and now is the owner of and entitled to the possession of" the property, and that on or about that day, defendant wrongfully took possession thereof, is an argumentative allegation that the property was in Umatilla county at the time the action was commenced; and though obnoxious to a demurrer, in the absence of objections to the pleadings, is sufficient to warrant the admission of evidence to show that the property was in that county at the time of the alleged wrongful taking. Moorhouse *v.* Donaca, 14 Oregon 430.

1. Blue Valley Bank *v.* Bane, 20 Neb. 294; Hartt *v.* McNeil, 47 Mo. 526; Gould *v.* Saunders, 69 Mich. 5; Sellars *v.* Ke'ly, 45 Miss. 323; Tully *v.* Harloe, 35 Cal. 302; 95 Am. Dec. 102. See Lang *v.* Daugherty, 74 Tex. 226; Hosmer *v.* Moseley, 11 Cush. (Mass.) 211; Lill's Chicago Brewery Co. *v.* Russell, 22 Wis. 178; Harper *v.* Weeks, 89 Ala. 577; Grossman *v.* Walters, 58 Hun (N. Y.) 603; Caldwell *v.* Custard, 7 Kan. 303.

The value of the property in suit, only, is material, and evidence as to the value of other property described in the bill of sale under which plaintiff claims is inadmissible. Burrill *v.* Wilcox Lumber Co., 65 Mich. 571.

It was not denied in the answer that the plaintiff in an action of claim and delivery was the real party in interest and no issue on that point was raised. It was held that questions put by the defendant, in order to show that the plaintiff was not a party in interest were properly disallowed. Woods *v.* Berry, 7 Mont. 195.

In replevin for beasts impounded, under the *Vermont* practice, if defendant wishes to justify, he must plead an avowry, setting forth the facts relied upon, in the same way as at common law. It is only in special cases to which replevin has been extended by *Vermont* Gen. Stat., ch. 35, §§ 13, 14, that evidence of justification is admissible, under the general issue. Howard *v.* Black, 49 Vt. 9.

Held, in an action of replevin, in which the value of a promissory note was at issue, that testimony tending to show an admission of the defendant as to the value of the note, made four years prior to the action, was not admissible to show its value at the time of the action. Stearns *v.* Johnson, 17 Minn 142.

In an action of replevin for goods, wares, and merchandise, taken from the plaintiff by the defendant as sheriff, on certain orders of attachment and held about two months by the sheriff before the trial of the replevin action, a ruling of the trial court admitting evidence from a competent witness tending to show that there would be a depreciation in the market value of that kind of goods if kept over for another season, is not materially erroneous. Carson *v.* Golden, 36 Kan. 705.

While defendant in replevin for a horse was properly allowed to show the pedigree of the horse and the general reputation of that blood of horses as fast trotters, as bearing on the value of the horse, it was error to allow defendant to name particular horses of that blood and give their reputed time as trotters. Defendant having been permitted to show the speed of certain horses of that blood, it was held error not to allow plaintiff, on rebuttal, to show that certain horses of the same blood had not developed into fast trotters. Ellis *v.* Simpkins, 81 Mich. 1.

Evidence showing the intention of the defendant in taking and appropriating property, is immaterial evidence. His liability does not depend on his intention. Ecker *v.* Moore, 2 Chand. (Wis.) 85.

Upon the issue of "no rent in arrear," the plaintiff in replevin will not be permitted to show that the defendant had nothing in the tenements. White *v.* Cross, 2 Cranch (C. C.) 17.

The judgment in an attachment suit is admissible in an action of replevin for the goods brought by the plaintiff in attachment against an officer, to show the extent of the plaintiff's lien. Berger *v.* Clippert, 53 Mich. 468.

In replevin against an officer to recover attached property, plaintiff may show a reduction of the debt by a sale

its nature is susceptible must be produced.[1] The plaintiff may

of a portion of the property taken. Kerr *v.* Drew, 90 Mo. 147.

Where, in replevin, the defendant claims title under a parol contract, while the plaintiff claims under a written contract of conditional sale which the defendant charges was procured by fraud, all the facts may be given in evidence to enable the jury to determine which of the contracts is valid. Baldwin *v.* Burrows, 95 Ind. 81.

For cases where evidence offered has been held irrelevant, see Greaner *v.* Mullen, 15 Pa. St. 200; Robins *v.* Kitchen, 8 Watts (Pa.) 390; Campbell *v.* Dick (Wis. 1891), 49 N. W. Rep. 120; Bateman *v.* Blake, 81 Mich. 227; Burket *v.* Pheister, 114 Ind. 503.

For cases where held material, see Scofield *v.* Kreiser, 14 N. Y. Supp. 274; Bonesteel *v.* Gardner, 1 Dak. 372; (bill of sale to plaintiff), Wiggin *v.* Day, 9 Gray (Mass.) 97; Busch *v.* Nester, 70 Mich. 525; Doyle *v.* Dobson, 74 Mich. 562; Moore *v.* Shenk, 3 Pa. St. 13; 65 Am. Dec. 618.

1. See Lausley *v.* Van Alstyne (Iowa, 1890), 46 N. W. Rep. 1119; Hibbard *v.* Zenor (Iowa, 1891), 49 N. W. Rep. 63; Lincoln Nat. Bank *v.* Davis (Neb. 1891), 48 N. W. Rep. 892; Murray *v.* Norwood, 77 Wis. 405; King *v.* Lacrosse, 42 Minn. 488; Watrous *v.* Cunningham, 71 Cal. 30.

A purchaser of personal property at a sheriff's or constable's sale cannot maintain trover or replevin against a party who subsequently causes the same property to be sold by virtue of a judgment and execution in his favor, without producing in evidence the judgment and execution under which his purchase was made. Sandeford *v.* Hess, 2 Head (Tenn.) 680.

To sustain a judgment in replevin in favor of an officer who claims the right of possession by virtue of a seizure in an attachment action, the proof should show his official character and the proceedings and process under which he acted and claims possession. Graham *v.* Shaw, 38 Kan. 734; Arn *v.* Parker, 39 Kan. 338.

Parol evidence may be introduced for the purpose merely of identifying the transaction, of the fact that the property in question had been taken on an execution, where the contents or validity of the execution is not sought to be shown in that way. Hunt *v.* Strew, 33 Mich. 85. See also Elliott *v.* Hart, 45 Mich. 234.

Where property is replevied from an officer who justifies his possession by pleading that he holds it as sheriff, under an attachment and judgment, the record of such judgment should be rejected as evidence for the defendant below, the record failing to show that the defendant in the attachment was properly served with process. Repine *v.* McPherson, 2 Kan. 340.

Where replevin is brought for property claimed by defendant under a mortgage from a third person, who exhibited a bill of sale of such property as evidence of his title thereto, evidence of the contents of such bill of sale is inadmissible, when its genuineness is questioned, and defendant makes no attempt to establish the same. Bray *v.* Flickinger, 79 Iowa 313.

Goods may be identified and their value found by evidence derived in part from invoices properly introduced on the trial and taken by the jury to the jury room, the items being so numerous as to be difficult of remembrance. Hickman *v.* Ford, 43 Ark. 207.

A written contract drawn in accordance with an oral agreement, but unsigned, if admitted by the parties to be a correct statement of their agreement, is competent evidence of its terms. Grand Rapids Chair Co. *v.* Lyon, 73 Mich. 438. See Eames *v.* Snell, 143 Mass. 165.

The record of an action between the defendant and a third person for the same property, in which action the present plaintiff testified that the property belonged to such third person, is admissible in evidence in defense. Jones *v.* Dipert, 123 Ind. 594.

Acts and declarations of the plaintiff in an action of replevin are not admissible in his favor. Roach *v.* Binder, 1 Colo. 322.

Where an officer attaches property which is subsequently replevied from him by a stranger, who claims title and the right to its possession, and such officer seeks to justify his possession under his attachment process, it is incumbent upon him to prove his authority by the order of attachment, in order to show his right to possession and the measure of his damages, if successful in the suit. Williams *v.* Eikenbury, 22 Neb. 210.

declare generally claiming the property as his own and give special facts in evidence to establish the manner in which the defendant obtained possession of the goods.[1] Under the general denial where the issue is *non detinet*, the defendant may show that the plaintiff does not own the property,[2] or may give evidence of any special matter which amounts to a defense to the plaintiff's cause of action.[3] When the defendant in replevin pleads prop-

If the plaintiff in replevin desires to prove that the property in controversy was taken from the possession of the defendant and delivered to him by the officer, he should introduce the order of delivery as well as the return, where the latter does not, of itself, identify the property. Jelton *v.* Smead, 29 Ark. 372.

In an action of replevin against a sheriff, for the act of his deputy in levying an execution, it is sufficient for the plaintiff to show that the deputy was a deputy of the defendant, and that he acted *colore officii*, in order to make his declarations in relation to his official acts admissible in evidence against the sheriff, without proving the issuing and delivery of the execution to him. Stewart *v.* Wells, 6 Barb. (N. Y.) 79.

1. Benesch *v.* Waggner, 12 Colo. 534; Benesch *v.* Mitchelson, 12 Colo. 539.

A plaintiff in replevin cannot maintain his action simply by showing that since it was commenced the defendant has gone into insolvency, although the assignee does not appear and take upon himself the defense. Hallet *v.* Fowlor, 8 Allen (Mass.) 93.

2. Seidenbach *v.* Riley, 111 N. Y. 560; Kennett *v.* Fickel, 41 Kan. 211; Chamberlain *v.* Winn, 1 Wash. 501; King *v.* Lacrosse, 42 Minn. 488; Constantine *v.* Foster, 57 Ill. 36; Davis *v.* Warfield, 38 Ind. 461; Kennedy *v.* Shaw, 38 Ind. 474; Lane *v.* Sparks, 75 Ind. 278; Timp *v.* Dockham, 32 Wis. 146.

He may do this by proving title in a third person. Driscoll *v.* Dunwoody, 7 Mont. 394, Chamberlain *v.* Winn, 1 Wash. 501; or in himself. Dimond *v.* Downing, 2 Wis. 498; Emmons *v.* Dowe, 2 Wis. 322; Elliott *v.* Powell, 10 Watts (Pa.) 453; 36 Am. Dec. 200; May *v.* Pavey, 63 Ind. 4.

Where plaintiff in replevin testifies that the property in controversy belongs to him and was taken from him by defendant, and defendant claims under a mortgage, which is introduced in evidence, but there is no evidence that the property mortgaged is the same as that sought to be recovered, a judgment for plaintiff is proper. Game *v.* Whaley, 43 Minn. 234.

In replevin for goods claimed by defendant under a mortgage from a third person, though defendant was permitted to testify that he believed his mortgagor owned such goods, evidence as to reasons for such belief is inadmissible. Bray *v.* Fleckinger, 79 Iowa 313.

3. Merrill *v.* Wedgwood, 25 Neb. 283; Williams *v.* Eikenberry, 23 Neb. 210; Aultman *v.* Stichler, 21 Neb. 72; Holliday *v.* McKinne, 22 Fla. 153; Bailey *v.* Bayne, 20 Kan. 657; Deford *v.* Hutchison, 45 Kan. 318; Bosse *v.* Thomas, 3 Mo. App. 472. See Ellis *v.* Simpkins, 81 Mich. 1; Page *v.* Fowler, 28 Cal. 605.

Where the answer is a general denial it will not be required to be made more definite and certain. Aultman *v.* Stichler, 21 Neb. 72.

Under a general denial in replevin, and a claim of ownership, defendant may show that a mortgage under which plaintiff claims is a forgery. Gandy *v.* Pool, 14 Neb. 98.

The evidence showed that an agreement between defendant and his vendee's agent was that defendant should have a lien on the property for expenses in keeping the same. *Held*, no error to permit the defendant to testify as to the amount expended by him for such purpose, since the items would be proper if the agreement should be sustained. Dutton *v.* Knubs, 80 Iowa 267.

Set-off cannot be proved as a defense to the action of replevin. Kennett *v.* Fickel, 41 Kan. 211.

Proving a claim against the estate of a bankrupt, as for goods sold and delivered to him, precludes the creditor from replevying on the representation that he did not sell them to the bankrupt. Ormsby *v.* Dearborn, 116 Mass. 386.

Where plaintiffs allege ownership generally, defendant need not set up in

erty in himself or a third person and traverses the plaintiff's title, it is a mere inducement to the formal traverse of the right of property in the plaintiff, and the burden of proof is on the plaintiff to prove property in himself.[1] But if the defendant claims property in himself or a third person without traversing the plaintiff's title, it leaves the burden of proof upon the defendant.[2] The plaintiff need not prove facts which are admitted by the defendant in his pleadings.[3] No evidence will be admitted to contradict the sheriff's return upon the writ of replevin.[4] What effect is to be given to an admission of the

his answer that a bill of sale, under which plaintiff claims, is a mortgage, in order to introduce evidence to that effect. Kerron *v.* Northern Pac. Lumbering, etc., Co., 1 Wash. 241.

An action of replevin was brought to recover the possession of certain stacks of oats, and the plaintiff offered evidence tending to prove that she had sown and harvested the oats on land of which she had been in possession several years. *Held*, that in such an action, the defendants had no right to show that the plaintiff had made a settlement and entry of the land for the benefit of her father, and therefore that her possession was fraudulent as against the government. Barnhart *v.* Ford, 37 Kan. 520.

Where an officer justified the taking of property by execution, and a plaintiff claimed under a previous purchase from the defendant in the execution, the officer may show that such purchase was fraudulent as to creditors, and, in so doing, may show the judgment under which the execution was issued. Stephens *v.* Frazier, 2 B. Mon. (Ky.) 250.

In replevin under the plea of *non detinet*, the defendant may show that he held the goods as a constable by virtue of certain executions, without special plea or notice. Oaks *v.* Wyatt, 10 Ohio 344.

1. Reynolds *v.* McCormick, 62 Ill. 412; Chandler *v.* Lincoln, 52 Ill. 74; Van Namee *v.* Bradley, 69 Ill. 299; Dobbins *v.* Hanchett, 20 Ill. App. 396; Constantine *v.* Foster, 57 Ill. 36; Anderson *v.* Talcott, 6 Ill. 365; Atkins *v.* Byrnes, 71 Ill. 326; Pope *v.* Jackson, 65 Me. 162; McIlvaine *v.* Holland, 5 Harr. (Del.) 226.

Mere matter of inducement in a plea is not traversable. Lamping *v.* Payne, 83 Ill. 463.

In an action of replevin to recover certain negroes, the plaintiff introduced an agreement, under which he claimed title, derived from A, having first shown title in A. The defendant objected that the plaintiff had not shown the identity of the negroes. *Held*, that the evidence was admissible, although the identity was to be afterwards shown. Brooke *v.* Berry, 1 Gill (Md.) 153.

The plaintiff in proving property may use an execution in which he is defendant, and under which the property was delivered to him on a forthcoming bond, without producing the judgment. Lynch *v.* Welsh, 3 Pa. St. 294.

In an action of replevin for a horse, which the defendant claimed to have become possessed of by barter with the plaintiff, the burden of proof was held to be upon the latter to establish his ownership, and not upon the former to first prove the contract of sale. Peake *v.* Conlan, 43 Iowa 297.

2. Chandler *v.* Lincoln, 52 Ill. 74.

3. Mills *v.* Kansas Lumber Co., 26 Kan. 574; Jones *v.* Spears, 47 Cal. 20.

An averment of value is a material averment in an action of replevin, and, when made, is admitted if not denied. Tucker *v.* Parks, 7 Colo. 62.

4. Phillips *v.* Hyde, 1 Dall. (U. S.) 439.

No evidence will be admitted, to contradict the sheriff's return of *elongatur*, after judgment *de retorno habendo* in replevin. Phillips *v.* Hyde, 1 Dall. (U. S.) 439.

One of two rival claimants of an uncertain number of logs mingled with other logs in a boom brought replevin against the boom company for "329.760 feet of white pine saw logs, more or less, marked 'E,' of the value," etc.; the sheriff returned "replevied as within commanded;" defendants gave bond and retained property, and the defendants pleaded *non cepit* and "property."

parties, is a question for the jury.[1] The burden of proof is on the plaintiff in all cases where the defendant denies generally the allegations in the plaintiff's declaration.[2]

6. Verdict or Finding.—If different interests exist, the verdict should specify for what interests replevin should lie and for what it should not lie.[3] Where there have been several pleas to

Held, that they were not by the return and plea estopped from showing the actual amount of the lumber. Susquehanna Boom Co. *v.* Finney, 58 Pa. St. 200.

Bond Estoppel.—In replevin where the defendants give a bond to retain the property, they are estopped from showing at the trial that the property in controversy was never in their possession. Carpenter *v.* Stearns, 32 Mo. App. 132.

1. Ingalls *v.* Bulkley, 15 Ill. 224: Young *v.* Foute, 43 Ill. 33.

2. Andrews *v.* Costican, 30 Mo. App. 29.

Where, in an action of replevin, the identity of the property, and the genuineness of the writing under which the plaintiff claims it, are denied, the burden of proof is upon him to establish both facts. Webber *v.* Read, 65 Me. 564.

3. White *v.* Jones, 38 Ill. 159; Burke *v.* Birchard, 47 Wis. 35; Warner *v.* Hunt, 30 Wis. 200; Dowell *v.* Richardson, 10 Ind. 573.

The jury may find, in replevin, that one part of the property belonged to the plaintiff and another part to the defendant. O'Keefe *v.* Kellogg, 15 Ill. 347; Williams *v.* Beede, 15 N. H. 483; Edelen *v.* Thompson, 2 Har. & G. (Md.) 31.

A verdict which states that "we, the jury, in the above entitled case, find for the plaintiff that he is entitled to the possession of the header mentioned in the complaint, and that the value thereof is $140," finds all the facts required by § 211 of the Civil Code of *Oregon*. Moorhouse *v.* Donaca, 14 Oregon 430.

The verdict in replevin, "we, the jury, find the defendant guilty," is not precisely right; but the finding is equivalent to a finding of property in the plaintiff, in a case where the proceedings were *ore tenus*. Jarrard *v.* Harper, 42 Ill. 457; 92 Am. Dec. 84.

A verdict in favor of the plaintiff is bad for uncertainty, if the court cannot understand from it what property the jury intended to find belonged to him. Dowell *v.* Richardson, 10 Ind. 573.

Nebraska.—Section 191 of the Civil Code of *Nebraska* provides that "in all cases where the property has been delivered to the plaintiff, where the jury shall find upon issue joined for the defendant, they shall also find whether the defendant had the right of property or the right of possession only, at the commencement of the suit; and, if they find either in his favor, they shall assess such damages as they think right and proper for the defendant; for which, with costs of suit, the court shall render judgment for the defendant."

It was held that a verdict which found for the defendants, and that they were entitled to the possession of the property, and also found the value of the interest of defendants to be $2,597, and the damages for the wrongful detention, was a sufficient verdict under the above section. Connolly *v.* Miller (Neb. 1887), 34 N. W. Rep. 76.

Where the complaint in a replevin action alleged that the plaintiff was the owner of certain personal property which the defendant unlawfully detained, and upon the issue of "not guilty" the jury found that the plaintiff was entitled to the possession of the property, and assessed its value and damages for its detention, but did not pass upon the question of title to the property, the verdict was defective in substance and a new trial should be awarded. Child *v.* Child, 13 Wis. 18.

A finding in an action of replevin, which does not fix the damages for detention, nor find and determine the right of possession, is fatally defective, and will not support a judgment. Bates *v.* Wilbur, 10 Wis. 415.

In replevin where plaintiff, claiming as mortgagee, has acquired and retains possession by giving the statutory bond, a verdict in his favor, finding him entitled to the possession, need not determine the value of his special interest. Woodruff *v.* King, 47 Wis. 261.

Where, in replevin for several distinct articles of property, the jury assess their value *in solido*, their verdict is erroneous and should not be received by the court, if any objection is made

the action, a general verdict in favor of either party finds all the issues in his favor.[1] Where there is but one issue made by the pleadings, which is as to the title to the property, if the jury "find for the plaintiff," and find the value and assess the damages, such finding is equivalent to finding the issue, submitted to them, for the plaintiff.[2] The verdict must pass upon all the

at the time it is rendered. Hanf *v.* Ford, 37 Ark. 544.

An attachment was for a certain sum. An action of replevin was brought against the officer for the attached goods and the answer in the action alleged that the sum was due the attachment plaintiff from F. The verdict was for the defendant generally. The value of the goods as conceded by the parties and found by the verdict, was a less sum. *Held*, that the verdict was sufficient, though it did not find the amount of the defendant's special interest, he being clearly entitled, if he recovered at all, to the full value of the property. Blakeslee *v.* Rossman, 44 Wis. 550.

In an action of replevin against a sheriff and execution plaintiffs for property levied on by virtue of an execution, a verdict for the defendants generally, as to part of the property is not contrary to law. Brunk *v.* Champ, 88 Ind. 188.

The jury in their verdict, assessed the value of goods, and stated that this was to be reduced by a factor's advances and charges, which they did not assess. This was held not a proper verdict. Wood *v.* Orser, 25 N. Y. 348.

In replevin, a verdict that the plaintiff recover the property with one cent damages for its detention, is a sufficient finding of the right of possession in the plaintiff. Stephens *v.* Scott, 13 Ind. 515.

In replevin under the *Kansas* Code, the wrongful detention is the gist of the action, and a verdict that finds there was no wrongful detention, is sufficient. Leroy *v.* McConnell, 8 Kan. 273.

Section 8341, of How. St. *Michigan*, provides that, if the verdict be in favor of the plaintiff, the jury shall assess the damages which he has sustained by the unlawful taking and detention of the property. Riley *v.* Littlefield, 84 Mich. 22.

The 549th § of the *Indiana* Rev. Stat. 1881, provides: "In actions for the recovery of specific personal property, the jury must assess the value of the property, as also the damages for the taking or detention, whenever, by their verdict, there will be a judgment for the recovery or return of the property." Baldwin *v.* Burrows, 95 Ind. 81.

1. **Plaintiff.**—Rhodes *v.* Bunts, 21 Wend. (N. Y.) 19; Lindauer *v.* Teeter, 41 N. J. L. 255; Payne *v.* June, 92 Ind. 252; Mitchell *v.* Burch, 36 Ind. 529; Coit *v.* Waples, 1 Minn. 134; Krause *v.* Cutting, 28 Wis. 655; Gaines *v.* White (S. Dak. 1891), 47 N. W. Rep. 524; Underwood *v.* White, 45 Ill. 437; Arthur *v.* Wallace, 8 Kan. 267.

Defendant.—Baldwin *v.* Burrows, 95 Ind. 81. See Rowan *v.* Teague, 24 Ind. 304.

In replevin, where the pleas were: 1. That the defendant had not taken nor detained the property; 2. Property in a stranger; 3 Property in the defendant, the plaintiff joined issue on the first plea, and replied to the second and third, property in himself. Verdict "We find the property to be in the plaintiff." Judgment against the defendant for costs. *Held*, that this verdict did not authorize a judgment for plaintiff, as the jury had not found that the horse had been taken or detained by the defendant. Huff *v.* Gilbert, 4 Blackf. (Ind.) 19.

2. Everit *v.* Walworth Co. Bank, 13 Wis. 468; Krause *v.* Cutting, 32 Wis. 687. See also Rowan *v.* Teague, 24 Ind. 304.

In replevin, the title to the property, as well as the present right of possession, being in issue, defendant is entitled to have the former question passed upon by the verdict. Appleton *v.* Barrett, 22 Wis. 568.

Where one of the defendants claimed title in himself and the other disclaimed title and possession, the finding "that the possession of the property mentioned in the complaint be given to the plaintiff," is equivalent to finding the property in the plaintiff, and that he is entitled to the possession. Robertson *v.* Caldwell, 9 Ind. 514.

In replevin in the *detinet* the finding was, that the plaintiff was a mortgagee of the chattel in dispute and possession; that the defendant as constable took and detained the same on an execu-

issues submitted to the jury.[1] If the jury neglect to find all the issues submitted to them, the judge may direct them to supply

tion against the mortgagor, and that by law a mortgagee of a chattel in possession might maintain replevin in the *detinet* against a constable who took and detained the mortgaged chattel for the mortgagor's debts. *Held*, that the finding did not, even by necessary implication, show a right of possession in the plaintiff. Bates *v.* Wilbur, 10 Wis. 415.

A verdict for the plaintiff for the possession of the property, or its value, is good, under *California* Code Civ. Proc., § 627; Ryan *v.* Fitzgerald, 87 Cal. 345.

1. Ridenour *v.* Beekman, 68 Ind. 236; Muller *v.* Jewell, 66 Cal. 216; Nelson *v.* Bowen, 15 Ill. App. 477; Dole *v.* Kennedy, 38 Ill. 282; Holt *v.* Van Eps, 1 Dak. 206; Robbins *v.* Foster, 20 Mo. App. 519; Smith *v.* Smith, 17 Oregon 444; Yick Kee *v.* Dunbar (Oregon, 1891), 26 Pac. Rep. 275; Phipps *v.* Taylor, 15 Oregon 484; Boynton *v.* Page, 13 Wend. (N. Y.) 425; Bemus *v.* Beckman, 3 Wend. (N. Y.) 667; Sprague *v.* Kneeland, 12 Wend. (N. Y.) 161; Child *v.* Child, 13 Wis. 17; Carrier *v.* Carrier, 71 Wis. 111; Donaldson *v.* Johnson, 2 Chand. (Wis.) 160; Smith *v.* Phelps, 7 Wis. 211; Rouge *v.* Dawson, 9 Wis. 246; Appleton *v.* Barrett, 22 Wis. 568; Hass *v.* Prescott, 38 Wis. 146; Feder *v.* Daniels, 79 Wis. 578.

In an action of replevin, where the goods were delivered to plaintiff, the finding: "I do find for plaintiff, and against defendant for the goods, and for all the costs of this action by her expended," it was held sufficient to sustain a judgment for the plaintiff, though it should have found the right of possession in plaintiff and assessed damages. Degering *v.* Flick, 14 Neb. 448.

In replevin tried by the court without a jury, a finding for defendants sufficiently determines issues joined upon *non cepit* and property in a stranger. Freas *v.* Lake, 2 Colo. 480.

Finding the "issues" for the defendant and assessing his damages at a certain sum are not a compliance with the statute, which requires to find whether he had the right of property or the right of possession only, and then to find the value of the property or of the possession and damages. Fulkerson *v.* Dinkins, 28 Mo. App. 160.

In a suit to recover a horse alleged to have been wrongfully taken and detained by the defendant, he answered: 1. Property in himself; 2. In a third person; 3. Denial. *Held*, that a verdict, "We, the jury, find for the plaintiff; find the property in the horse to be in him, and that he is entitled to the possession, etc.; we also find the value of the horse to be $125," sufficiently covered all the issues in the case. Clark *v.* Heck, 17 Ind. 281.

Where the defendant in an action of replevin pleaded property in himself and others, representatives of A, property in B, and also property in himself alone, and issues were joined and the jury found for the defendant on the first plea alone, disregarding the other issues, it was held that this finding was sufficient, because a finding of the other issues in favor of the plaintiff could not have affected the judgment. Ramsey *v.* Waters, 1 Mo. 406. See Single *v.* Barnard, 29 Wis. 463.

A defendant in replevin pleaded, 1. *Non cepit;* 2. An avowry, averring the goods taken to be his property; to which the plaintiff replied and took issue. The jury found a general verdict for the plaintiff on the issue of *non cepit*, without any mention of the other issue. *Held*, sufficient to sustain a judgment for plaintiff. Thompson *v.* Button, 14 Johns. (N. Y.) 84.

A verdict that the property detained is that of the plaintiff, and awarding damages for the detention, is defective, and must be set aside, unless it be also found by the jury that the detention was unjust on the part of the defendants. Swain *v.* Roys, 4 Wis. 150.

A general verdict must be understood as a decision by the jury in favor of the party for whom it is found, of all questions put in issue by the pleadings. Fitzer *v.* McCannan, 14 Wis. 63.

In replevin, where issues are made upon different and inconsistent pleas, a general verdict upon all is bad. Hewson *v.* Saffin, 7 Ohio 232.

The verdict of not guilty in replevin is responsive to the issues of *non cepit* and *non detinet*. Bourk *v.* Riggs, 38 Ill. 321. See also Dole *v.* Kennedy, 38 Ill. 282; Hackett *v.* Jones, 34 Ill. App. 562.

Where defendant pleaded *non cepit* and property in a third person, upon an execution against whom the defendant

such omission ;[1] and if the defect is one of form merely and not of substance, it may be amended by the court.[2] The verdict must find the value of the property and assess the damages ;[3]

had taken it, it was held that a verdict, "We, the jury, find the defendant not guilty, and the right of special property to be in the defendant," was erroneous. Hanford *v.* Obrecht, 49 Ill. 146.

A verdict that the plaintiff is entitled to the property does not respond to the issue upon the plea of *non cepit*, and the property in the defendant; and no valid judgment can be rendered upon it. Smith *v.* Houston, 25 Ark. 183.

A verdict for damages only, and not in the alternative for the value of the goods, is not erroneous, where it was shown that many of the goods had been sold to third persons, and so could not be returned. McGraw *v.* Franklin (Wash. 1891), 25 Pac. Rep. 911.

1. Noble *v.* Epperly, 6 Ind. 468; Hanf *v.* Ford, 37 Ark. 544; Muller *v.* Jewell, 66 Cal. 216.

Where a jury find but part of the matter put in issue, and say nothing as to the residue, the verdict is ill, and a *venire facias de novo* should issue if no judgment is given; but if judgment is entered upon the verdict, it should be reversed. Mattson *v.* Hanisch, 5 Ill. App. 102.

2. Coit *v.* Waples, 1 Minn. 134.

In an action of replevin for a colt, the complaint alleging that "said defendants have possession of without right, and unlawfully detain said colt from the plaintiff," the answer of general denial was filed. The cause was tried by a jury who returned the following verdict: "We, the jury, find the property was replevied in Miami county, and at the commencement of this suit the right of and possession thereto was in the plaintiff, and assess his damages at twenty-five dollars." *Held*, that the verdict was radically defective and did not justify the rendition of any judgment, and that a motion for a *venire de novo* should have prevailed. Ridenour *v.* Beekman. 68 Ind. 336.

3. Hohenthal *v.* Watson, 28 Mo. 360; Gulath *v.* Waldstein, 7 Mo. App. 66; Chisson *v.* Lamcool, 9 Ind. 530; Phillips *v.* Melville, 10 Hun (N. Y.) 212; Bailey *v.* Ellis, 21 Ark. 488; Averett *v.* Milner, 75 Ala. 505; Williams *v.* Morrison, 29 Fed. Rep. 282; Young *v.* Parsons, 2 Metc. (Ky.) 499; Wallace *v.* Hilliard, 7 Wis. 627; Rogers *v.* Sample (Neb. 1889), 44 N. W. Rep. 86; Archer *v.* Long (S. Car. 1890), 11 S. E. Rep. 86.

Where a constable levies upon property by virtue of an execution, he has a special interest therein as against the owner to the amount due upon the execution, including his fees. And if the debtor brings replevin against the officer, and the latter has a verdict in his favor, the jury should assess the value of the property at that amount. Seaman *v.* Luce, 23 Barb. (N. Y.) 240.

Where, as in *Florida*, the plaintiff in replevin may have a verdict for the property or for its value as he elects, a verdict for the value is not defective because in form it purports to be a verdict for damages, the judge's charge having been accurate, and there being no probability of the jury having been misled. Jeffreys *v.* Greeley, 20 Fla. 819. See also Brannin *v.* Bremen, 2 N. Mex. 40; Western Stage Co. *v.* Walker, 2 Iowa 504; 65 Am. Dec. 789.

The jury is in all cases authorized to assess the value of property under § 11, ch. 132, *Wisconsin* Rev. Sts., where they find that the defendant in replevin is entitled to a return whether he waives it or not. Farmers' L. & T. Co. *v.* Commercial Bank, 15 Wis. 424; 82 Am. Dec. 689.

The finding of a jury in replevin of the amount of rent in arrear, is surplusage, unless accompanied by a finding of the value of the goods distrained. Wood *v.* May, 3 Cranch (C. C.) 172.

A finding of the value of property and an award of damages in a fixed sum for its detention will be set aside where there is no evidence of the value and where the extent of the damages rests on mere conjecture. Ascher *v.* Schaeper, 25 Mo. App. 1.

The allegation in a declaration in an action of replevin as to the value of the property taken by the defendant, is matter of form and not an admission in an inquiry by the jury as to the value. Bailey *v.* Ellis, 21 Ark. 488.

A judgment for the return of property in a replevin suit, under a verdict which fails to find the value of the property to be returned, is erroneous, but, in the absence of any appeal therefrom, is not void; and, in such case, if the party recovering elects to have the

and if various distinct items have been replevied the verdict must find the value of each item.[1] The verdict must describe the property.[2] The verdict must be construed with reference to the pleadings,[3] and must be consistent with the issues presented by the pleadings.[4] If there are two or more defendants, the jury

property returned, and demands the same, he is entitled to receive it. State *v.* Dunn, 60 Mo. 64.

Where the property has already been delivered to the plaintiff, a general verdict in his favor is sufficient, without an assessment of value. Nor is the verdict defective in not finding the amount of damages. Prescott *v.* Heilner, 13 Oregon 200.

Damages.—A jury may be waived and damages assessed by the court in actions of replevin. Baker *v.* Daily, 6 Neb. 464.

Where damages are claimed for both the taking and detention, a verdict for damages in a certain sum is good, though it does not specify whether the damages are for the taking or the detention or both. Ryan *v.* Fitzgerald, 87 Cal. 345.

A verdict for plaintiff will not be set aside at defendant's instance because the verdict did not assess damages. Gaines *v.* White (S. Dak. 1881), 47 N. W. Rep. 524.

Under *Indiana* Rev. Stat. 1881, § 1550, relating to replevin before justices of the peace, and providing that if the defendant prevail, judgment shall be rendered that he may have return of the property; and under § 549, relating to civil procedure, and providing "in actions for the recovery of specific, personal property, the jury must assess the value of the property as also the damages, whenever by their verdict, there will be a judgment for the recovery or return of the property," where the cause originates before a justice, and the verdict is, that defendant is entitled to have return of the property, the jury need not assess the value of the property or the damages. Burket *v.* Pheister, 114 Ind. 503. See also Buck *v.* Young, 1 Ind. App. 538.

1. Cook *v.* Halsell, 65 Tex. 1; Hanf *v.* Ford, 37 Ark. 544; Drane *v.* Helzheim, 21 Miss. 336.

Where the complaint and affidavit described the property as "one red sorrel mule," and "one dark mare mule," it was held that a verdict assessing the value of the mules together was error, under *Alabama* Code, § 2719, providing that the jury must assess the value of each article separately, if practicable. Southern Warehouse Co. *v.* Johnson, 85 Ala. 178.

The party against whom the cause is decided has a right under the statutes of *Texas* to return all of the property in satisfaction of the judgment or part in satisfaction *pro tanto*, and for that purpose may have the value assessed. Cook *v.* Halsell, 65 Tex. 1.

California.—A judgment for defendant in replevin is not invalidated because the value of each separate article was not found. Whetmore *v.* Rupe, 65 Cal. 237.

Colorado.—The same doctrine is maintained in *Colorado.* Stevenson *v.* Lord, 15 Col. 131.

When the defendant makes no request for a separate valuation and does not object to the verdict before the jury is discharged, he waives his right to the separate valuation of the property replevied. Hobbs *v.* Clark, 53 Ark. 411.

In replevin for a mare and colt, it is no ground for vacating the judgment that there was not a separate finding of the value of each article, the mare and colt being so intimately connected as to constitute one whole. Henry *v.* Dillard (Miss. 1891), 9 So. Rep. 298.

2. Gulath *v.* Haldstein, 7 Mo. App. 66; Guille *v.* Wong Fook, 13 Oregon 577.

A description of the property in the verdict is sufficient, which refers to it as "said property," where the property is specifically described in the complaint. Anderson *v.* Lane, 32 Ind. 102. See also Hobbs *v.* Clark, 53 Ark. 411.

3. Blakeslee *v.* Rossman, 44 Wis. 550; Everit *v.* Walworth Co. Bank. 13 Wis. 419. See Newlien *v.* Reed, 30 Iowa 496.

4. Shelton *v.* Franklin, 68 Ill. 333. A verdict which finds the plaintiff to be the owner of property the title to which he has disclaimed is erroneous. Updyke *v.* Wheeler, 37 Mo. App. 680.

In an action of replevin, the defendant, a sheriff, pleaded property in himself and in A, a judgment debtor, and the jury found "the right of property in the defendant." *Held*, that the form

may find in favor of part and against the others.[1] Where the defendant has improved the property for which replevin is brought against him, and he claims the additional value and retains the property by giving a bond, a verdict for the plaintiff for damages transfers the title to the defendant.[2]

7. Judgment in Replevin.—The judgment in replevin must be rendered according to the verdict[3] or finding of the

of verdict should have been that they found the issues for the defendant, and that the property in question was the property of A. Gilligan *v.* Stevens, 4 Ill. App. 401.

A finding that plaintiff has the general property, but that defendant did not unlawfully detain the goods, is contradictory and cannot sustain a judgment in a case where it is impossible that a special property should coexist with the general ownership. Rodman *v.* Nathan, 45 Mich. 607.

1. Carothers *v.* Van Hagan, 2 Greene (Iowa) 481.

2. Herdic *v.* Young, 55 Pa. St. 176; 93 Am. Dec. 739.

3. Poor *v.* Woodburn, 25 Vt. 234; Greene *v.* Lewis, 85 Ala. 221; Corn Exch. Bank *v.* Blye, 54 Hun (N. Y.) 312; Holliday *v.* McKinne, 22 Fla. 153; Wolf *v.* Blue, 5 Blackf. (Ind.) 153; McKeal *v.* Freeman, 25 Ind. 151; Wangler *v.* Franklin, 70 Mo. 659; Black *v.* Winterstein, 6 Neb. 224; Flanagan *v.* McWilliams, 52 Iowa 148; Hews *v.* Wall, 27 Ill. App. 445.

See White *v.* Lloyd, 3 Blackf. (Ind.) 390; Buck *v.* Young, 1 Ind. App. 558; Moore *v.* Vrooman, 32 Mich. 526; Emmons *v.* Dowe, 2 Wis. 322; Hanford *v.* Obrecht, 38 Ill. 493; Stevenson *v.* Lord, 15 Colo. 131; Cooke *v.* Aguirre, 86 Cal. 479; Waldman *v.* Broder, 10 Cal. 378.

Where the verdict is for both parties, in an action of replevin; for one, damages and costs, as to that portion upon which he maintained his replevin; and for the other, for the return of the property improperly taken by the writ, damages for its detention and costs, the judgment must follow the verdict. Poor *v.* Woodburn, 25 Vt. 234.

A judgment for six cents' damages is not sufficient grounds for a reversal of the judgment, although no damages were found in the verdict. Reise *v.* Delles, 45 Wis. 662.

The jury in a replevin suit found "for the defendant, $50." *Held*, that judgment should be rendered on the verdict and not for a return of the property. Hunt *v.* Bennett, 4 Greene (Iowa) 512.

Where a petition in replevin alleges ownership and right to possession in plaintiff, and wrongful detention by defendant, a general verdict for plaintiff finds all these issues in his favor, and the judgment may be entered accordingly. And, in such case, a judgment that the "plaintiff have and recover of the defendant the possession of the property described in the petition, or the value thereof in case a delivery cannot be had," is not in proper form. Arthur *v.* Wallace, 8 Kan. 267.

An action was brought for the recovery of different articles of personal property, the issues in respect to which were severable, or the several items of damages claimed were distinct and separate, and a general verdict was rendered for the defendant, which was supported by the evidence, except as to particular items, the amount or value of which clearly appeared upon the record. *Held*, that the court might, in the exercise of a sound discretion, deny a motion for a new trial, based on the ground that the verdict was against the evidence, upon the condition that the defendant stipulated to allow a recovery for the property or damages to which plaintiff appeared to be entitled. Ladd *v.* Newell, 34 Minn. 107.

Where a petition in replevin alleged absolute ownership, and the findings of fact showed simply the right derived from a stoppage *in transitu*, and it does not appear that any objection was made to proof of this kind of interest, and it appears that no motion was made for a new trial, and that the attention of the lower court was not called to the variance, a judgment sustained by the findings will not be reversed on account of such variance. Rucker *v.* Donovan, 13 Kan. 251; 19 Am. Rep. 84.

A verdict in replevin against a sheriff found the property to be in the

court,[1] and should be in the alternative for the possession of the property or its value, in case a delivery or return cannot be had,[2]

plaintiff "except the mare bought," etc. *Held*, that the judgment should have required a return of the mare to the officer. Pratt *v.* Tucker, 67 Ill. 346.

A sale of mortgaged property recovered by a mortgagee in an action of replevin should not be ordered, the proceeding being merely to recover possession and not to foreclose. Marks *v.* McGehee, 35 Ark. 217.

1. Leighton *v.* Stuart, 10 Neb. 224; Cummings *v.* Stewart, 42 Cal. 230.

Judgment on a discontinuance in replevin is for costs only, and not for a return. McIlvaine *v.* Holland, 5 Harr. (Del.) 226.

Where any of the pleas in replevin present a complete bar to the action, and the plaintiff's demurrer thereto is overruled without his taking issue thereon, the court must render final judgment against him, and for a return of the property. Kimball *v.* Citizens' Sav. Bank, 3 Ill. App. 320.

2. Judgment for Plaintiff.— Cummins *v.* Stewart, 42 Cal. 230; Cooke *v.* Aguirre, 86 Cal. 479; McCue *v.* Tunstead, 66 Cal. 486; Stewart *v.* Taylor, 68 Cal. 5; Jarman *v.* Webb, 67 N. Car. 32; Thompson *v.* Eagleton, 33 Ind. 300; Hebel *v.* Scott, 36 Ind. 226; Bales *v.* Scott, 26 Ind. 202; Ward *v.* Masterton, 10 Kan. 77; Fitzhugh *v.* Wiman, 9 N. Y. 559; Phillips *v.* Melville, 10 Hun (N. Y.) 212; Dows *v.* Rush, 28 Barb. (N. Y.) 157; Young *v.* Atwood, 5 Hun (N. Y.) 234; Ingersoll *v.* Bostwick, 22 N. Y. 425; McNamara *v.* Eisenleff, 14 Abb. Pr. N. S. (N. Y.) 25; Stauff *v.* Maher, 2 Daly (N. Y.) 142; Morris *v.* Coburn, 71 Tex. 406; Rowark *v.* Lee, 14 Ark. 425; Jetton *v.* Smead, 29 Ark. 372; Hanf *v.* Ford, 37 Ark. 544; Gulath *v.* Waldstein, 7 Mo. App. 66; Anderson *v.* Tyson, 14 Miss. 244; Lambert *v.* McFarland, 2 Nev. 58; Clark *v.* Warner, 32 Iowa 219; Rose *v.* Tolly, 15 Wis. 443; Smith *v.* Phelps, 7 Wis. 211; Heeron *v.* Beckwith, 1 Wis. 17; Rogers *v.* Bradford, 8 Bush (Ky.) 163; Stevenson *v.* Lord, 15 Colo. 131.

The defendant must not have the option of retaining the property by paying a named sum. Cummings *v.* Stewart, 42 Cal. 230; Schwantz *v.* Pillow, 50 Ark. 300.

Where the finding contains all the requisites for the rendering of a proper judgment for the plaintiff, and the judgment is not in the alternative, no question as to the defective form of the judgment is raised by a motion for a new trial, assigning for cause, "that the judgment is contrary to law and is not supported by sufficient evidence." Thompson *v.* Eagleton, 33 Ind. 300.

A judgment similar to a judgment in assumpsit is not a proper judgment in replevin. Hamilton *v.* Clark, 25 Mo. App. 428.

Where the property in suit was delivered to the plaintiff upon his giving bond therefor, a judgment for the value of the property and for damages and costs was held erroneous. It should have been for the possession and damages and costs. Everit *v.* Walworth Co. Bank, 13 Wis. 419. See also Chissom *v.* Lamcool, 9 Ind. 530.

Where Plaintiff Acquires Right After Action Brought.—In an action of replevin where the plaintiff took the property at the commencement of the action, and the defendant prayed a return of it, and the defendant was entitled to the property at the commencement of the action, but his right had ceased and vested in the plaintiff before trial, the judgment should have left the property in plaintiff's possession; but should have awarded costs to defendant. O'Connor *v.* Blake, 29 Cal. 312; Wheeler *v.* Train, 4 Pick. (Mass.) 168. See also Doane *v.* Lockwood, 115 Ill. 490; Barney *v.* Brannan, 51 Conn. 175; Martin *v.* Bayley, 1 Allen (Mass.) 381; Ingraham *v.* Martin, 15 Me. 373.

The plaintiff cannot have judgment for a return merely on the strength of an after-acquired lien. Ator *v.* Rix, 21 Ill. App. 309.

Pennsylvania.—In *Pennsylvania*, the plaintiff cannot have judgment for delivery of the property. He must recover the whole in damages. Moore *v.* Shenk, 3 Pa. St. 13; 65 Am. Dec. 618; Chaffee *v.* Sangston, 10 Watts (Pa.) 265; Easton *v.* Worthington, 5 S. & R. (Pa.) 130; Etter *v.* Edwards, 4 Watts (Pa.) 63; Marsh *v.* Pier, 4 Rawle (Pa.) 290; 26 Am. Dec. 131; Huston *v.* Wilson, 3 Watts (Pa.) 288.

Arkansas.—Where the subject-matter of the suit is within the control of

the court, the judgment should be for a delivery only. An assessment of value and an alternative judgment are unnecessary. Harris *v.* Harris, 43 Ark. 535.

Destroyed Property.—If on the trial of an action of replevin, it appears that the personal property in controversy has been destroyed, so that a judgment for its delivery would be unavailing, the rendition of judgment for damages alone, without awarding a return, is, at most, a technical error which does not warrant a reversal. Brown *v.* Johnson, 45 Cal. 76.

Election.—The judgment in replevin provided that plaintiff should have the immediate possession of the property, and in default thereof should recover its value—held, that such judgment constituted an election by plaintiff to take the property, and that he could not demand its value in money. Oskaloosa Steam Engine Works *v.* Nelson, 54 Iowa 519.

A judgment for a sum of money equal to the number of cattle taken by the writ of replevin, multiplied by their value per head, as found by the evidence, and also providing for their return to plaintiffs to be credited on the judgment at the same value per head, is in effect a judgment for the return of the cattle or their value. Lang *v.* Daugherty, 74 Tex. 226.

If the court is satisfied that the delivery of the property cannot be made, it may render absolute judgment for the value of the property. Boley *v.* Griswold, 20 Wall. (U. S.) 486; Babb *v.* Aldrich, 45 Kan. 218.

Under the *Nebraska* Code Civ. Proc., § 193, which provides that in replevin, when the property has been returned for want of the undertaking required by section 185 the action may proceed as one for damages only, the action then becomes in substance an action in trover for the value of the goods, and, the judgment, when in favor of the plaintiff, should be for the amount of damages found due and not for the return of the property. Philleo *v.* McDonald, 27 Neb 142.

It is error to render judgment for plaintiff for part of the property, "leaving the defendant to his remedy on the bond" as to the rest, when the plaintiff gained possession of the property at the beginning of the action. Jandt *v.* South, 2 Dak. 46.

Judgment for Defendant.—Myers *v.* Moulton, 71 Cal. 498; Bliss' Ann. Code of *New York*, § 1730; Cochran *v.* Gottwald, 41 N. Y. Super. Ct. 317; Seaman *v.* Luce, 23 Barb. (N. Y.) 240; Glann *v.* Younglove, 27 Barb. (N. Y.) 480; Fugina *v.* Brownlie, 65 Wis. 628; Smith *v.* Coolbaugh, 19 Wis. 106; Higbee *v.* McMillan, 18 Kan. 133; Ponceler *v.* Marshall, 45 Kan. 672; Thompson *v.* Lee, 19 S. Car. 489; Robbins *v.* Slattery (S. Car. 1889), 9 S. E. Rep. 510; Reed *v.* King (Ky. 1889), 12 S. W. Rep. 772.

When a plaintiff in replevin is nonsuited on the ground that the property replevied had never been in the possession of the defendant, the latter is not entitled to judgment for a return of the property or for its value. Gallagher *v.* Bishop, 15 Wis. 276; Gidday *v.* Wetherspoon, 35 Mich. 368.

In an action of replevin before a justice of the peace, judgment was entered for a return of the property, but the alternative part was not entered. The defendant appealed to the circuit court, but voluntarily dismissed his appeal, and the circuit court failed to enter final judgment at the time of the dismissal. The justice corrected his docket of his own motion, and subsequently the circuit court entered final judgment for the recovery of the property or the value thereof. The defendant then sought to enjoin the execution of the judgment. It was held that as a part of the judgment was admitted to be rightful, there could be no complaint against the alternative until it was shown that the right judgment could not be complied with. Putman *v.* Webb, 15 Oregon 440.

If the property has been delivered to the plaintiff, and the defendant, by his answer, claims a re-delivery, a judgment on a verdict in his favor must be in the alternative, for a return of the property, or the value thereof in case it cannot be returned even though there was testimony given on the trial tending to show that plaintiff has sold the property. Cochran *v.* Gottwald, 41 N. Y. Super. Ct. 317.

Missouri, see Dilworth *v.* McKelvy, 30 Mo. 149.

Kansas.—In *Kansas*, upon a verdict for defendant in a replevin suit in which the property has been delivered to the plaintiff, a judgment should be entered for the return of the property. And if through the mistake or omission of the clerk it is entered simply for costs, the

court may on motion modify it. Sumner *v.* Cook, 12 Kan. 162.

Illinois.—The provision for an alternative judgment in replevin (*Illinois* Rev. Stat. of 1874, ch. 119, § 22) applies only to cases where the general property is in the plaintiff, and the defendant shows a special property by levy, lien, etc. Lamping *v.* Payne, 83 Ill. 463.

Nebraska.—Under *Nebraska* Gen. Sts. 713, judgment must be for the return or value of property, or value of the possession thereof, and for damages for withholding and for costs of suit. Search *v.* Miller, 9 Neb. 26.

The plaintiff cannot object that a judgment for the defendant in replevin was not in the alternative, unless he can show that he has the property in a suitable condition for return. Goodman *v.* Kennedy, 10 Neb. 270.

Property in the Hands of an Officer.—Where goods held by an officer under attachment or execution, are taken from him on a writ of replevin, and judgment in his favor before the attachment proceedings are decided must be for the return of the property, and not for the special value of his lien. Frederick *v.* Mecosta Co., 52 Mich. 529.

After a verdict for the defendant in an action of replevin against an attaching officer in which the question of property in the plaintiff was tried and a verdict found against him, judgment for a return of the goods replevied would be ordered although since the rendition of the verdict the attachment has been dissolved. Dawson *v.* Wetherbee, 2 Allen (Mass.) 461. *Compare* Saffell *v.* Wash, 4 B. Mon. (Ky.) 92.

An alternative judgment should have been for the return of the property or for the amount due on an execution, instead of for the greater value of the property, yet so long as the judgment could have been discharged by returning the property, it was held that the error was without prejudice. Ormsby *v.* Nolan, 69 Iowa 130.

Where Action Dismissed.—An action of replevin brought to recover possession of liquors taken by an officer under the act for the suppression of intemperance was dismissed on motion of the defendant. *Held*, that he was entitled to a judgment for the return of the property replevied or for its value. Funk *v.* Israel, 5 Iowa 438.

Where the property has been redelivered to the defendant upon his giving bond, no judgment in his favor for a return is necessary to entitle him to retain possession of the property, where the action has been discontinued by the plaintiff. Hackett *v.* Bonnell, 16 Wis. 471.

No return can be ordered to the defendant, of property whereof the plaintiff never obtained possession under the writ. Prentiss *v.* Moore, 3 Ill. App. 539; Paxton *v.* Schick, 3 Ill. App. 542.

Where it appears by the officer's return in replevin, that he has restored the property replevied, it is error not to be cured by remittitur of the damages, to render a judgment *retorno habendo.* Harrod *v.* Hill, 2 Dana (Ky.) 165.

Insolvency.—A defendant in replevin who has gone into insolvency is entitled to a return if successful in the action and he is responsible to the general creditors for the property. Kimball *v.* Thompson, 4 Cush. (Mass.) 441; Hallett *v.* Fowler, 10 Allen (Mass.) 36.

Nonsuit.—After a nonsuit in replevin, a judgment for a return of the property is proper. Chadwick *v.* Miller, 6 Iowa 34; Kerley *v.* Hume, 3 T. B. Mon. (Ky.) 181; Pannell *v.* Hampton, 10 Ired. (N. Car.) 463; Hoeffner *v.* Stratton, 57 Me. 360; Kneebone *v.* Kneebone, 83 Cal. 645; Berghoff *v.* Heckwolf, 26 Mo. 511; Thurber *v.* Richmond, 46 Vt. 395; Fleet *v.* Lockwood, 17 Conn. 233; Fowler *v.* Richardson, 32 Ill. App. 252. See Capital Lumbering Co. *v.* Hall, 10 Oregon 202.

And it is held in *Missouri* that the defendant is entitled to the same judgment as if he had recovered a verdict against the plaintiff. Smith *v.* Winston, 10 Mo. 299; Munly *v.* King, 40 Mo. App. 531.

Under the Ter. Code of *Wyoming* making the proceedings on a nonsuit in replevin the same as where there is a judgment for the defendant on demurrer, the defendant, having obtained a nonsuit, may proceed to impanel a new jury in the same cause and assess his damages. Bath *v.* Ingersoll, 1 Wyoming Ter. 280.

Rhode Island Pub. St., ch. 235, § 5, provides that, whenever any plaintiff in replevin shall neglect to enter and prosecute the suit, defendant, on complaint, shall have judgment. *Held*, that where plaintiff enters and prosecutes the suit, no formal or written complaint is necessory to authorize judgment for defendant. Wright *v.* Card, 16 R. I. 719.

Replevin against a sheriff to recover goods levied on as the property of the

but this judgment is rendered for the plaintiff only when he fails to obtain possession of the property at the beginning of the action.[1] In some States the parties may elect to take judgment for the value of the property.[2] If the evidence authorizes a return of

execution debtor was discontinued by plaintiff without returning the goods to the sheriff. The discontinuance was set aside, and the execution debtor allowed to contest the claim of the plaintiff in replevin. Rosenberg *v.* Flack, 57 Hun (N. Y.) 587.

Place of Delivery.—The plaintiff in replevin recovered judgment for certain pumping machinery which the defendant had found in a mine, placed there for use and connected with the mine. It not appearing that they ever intended to remove it, it was held, that they were not bound to deliver the machinery above ground, or in any other place than that in which it was put for use. Nimon *v.* Reed (Iowa 1890), 44 N. W. Rep. 802.

1. Rowark *v.* Lee, 14 Ark. 425; Claudius *v.* Aguirre, 89 Cal. 501; Baird *v.* Taylor, 30 Mo. App. 580.

2. **Plaintiff — Missouri.** — Wooldridge *v.* Quinn, 70 Mo. 370.

Wisconsin.—Tuckwood *v.* Hanthorn, 67 Wis. 326.

This election may be made when judgment is rendered. Reiss *v.* Delles, 45 Wis. 662.

New Jersey.—If the defendant in replevin retains the goods, giving a bond and making a claim of property, the plaintiff may have the value of the goods embraced in the damages, and such judgment for damages will be absolute, and cannot be discharged by a a return of the property. Field *v.* Post, 38 N. J. L. 346. But he can have such judgment only when the defendant retains the property. Lindauer *v.* Teeter, 41 N. J. L. 255.

Defendant — Missouri. — White *v.* Graves, 68 Mo. 218.

Wisconsin.—Farmers' L. & T. Co. *v.* Commercial Bank, 15 Wis. 424; 82 Am. Dec. 689; Pratt *v.* Donovan, 10 Wis. 378.

If the defendant in replevin by his answer does not claim a return of property of which the plaintiff has gotten possession under the statute, he is entitled, if he prevails, to judgment for the value of the property or his interest therein. Kloetz *v.* Delles, 45 Wis. 484.

Where a plaintiff in replevin discontinues his suit, the necessary result must be a liability for the property taken, and the damages for detention; and the defendant, in that case, may elect to have a return and his damages. Saunderson *v.* Lace, 1 Chand. (Wis.) 231.

New York.—In *New York*, the defendant cannot elect to take such judgment. Seaman *v.* Luce, 23 Barb. (N. Y.) 240; McKnight *v.* Dunlop, 4 Barb. (N. Y.) 36; Glann *v.* Younglove, 27 Barb. (N. Y.) 480.

New Hampshire.—The defendant may elect to have judgment for the value of the property. Gen. Laws *New Hampshire* 1878, p. 565, ch. 245, § 9.

Nebraska.—See Frey *v.* Drahos, 10 Neb. 594.

Iowa.—Section 3241 of the *Iowa* statute which provides that the person found to be entitled to the possession of the property may, at his option, have execution for the specific delivery of the property or for the value thereof, as determined by the jury, applies only to those cases which are decided on their merits, and not to those which are decided on demurrer for want of jurisdiction. Williams *v.* Chapman, 60 Iowa 57.

After the plaintiff in replevin had acquired possession of the cattle, some of them died. *Held*, that the defendant, upon electing to take a money judgment, was entitled to have it cover all the property. Lillie *v.* McMillan, 52 Iowa 463.

Michigan.—It is essential to a judgment for the defendant for the value of the property in an action of replevin, that the record should affirmatively and distinctly show the election to take the value instead of a return of property. Adams *v.* Champion, 31 Mich. 233. See Bateman *v.* Blake, 81 Mich. 227. But the waiver need not be in writing. Kline *v.* Kline, 49 Mich. 419. See MANDAMUS, vol. 14, p. 135.

Waiver of Personal Judgment.—The plaintiff cannot object to the waiver of personal judgment by the defendant. Morrison *v.* Austin, 14 Wis. 601.

Objections by Surety.—In an action of replevin the plaintiff and defendant stipulated that judgment might be en-

the property, it will be ordered though not claimed in the pleadings;[1] but not if the pleadings admit the property to be in the other party.[2] Where the parties sue or defend jointly, having a joint property in the goods, the judgment for or against them should be joint.[3] Where the suit is brought by the plaintiff in the character of administrator, the judgment, if against him, should be against him in his official character.[4] The judgment must describe the property with a reasonable degree of certainty,[5] and

tered for the value of the property, and it was so entered. *Held*, that the surety in the undertaking, when sued upon it, cannot object that the judgment in replevin should have been in the alternative. Robertson *v.* Davidson, 14 Minn. 534.

Michigan.—Where the writ has been levied by mistake on property to which the plaintiff has no claim, the defendant may waive return of the property and is entitled to a verdict for its value. Dewey *v.* Hastings, 79 Mich. 263.

How. St. *Michigan* provide that defendant may have judgment for a return of the goods and damages for their detention, or, if he waive a return, he may take judgment for the value of the goods. It was held that where a third person took the goods replevied under another writ, and returned them to the defendant, and defendant waived judgment for a return of the property or for its value, a judgment that plaintiff take nothing, and that defendant recover "$100 as his damages" was unauthorized. Bateman *v.* Blake, 81 Mich. 227.

1. Comer *v.* Comstock, 17 Ind. 90; Matlock *v.* Straughn, 21 Ind. 128; King *v.* Ramsay, 13 Ill. 619; Tuley *v.* Mauzey, 4 B. Mon. (Ky.) 5; Bates *v.* Buchanan, 2 Bush (Ky.) 117; Fleet *v.* Lockwood, 17 Conn. 233. See Timp *v.* Dockham, 32 Wis. 146; Kirby *v.* Tompkins, 48 Ark. 273.

After the dismissal of an action of replevin, for want of a sufficient bond, the court has jurisdiction to order a return of the goods although no answer has been filed. Lowe *v.* Brigham, 3 Allen (Mass.) 429.

2. Mattson *v.* Hanish, 5 Ill. App. 102.

3. West Michigan Sav. Bank *v.* Howard, 52 Mich. 423; Sweetzer *v.* Mead, 5 Mich. 107.

A judgment cannot be rendered against the plaintiff and the sureties on his bond. Hurd *v.* Gallaher, 14 Iowa 394.

In an action of replevin against an officer for property seized by him on execution, the plaintiff in the execution was afterwards made a party defendant, but not in lieu of, nor substituted for, the officer, and the petition was not amended so as to allege anything against said new party, and said party did not in his answer set up any ground for, nor ask any affirmative relief. *Held*, that a judgment jointly against said officer and said new party for two hundred and twenty-five dollars and the costs was erroneous against said new party. Furrow *v.* Chapin, 13 Kan. 107. See also Palmer *v.* Meiners, 17 Kan. 478.

There may be judgment for one plaintiff and against another in a joint replevin suit. Hamilton *v.* Browning, 94 Ind. 242.

In replevin against a husband and wife, the judgment for damages and costs must be against him alone. Steinwender *v.* Outley, 5 Mo. App. 589.

4. Ranney *v.* Thomas, 45 Mo. 111; State *v.* Dailey, 7 Mo. App. 548.

5. A judgment which merely describes the property, as "two stallion horses," without referring to other papers for a further description is bad for uncertainty. Cooke *v.* Aguirre, 86 Cal. 479.

Where the judgment in replevin for the plaintiff describes the property to be restored as "buckwheat, valued at three hundred and sixty-five dollars and seventy-five cents," the description is insufficient to sustain the judgment, unless the judgment refer for a fuller description to the complaint, and there is a more definite description in the complaint. Welch *v.* Smith, 45 Cal. 230.

A judgment that plaintiff recover "the property in controversy," or, in default, a sum fixed as its value, will not be reversed for uncertainty in the recovery, where the petition claims several articles, but the record shows that the controversy is reduced to two of them. Coleman *v.* Reel, 75 Iowa 304.

must not be conditional.[1] The judgment is conclusive between the parties both as to value[2] and ownership, if the ownership is in issue.[3] A mistake in the form of a judgment may be amended either in the lower court or ordered on appeal.[4] Where a money judgment for the value of property is paid, it vests the title to the property in the party against whom the judgment was rendered.[5] Where judgment is in the alternative, the party against whom it is rendered makes a sufficient compliance with it by tendering the property in controversy in satisfaction thereof,[6] or by paying the money value when it is out of his power to deliver the property.[7]

1. Rose *v.* Tolley, 15 Wis. 443.

2. Smith *v.* Mosby, 98 Ind. 445.

Where, in an action of replevin, judgment was rendered for the defendant for the value of the property, this was a solemn adjudication that the damages awarded defendant belonged to him. A motion for the satisfaction of such judgment on the ground that another party was equally interested in it should be denied. Lowe *v.* Smith, 23 Mo. App. 44.

A verdict and judgment in replevin are conclusive only as between the parties to the action and their privies. Edwards *v.* McCurdy, 13 Ill. 496.

3. Smith *v.* Mosby, 98 Ind. 445; McFadden *v.* Fritz, 110 Ind. 1; Witter *v.* Fisher, 27 Iowa 9.

Unless the title is distinctly put in issue the judgment does not pass upon it. McFadden *v.* Ross, 108 Ind. 512.

Where the writ in an action of replevin, is quashed for a defect in the affidavit, and thereupon the cause is dismissed by the plaintiff, the question of title to the property in dispute is not settled. Stockwell *v.* Byrne, 22 Ind. 6.

A judgment directing a return of the property is conclusive that the defendant's right of possession is superior to that of the plaintiff. Bath *v.* Miller, 53 Me. 308. See also Deyoe *v.* Jamison, 33 Mich. 94.

4. Hood *v.* Spaeth, 51 N. J. L. 129; Fitzhugh *v.* Wiman, 9 N. Y. 559; Berthold *v.* Fox, 21 Minn. 51; Sumner *v.* Cook, 12 Kan. 162. See Rowark *v.* Lee, 14 Ark. 425.

Third Persons.—Such amendment is inoperative to effect the rights of third persons not parties to the suit, but a clause saving such rights should be inserted in the order allowing it. The application for such amendment being made by the defendant more than three years after the entry of judgment, notice of such application should be served upon the plaintiff, and service on his attorney is insufficient where the attorney's only authority to represent his client is that implied in his retainer to prosecute the action. Berthold *v.* Fox, 21 Minn. 51.

New York.—In *New York* such amendment can only be made by motion in the court below. Ingersoll *v.* Bostwick, 22 N. Y. 425; Young *v.* Atwood, 5 Hun (N. Y.) 234.

5. Marix *v.* Franke, 9 Kan. 132. See also Hunt *v.* Bennett, 4 Greene (Iowa) 512.

6. Reavis *v.* Horner, 11 Neb. 479; Frey *v.* Drahos, 10 Neb. 594; Pickett *v.* Bridges, 10 Humph. (Tenn.) 171.

Where the verdict is for plaintiff, and he has not already received the property, the defendant has the right to deliver it instead of money. In such case, no option rests with the plaintiff. Carson *v.* Applegarth, 6 Nev. 187.

A defendant in replevin, who retains several distinct articles, may return any one of them for its value, and is entitled for this purpose to have the value fixed by the jury and alternative judgment accordingly. Hanf *v.* Ford, 37 Ark. 544. See also Davis *v.* Calhoun, 41 Tex. 554.

No property need be accepted in satisfaction of a judgment for a return, except the identical property taken under the replevin writ. Irvin *v.* Smith, 68 Wis. 227.

7. Reavis *v.* Horner, 11 Neb. 479; Frey *v.* Drahos, 10 Neb. 594; Pickett *v.* Bridges, 10 Humph. (Tenn.) 171.

It has been held in *Michigan* that a writ of return upon a judgment cannot run to the sheriff of any county other than that in which the judgment was rendered. Rathbun *v.* Ranney, 14 Mich. 382.

De Retorno Habendo.—The writ *de*

8. Damages.—The action of replevin, like trespass, sounds in damages;[1] but no greater damages can be allowed than are prayed in the petition,[2] or claimed by the an-

retorno habendo is the writ of execution in the action of replevin. 3 Bl. Com. 150–413; Black's L. Dict., p. 1038; Fowler *v.* Richardson, 32 Ill. App. 252; Hackett *v.* Jones, 34 Ill. App. 562; Suppiger *v.* Granz (Ill. 1891), 27 N. E. Rep. 22; Harris *v.* McCasland, 29 Ill. App. 430.

The term has also been applied to the judgment for a return of the property in this action. And. L. Dict., p. 897; Phillips *v.* Hyde, 1 Dall. (U. S.) 439; Harris *v.* McCasland, 29 Ill. App. 430.

1. Recknor *v.* Dixon, 2 Greene (Iowa) 591; Reed *v.* Wilson, 13 Mo. 28; Herdic *v.* Young, 55 Pa. St. 176; 93 Am. Dec. 739; M'Donald *v.* Scaife, 11 Pa. St. 381; 51 Am. Dec. 556; Buckley *v.* Buckley, 12 Nev. 423; Hopkins *v.* Hopkins, 10 Johns (N. Y.) 369.

Under How. Stats. of *Michigan*, § 8375, the defendant on non-suit of the plaintiff, who has replevied distrained property, may have damages covering every claim arising out of the distress and damages done him by the beasts distrained. Sterner *v.* Hodgson, 63 Mich. 419.

Missouri.—Where suit is brought under the statutes of *Missouri* 807, § 4, the damages claimed for injuries or detention are not the cause of action, but are merely incidental to the recovery of a judgment for the specific property sued for. Alley *v.* Gamelick, 55 Mo. 518.

Where the plaintiff fails in an action of replevin, in the absence of proof of actual damages, the defendant is entitled to nominal damages only. Seabury *v.* Ross, 69 Ill. 533; Washington Ice Co. *v.* Webster, 62 Me. 341; 16 Am. Rep. 462.

In replevin a verdict will be set aside if damages are assessed in favor of the defendant, without proof of damages other than the value of the property, and the fact and time of replevy. Mann *v.* Grove, 4 Heisk. (Tenn.) 403.

In replevin tried by the court without a jury, if plaintiff shows a right to recover, an assessment by the court is proper. Where he establishes only right of possession and no actual loss is proved, an award of nominal damages should be made. Frey *v.* Drahos, 7 Neb. 194; Hammond *v.* Solliday, 8 Colo. 610.

One who institutes an unfounded action of replevin may incur damages as against the defendant, even though the latter does not own the property. Burt *v.* Burt, 41 Mich. 82.

In replevin by a town treasurer for a chattel levied upon by him to raise a tax, and taken from him by defendant, payment of the tax and return of the chattel by plaintiff to defendant did not preclude a recovery by plaintiff of damages for the detention, with costs of the action, although such damages were merely nominal. Thomas *v.* Weismann, 44 Wis. 339.

Where the jury found a verdict for plaintiff but failed to agree on the amount of damages, as required by *New York* Code, § 1726, defendant cannot complain because the court inserted nominal damages in the verdict. Segelke *v.* Finan, 48 Hun (N. Y.) 310.

Excessive Damages.—In claim and delivery for a branding-iron belonging to plaintiff, and damages for its detention, plaintiff testified that a contract to sell all his cattle of that brand fell through because the iron could not be delivered to the purchaser, but admitted that two days later the purchaser took the cattle without any "complaint about the branding-iron," and that the iron was not specified in the contract; and alleged that he suffered $500 damages in having to gather up the cattle, without showing that such damages were caused by defendant's failure to give up the iron. *Held*, that there was no evidence to support a finding of $500 damages. Wheeler *v.* Kassabaum, 76 Cal. 90.

2. Burke *v.* Koch, 75 Cal. 356; Tyner *v.* Hays, 37 Ark. 599; Schultz *v.* Hickman, 27 Mo. App. 21. *Compare* Singer Mfg. Co. *v.* Doxey, 65 Ind. 65. See Claflin *v.* Beaver, 41 Fed. Rep. 204.

Where, in an action of replevin, the verdict was found against the plaintiff and the damages fixed at less than half the value claimed in the plaintiff's petition, the plaintiff cannot be heard to complain that the property was not returned at the beginning of the action. Weil *v.* Ryus, 39 Kan. 564.

In § 74 of the Justice's Act in civil cases approved June 9th, 1852, it is pro-

swer.[1] If the verdict in the action be found for the plaintiff, he should have damages for the caption and detention.[2] If for the

vided that, if the "property, not so found, is adjudged to be the property of the plaintiff, and liable to have been recovered in that action, if it had been found, he shall recover the value thereof in damages, whether he shall have claimed that amount as damages in his complaint or not." 2 *Indiana* Rev. Stat., 1876, p. 630.

Under a complaint alleging that defendant wrongfully took and detained goods, to the damage of the plaintiff $5,000, but without any allegation of special damage, the plaintiff may recover damage for depreciation resulting by reason of the lapse of time. Young *v.* Willet, 8 Bosw. (N. Y.) 486.

The *ad damnum* in a declaration in replevin refers, under Practice Act, *Florida*, 1861, § 20 (McClel. Dig., p. 817, § 28), to damages for the detention of the property, and not to its value; and when plaintiff elects, under the replevin statute, to take judgment for the value, the judgment will not be reversed because it exceeds the amount of such *ad damnum*. Anderson *v.* Carlin, 24 Fla. 199.

The judgment may be for more than the value as alleged in the complaint, if it be within the *ad damnum* of the writ. Coghill *v.* Boring, 15 Cal. 213.

1. Eaton *v.* Caldwell, 3 Minn. 134; Houston *v.* Smythe, 66 Miss. 118. See Kirby *v.* Thompkins, 48 Ark. 273.

In replevin, under *Nebraska* Code, a defendant who prevails may have damages assessed, notwithstanding his answer is only general denial. School District *v.* Shoemaker, 5 Neb. 36; Creighton *v.* Newton, 5 Neb. 100.

New York.—It is not necessary for a defendant, in an action to recover possession of personal property, to claim in his answer special damages for the taking and detention of his property from him by the plaintiff, in order to entitle him to recover them. Woodruff *v.* Cook, 25 Barb. (N. Y.) 505.

2. Kendall *v.* Fitts, 22 N. H. 1; Messer *v.* Bailey, 31 N. H. 9; Coffin *v.* Taylor, 16 Oregon 375; Gray *v.* Nations, 1 Ark. 557; Graves *v.* Sittig, 5 Wis. 219; Fisher *v.* Whoollery, 25 Pa. St. 197; Philips *v.* Harris, 3 J. J. Marsh. (Ky.) 122.

In an action of replevin it is not competent for the plaintiff to show, for the purpose of fixing his damages, that he was compelled to deposit with his surety on the replevin bond a sum of money as indemnity. Wilson *v.* Hillhouse, 14 Iowa 119.

Although the sheriff delivered the property to the plaintiff on the writ, yet he may also have damages for injury by reason of the illegal detention if any have been sustained. Hoover *v.* Rhoads, 6 Iowa 505; Tracy *v.* New York, etc., R. Co., 9 Bosw. (N. Y.) 396.

A judge instructed a jury that if plaintiff recovered he was to have damages from the time of the "taking." *Held*, no error. Lingle *v.* Kitchen, 69 Ind. 349.

If the plaintiff count in the *detinuit*, he can only recover damages for the detention until replevin, though he should prove the property to be still in the defendant's possession. Truitt *v.* Revill, 4 Harr. (Del.) 71. See also Fox *v.* Prickett, 34 N. J. L. 13.

Where the sheriff, in replevin by execution defendants for property levied upon, recovers judgment for the value of the property, which is paid, the execution plaintiff, in an action on the redelivery bond, can recover no more than nominal damages. Stuart *v.* Trotter, 75 Iowa 96.

Where the detention of goods is unlawful, a subsequent delivery, in good faith, will not prevent the owner from recovering damages for detention. Hanselman *v.* Kegel, 60 Mich. 540.

Damages in a replevin suit can only be recovered where the detention is wrongful, but detention of property acquired at a judicial sale is not wrongful even against the true owner, unless after proper notice and demand. Arthur *v.* Wallace, 8 Kan. 267.

The failure of a plaintiff in whose favor a judgment was rendered in a justice's court, to get possession upon an appeal taken by the opposite party, by giving the undertaking mentioned in the *Wisconsin* Code, is no reason why he should not recover all the damages he has sustained by the detention of the property pending such appeal. Williams *v.* Phelps, 16 Wis. 80.

In replevin where the plaintiff's title or right of possession is legally divested after suit brought and before trial, he can, as against the owner or person entitled to the possession, recover only

defendant, they should be assessed for the value of the property,[1]

damages for the unlawful detention up to the time his title or right of possession was divested. Deal *v.* Osborne, 42 Minn. 102.

California Civil Code, § 3336, provides that "the detriment caused by the wrongful conversion of personal property is presumed to be . . . (2) a fair compensation for the time and money properly expended in pursuit of the property." *Held*, that expenses of pursuit could be recovered as well in an action to recover the property as in an action for conversion merely. Arzaga *v.* Villaba, 85 Cal. 191.

Plaintiffs, in replevin against a sheriff who had levied on their goods as belonging to a judgment debtor, cannot recover for damages and expenses, including attorney's fees, incurred after suit commenced. Wildman *v.* Sterritt, 80 Mich. 651; Jandt *v.* South, 2 Dak. 46.

Personal property was delivered to the plaintiff in a suit under the statute for its claim and delivery upon his giving bond. Subsequently he sold it. *Held*, that he was not thereby barred from maintaining his suit and recovering damages for the illegal detention of his property. Donohoe *v.* McAleer, 37 Mo. 312.

Where it appears in an action of replevin that the defendant has delivered up the property since suit brought, plaintiff is entitled to a verdict, at least for nominal damages. Cardwill *v.* Gilmore, 86 Ind. 428.

Where the defendant in an action of replevin appeals from a judgment for the plaintiff, and retains the property by virtue of a proper undertaking, and the judgment is affirmed, the plaintiff cannot bring another action for the depreciation of the property between the date of the judgment and its final affirmance. Corn Exch. Bank *v.* Blye, 123 N. Y. 132.

1. Kendall *v.* Fitts, 22 N. H. 1; Messer *v.* Bailey, 31 N. H. 9; Williams *v.* Morrison, 29 Fed. Rep. 282; Nitz *v.* Bolton, 71 Mich. 388; Moore *v.* Kepner, 7 Neb. 291; Cruts *v.* Wray, 19 Neb. 581; Tuck *v.* Moses, 58 Me. 461; Hinchey *v.* Koch, 42 Mo. App. 230.

The market value is the value that should be assessed. Washington Ice Co. *v.* Webster, 68 Me. 449; 16 Am. Rep. 462.

The true measure of damages in an action of replevin in which judgment is rendered for defendant, who elects to take judgment for the value of the property of which plaintiff had acquired possession under his writ, is the value of the property at the date of the replevin, with interest up to the date of judgment, and defendant cannot recover for the use on such election. Just *v.* Porter, 64 Mich. 565.

Where the action of replevin is begun and the property seized, but due service is not made on the defendant, and the justice dismisses the case, defendant has a right to waive return of the property, and have the justice assess his damages, and a mandamus will issue to compel the justice to do so. Johnson *v.* Dick, 69 Mich. 108.

The defendant in replevin is entitled to the value of the property at the time, of the rendition of judgment for a return. Tuck *v.* Moses, 58 Me. 461.

In an action of claim and delivery of personal property (*North Carolina* Rev. Code, ch. 98), when the property cannot be redelivered by plaintiff in specie, the value thereof, in case of a judgment for defendant, should be assessed as of the time of trial, and not as of the time of its seizure by the sheriff. Holmes *v.* Goodwin, 69 N. Car. 467. See also Chapman *v.* Kerr, 80 Mo. 158; Richey *v.* Burnes, 83 Mo. 362; Burkeholder *v.* Rudrow, 19 Mo. App. 60; Anchor Milling Co *v.* Walsh, 20 Mo. App. 107.

Where judgment of return was rendered in favor of the defendant in replevin, it was held that plaintiff could not claim in mitigation of damages, that he had delivered the property to the vendor's receiver in the absence of evidence showing that the sale to the defendant, was in fraud of the receiver's right to the property. Yallop-De Groot Co. *v.* Minneapolis, etc., R. Co., 33 Minn. 482.

The expense of procuring men and teams for the removal of ice, which was rendered useless by the wrongful suing out of the writ of replevin, may enter into and become a portion of the damages. Washington Ice Co. *v.* Webster, 62 Me. 341; 16 Am. Rep. 462.

When a plaintiff in replevin pays to the collector, without the request and against the will of the defendant, a tax assessed to the defendant on property wrongfully replevied, where there

together with damages for the seizure and detention.[1] If part of

has been no seizure of property to enforce its collection, such payment is to be regarded as voluntary. In such case the plaintiff cannot set off the amount so paid in reduction of damages for the wrongful taking. Washington Ice. Co. *v.* Webster, 68 Me. 341; 16 Am. Rep. 462.

In replevin of property against a claimant of the same under a purchase, the defendant may show by way of enhancing his damages, the amount of expenditures made by him by way of improving the property after it came into his possession. Veazie *v.* Somerby, 5 Allen (Mass.) 280.

When replevied property is restored to the possession of the defendant before all his rights relating thereto are determined, his claim for the value of the property is thereby defeated. Harrow *v.* Ryan, 31 Iowa 156.

The provisions of the *Tennessee* Code, §§ 3389–3391, regulating the mode of assessing the damages to be awarded to defendant who recovers in replevin, give considerable discretion to the jury in view of the circumstances of each case. But in general they are to ascertain and allow the value of the property at the time when it was taken from the defendant upon the writ. To this is to be added interest from the seizure to the time of trial. This interest is the compensation for natural wear and deterioration of the property while in plaintiff's custody. If, however, it has suffered any unusual depreciation in actual value while in his hands, an addition is to be made for this loss. The plaintiff can elect whether to return the property in specie or to pay the damages. Therefore, an allowance must be made to defendant for any depreciation in market value, otherwise the plaintiff could throw the loss on defendant by returning the property. The defendant must also be allowed damages for any increase in value of the property, for the property is to be deemed his and he is entitled to the benefit of the increase. If the property has risen in market value since the seizure and has fallen again before the trial, it is discretionary with the jury to allow the defendant the benefit of the rise, as he might have realized benefit from it had the property not been taken from him. And in addition to all these elements, the jury may allow such further damages as they think the justice of the case demands, if they think the return of the property in specie is particularly important to the defendant, and that it is necessary to make it for the interest of the plaintiff to return it; or if the replevin suit has been vexatious, and has been prosecuted in bad faith or attended by circumstances of aggravation. Mayberry *v.* Cliffe, 7 Coldw. (Tenn.) 117.

Where the defendant's answer in replevin alleges that he held the goods as marshal or sheriff under an execution, etc., but does not show the amount of the execution, the burden is upon him to prove the amount before he can have judgment for the value of the property and damages for its detention. Booth *v.* Ableman, 20 Wis. 21.

In replevin for goods sold under execution against a third person, the price which the goods brought at the execution sale is not conclusive, and evidence is admissible to show their actual value. Hoffman *v.* Gundrum, 15 N. Y. Supp. 98.

1. Anchor Milling Co. *v.* Walsh, 20 Mo. App. 107; Hinchey *v.* Koch, 42 Mo. App. 230; McIntire *v.* Eastman, 76 Iowa 455.

Where defendant in replevin has waived return he is entitled to a verdict for the value of such property in his possession as is claimed by the declaration, but as to the ownership of which there is no evidence. White *v.* White, 58 Mich. 546.

Plaintiff, in replevin of property levied on to satisfy a tax, is not liable for defendant's attorney's fees. It was the duty of the county prosecutor, under 1 Comp. Laws *Utah*, 1888, p. 284, § 134, to appear for the defendant in the action, the county being interested in the collection of the tax. Ryan-Ream Cattle Co. *v.* Slaughter (Utah 1889), 21 Pac. Rep. 997.

When a suit in replevin has been discontinued by the plaintiff and the defendant waives return and asks for a judgment for the value of the property, the plaintiff may show that he is the owner of the property. Treadwell *v.* Paddock, 75 Mich. 286.

A defendant in replevin who has prevented the plaintiff from obtaining actual possession of the property, is not entitled to damages for its detention.

the goods belong to plaintiff and part to defendant the damages should be apportioned.[1] When it is impossible for the officer to take the property and deliver it to the plaintiff, the plaintiff may proceed in the cause and recover damages for the full value of the property as well as for the detention.[2] When the plaintiff elects to take judgment for the money value and not for the specific property, he is entitled to damages for the detention of the property.[3] When the party recovering is the general owner, the full value of the property is to be assessed, but if he have only a special property in the goods, he should recover only the value of such special interest.[4] In an action of replevin where the property is

Ware River R. Co. *v.* Vibbard, 114 Mass. 458.

1. Knowles *v.* Pierce, 5 Del. 178; Williams *v.* Beede, 15 N. H. 483.

2. Pomeroy *v.* Trimper, 8 Allen (Mass.) 398; 85 Am. Dec. 714; Harrisburg Electric Light Co. *v.* Goodman, 129 Pa. St. 206; Fisher *v.* Whollery, 25 Pa. St. 197; Pranke *v.* Herman, 76 Wis. 428; De Thomas *v.* Witherby, 61 Cal. 92; 44 Am. Rep. 542; Lininger *v.* Mills, 29 Neb. 297.

In replevin for goods seized by the sheriff under attachments, where the plaintiff testifies that the goods are worth $1,400, and it is shown that the sheriff sold them for $650, a verdict for $1,000, as the value of such goods is not excessive. Lamont *v.* Williams, 43 Kan. 558.

Where one in possession claiming title to the land, with full knowledge of an adverse claim, and in defiance of a notice from the claimant, cuts bark from trees thereon, and in replevin executes a claim and delivery bond, the measure of damages is the value of the bark at the time and place where replevied. Phillips *v.* Stroup (Pa. 1889), 17 Atl. Rep. 220.

Under Mansf. Dig. *Arkansas*, §§ 5145, 5181, providing for a recovery in replevin of "all damages sustained by the detention" of the property, damages may be estimated to the date of the verdict. Lesser *v.* Norman, 51 Ark. 301.

In replevin for property attached which plaintiff claims under a mortgage executed two years before, the mortgagor having been left in possession in the meantime, and allowed to sell the property—a stock of merchandise—in the usual course of trade, and to replace what was so sold, plaintiff can recover no more than the specific goods on which the mortgage was given, or their value. Wedgwood *v.* Citizens' Nat. Bank (Neb. 1890), 45 N. W. Rep. 289.

3. Hasted *v.* Dodge (Iowa, 1888), 39 N. W. Rep. 668; Cooke *v.* Hamilton, 67 Iowa 394. *Compare* Hasted *v.* Dodge (Iowa, 1887), 35 N. W. Rep. 462; Hanselman *v.* Kegel, 60 Mich. 540.

Where the defendant in replevin has given a delivery bond for property which perishes in his hands, plaintiff's measure of damages for unlawful detention is the same as if the property had been preserved to abide the result of the action. Hinkson *v.* Morrison, 47 Iowa 167.

The plaintiff in replevin for a race horse cannot recover for fines he was compelled to pay different trotting associations, because of the horse's failure to trot in races for which he had been entered previous to the attachment of the horse by the defendant. Riley *v.* Littlefield, 84 Mich. 22.

4. Wood *v.* Wiemar, 104 U. S. 786; Geisendorff *v.* Eagles, 70 Ind. 418; Lloyd *v.* Goodwin, 20 Miss. 223; Bates *v.* Snider, 59 Miss. 497; Pico *v.* Martinez, 55 Cal. 148; Walker *v.* Hunter, 5 Cranch (C. C.) 462; Booth *v.* Ableman, 20 Wis. 21; Gaynor *v.* Blewitt, 69 Wis. 582; Shahan *v.* Smith, 38 Kan. 474; Weber *v.* Henry, 16 Mich. 399; Williams *v.* Brosnahan, 66 Mich. 634; Darling *v.* Tegler, 30 Mich. 54; Mueller *v.* Provo, 80 Mich. 475; New Home Sewing Mach. Co. *v.* Bothne, 70 Mich. 443; Lewis *v.* Mason, 94 Mo. 551; Dilworth *v.* McKelvy, 30 Mo. 149; Burt *v.* Mears, 41 Mo. App. 231; Baldridge *v.* Dawson, 39 Mo. App. 527; Hickman *v.* Dill, 32 Mo. App. 509.

Property in Execution.—When the property is replevied from a sheriff or marshal holding it under execution, and having no other interest in it than that of the execution creditor, the value

of the officer's interest is the amount of the execution, with interest and costs thereon. Hayden *v.* Anderson, 17 Iowa 158; Booth *v.* Ableman, 20 Wis. 21; Booth *v.* Ableman, 20 Wis. 602; Jennings *v.* Johnson, 17 Ohio, 154; 49 Am. Dec. 451; Sutcliffe *v.* Dohrman, 18 Ohio 181; 51 Am. Dec. 450; Battis *v.* Hamlin, 22 Wis. 669; Friend *v.* Green, 43 Kan. 167; Wilton *v.* Beltezore, 17 Neb. 399; Gates *v.* Parrott (Neb. 1891), 48 N. W. Rep. 387; Kersenbrock *v.* Martin, 12 Neb. 374; Gillhan *v.* Kerone, 45 Mo. 487.

But if the value of the property be less than such special interest, the damages will be for the full value of the property. Jennings *v.* Johnson, 17 Ohio 154; 49 Am. Dec. 451; Sutcliffe *v.* Dohrman, 18 Ohio 181; 51 Am. Dec. 450. See Clark *v.* Lamoreux, 70 Wis. 508.

The petition alleged that plaintiff has a special property in certain books of the aggregate value of $259; that he is entitled to the immediate possession of the same; that he was in possession thereof as agent; and that defendant wrongfully detains, etc. *Held*, that upon proof of such special property, and right of possession, plaintiff was entitled to a judgment for the full value of the books, unless returned. Morris *v.* Burley, 74 Iowa 45.

The assignee of a valid judgment to enforce a laborer's lien upon logs, under the statute, bought the logs at an execution sale under the judgment, and the original owners, who were not parties to the lien suit, replevied the logs from him. It was held that such assignee and purchaser was entitled to recover in the replevin suit (in addition to damages for the taking) the full actual value of the logs, in case a delivery of them could not be had, and not merely the amount of the lien judgment and costs. Winslow *v.* Urquhart, 44 Wis. 197.

Where an action of replevin was brought by a mortgagee of chattels against another mortgagee and the plaintiff failed to make out a cause of action, and it appeared that the chattels were taken from defendant's possession by plaintiff, and that defendant was responsible to the mortgagor for them, it was held that a verdict against plaintiff for their full value, and not merely for defendant's interest, was proper. Madison Nat. Bank *v.* Farmer (Dak. 1888), 40 N. W. Rep. 345.

In replevin for chattels, by the seller against the purchaser, who has paid no part of the price, judgment should not be rendered on a general verdict for defendant for the value of the property, but a new trial should be ordered, to assess the value of defendant's interest. Peck *v.* Bonebright, 75 Iowa 98.

No presumption can be raised concerning the extent of a special interest beyond the amount proved. Weber *v.* Henry, 16 Mich. 399.

When defendant in replevin prevails on the ground that he is part owner with the plaintiff of the property in suit, the damages which he recovers should be reduced in proportion to the extent of his interest. Where he and the plaintiff were partners in the property and their respective interests are not proved, they will be presumed equal. Crabtree *v.* Clapham, 67 Me. 326.

Where an action of replevin was brought by a stranger having no title or interest in the property, against a sheriff to recover property seized under execution, and afterwards dismissed, in assessing damages against plaintiff, the latter cannot show that the execution debtor, and consequently the sheriff who held under him was not the real owner of the property, and hence was only entitled to nominal damages. The rule authorizing such proof of title applies only to cases where plaintiff stands in some relation of privity, in respect to the property, with defendant or those from whom he derives his interest. Nelson *v.* Luchtemeyer, 49 Mo. 56; Dilworth *v.* McKelvy, 30 Mo. 149.

Where a chattel mortgagee brings replevin to recover the possession of the mortgaged property, and the defendant by giving bond retains possession and the jury finds the value of the mortgaged property to be greater than the mortgage debt and interest, the judgment should be for the recovery of the property, or the debt and interest, and not for the recovery of the value of the property. Wolfley *v.* Rising, 12 Kan. 535; Converse *v.* Safford, 17 Kan. 15; Winstead *v.* Hulme, 32 Kan. 568.

Papers.—In an action of replevin for papers, the plaintiff may recover their value to him. The ordinary rule of market value is inapplicable to such a case. Drake *v.* Auerbach, 37 Minn. 505.

In an action of replevin by a mortgagee entitled to the immediate possession of the property replevied, if the

of usable value, the value of such use during the time of its wrongful detention should be given;[1] but in the absence of

taking and detention were both unlawful, he is entitled to recover the damages to the property caused directly by the taking and detention, although the property, when replevied, is of greater value than the amount due under the mortgage. Allen *v.* Butman, 138 Mass. 586.

How. St. *Michigan*, § 8324, provides that in replevin, before the property is delivered to plaintiff, he shall execute a bond in at least double the appraised value of the property, conditioned to prosecute the suit, and to return the property if so adjudged. Section 8325 provides that, on failure of plaintiff to execute the bond for twenty-four hours after the appraisal, the goods shall be returned to the person from whom taken. Section 8342 provides that when either of the parties shall have only a lien on goods replevied, such judgment shall be rendered "as shall be just between the parties." A writ of replevin specified the property to be taken, but other property was also seized, and the whole was appraised, and a bond given therefor. The jury found that plaintiffs were general owners of the property, but that defendant did not unlawfully detain it, and that he had a lien thereon. *Held*, that it was error to limit defendant's recovery to his lien on the goods specified in the writ, the replevin not being completed until the property was appraised and delivered to plaintiff, and the bond given. Carpentier *v.* Bresnahan, 74 Mich. 48.

A stipulation in a replevin suit, that if the court should find the defendant was lawfully entitled to the possession by virtue of the levy, judgment should be rendered for the defendant for a specified sum, is an admission of record that is conclusive and supersedes all inquiry into the value of the defendant's interest and precludes the plaintiff from claiming that defendant's right was one possessing only a nominal value. Macomber *v.* Saxton, 28 Mich. 516.

Either party may show the value of the property. Dehr *v.* Lampton, 31 Iowa 172.

When the value of the property is stated in the affidavit in the action of replevin, and not found by the justice, the value so stated must govern on appeal. Bradley *v.* Morse, 21 Wis. 680.

Contra, Stevenson *v.* Lord, 15 Colo. 131; Machette *v.* Wanless, 1 Colo. 225.

1. Bell *v.* Campbell, 17 Kan. 211; Yandle *v.* Kingsbury, 17 Kan. 195; 22 Am. Rep. 282; Ladd *v.* Brewer, 17 Kan. 204; Allen *v.* Fox, 51 N. Y. 562; 10 Am. Rep. 641; Butler *v.* Mehrling, 15 Ill. 488; Clark *v.* Martin, 120 Mass. 543; Boston Loan Co. *v.* Myers, 143 Mass. 446; Coffin *v.* Taylor, 16 Oregon 375; Sebree *v.* Smith (Idaho, 1888), 16 Pac. Rep. 915; Chauvin *v.* Valiton, 8 Mont. 251; Kennett *v.* Fickel, 41 Kan. 211; Aber *v.* Bratton, 60 Mich. 357; Burt *v.* Burt, 41 Mich. 82; Stanley *v.* Donoho, 16 Lea (Tenn.) 492; Anchor Milling Co. *v.* Walsh, 24 Mo. App. 97; Kelly *v.* Altemus, 34 Ark. 184; Washington Ice Co. *v.* Webster, 68 Me. 449; 16 Am. Rep. 462; Minthon *v.* Lewis, 78 Iowa 620.

The value of the use should be estimated by the ordinary market value of such use. Stanley *v.* Donoho, 16 Lea (Tenn.) 492; Anchor Milling Co. *v.* Walsh, 24 Mo. App. 97.

In determining the value of the use of the property the taxes which the successful party would have been compelled to pay had he retained possession thereof, and the usual and ordinary risk incident to the possession thereof, should be considered. Sebree *v.* Smith (Idaho, 1888), 16 Pac. Rep. 915.

In an action against a constable for possession of property seized, in which the real controversy is with an intervenor, the property being meanwhile in plaintiff's possession, an agreement by plaintiff and the constable that no judgment for damages is to be taken against the constable, who is to be discharged from the case, and that the property is to be regarded as in the hands of the court pending the final determination of the controversy between plaintiff and the intervenor, the intervenor, not being a party thereto, does not relieve plaintiff of liability for the use and profits of the property and damages for its detention, in the event of final judgment against him. Van Horn *v.* Redmon, 75 Iowa 421.

The plaintiff in replevin is not entitled to damages equal to the value of the user of the property unless he can

fraud, malice, negligence or appropriation, the damages for value of the user should be the interest on the value of the property during the time of its detention.[1] Speculative or expected

show that he was in a position to make use of it. Barney *v.* Douglass, 22 Wis. 464.

The value of the use of personal property, as special damages for its detention, can only be recovered by one who has a right to such use. A mortgagee, after default in the mortgage, has a right to the possession only for the purpose of foreclosure or sale under the mortgage, in order to satisfy the debt secured by it, and not for the purpose of using the property. Thompson *v.* Scheid, 39 Minn. 102.

An offer of a certain price for the use of property is not competent evidence from which to determine the amount of damages arising from its unlawful detention. Young *v.* Atwood, 5 Hun (N. Y.) 234.

1. 5 Wait's Actions and Defenses, p. 499; Palmer *v.* Meiners, 17 Kan. 478; Broadwell *v.* Paradice, 81 Ill. 474; M'Donald *v.* Scaife, 11 Pa. St. 381; 51 Am. Dec. 556; Collins *v.* Houston, 138 Pa. St. 481; Brizsee *v.* Maybee, 21 Wend. (N. Y.) 144; Twinam *v.* Swart, 4 Lans. (N. Y.) 263; Redmond *v.* American Mfg. Co., 121 N. Y. 415; Berthold *v.* Fox, 13 Minn. 501; 97 Am. Dec. 243; Nitz *v.* Bolton, 71 Mich. 388; Hanselman *v.* Kegel, 60 Mich. 540; Just *v.* Porter, 64 Mich. 565; Hooker *v.* Hammil. 7 Neb. 231; Moore *v.* Kepner, 7 Neb. 291; Dodge *v.* Runels, 20 Neb. 33; Hainer *v.* Lee, 12 Neb. 452; Bigelow *v.* Doolittle, 36 Wis. 115; Graves *v.* Sittig, 5 Wis. 219; Hurd *v.* Gallaher, 14 Iowa 394; Taylor *v.* Morton, 61 Miss. 24; Kelly *v.* McKibben, 54 Cal. 192; Reno *v.* Kingsbury, 39 Mo. App. 240. See Sims *v.* Mead, 29 Kan. 124.

In the absence of any statutory provision therefor, when a proceeding in replevin is dismissed, and the property is restored to the defendant, he is only entitled to the damages assessed, and not to the interest on the assessed value of the property. Smith *v.* Roby, 6 Heisk. (Tenn.) 546.

In replevin, damages for the detention of the property other than legal interest on the value of the property as found, are recoverable only in case of a return. If the property is not returned, the measure of damages is the value of the property as proved, together with lawful interest thereon from the date of the unlawful taking. Aultman *v.* Stichler, 21 Neb. 72.

In an action in the nature of replevin, to recover mules and harness, a party is entitled to the property, and the value of its use from the time he was deprived of it until the day of trial. Legal interest on its value during the period of detention is not the measure of damages. Morgan *v.* Reynolds, 1 Mont. 163.

When replevied property is goods or merchandise, capable of physical use or enjoyment, the damage assessed is interest upon its use to the time of rendition of the verdict in the replevin suit, or compensation for the loss of its use and enjoyment, when that exceeds interest. Washington Ice Co. *v.* Webster, 62 Me. 341; 16 Am. Rep. 462.

The general rule in actions of replevin that interest upon the value of the property unlawfully taken or detained is the measure of damages, is not applicable to a case where the chief benefit to be derived from it is from its daily use; but in such cases the real damage is the value of the use of the property, and interest on its value is not compensation. Williams *v.* Phelps, 16 Wis. 80.

In replevin against a bank for a passbook evidencing plaintiff's deposit, on verdict for plaintiff a judgment for the amount due on the face of the book, as the value thereof, with interest at seven per cent. is proper, even though deposits only draw interest at the rate of three per cent., for the action was to recover the pass-book, and the ordinary rules as to damages apply to it. Wegner *v.* Second Ward Sav. Bank, 76 Wis. 242.

Interest on the value of household furniture in use when replevied, is no criterion of the damages sustained by defendant. Boston Loan Co. *v.* Myers, 143 Mass. 446.

Where securities bearing interest have been replevied there is no presumption that any actual damages have been sustained thereby. Bartlett *v.* Brickett, 14 Allen (Mass.) 62.

Neither the plaintiff's time lost in prosecuting the action, nor his attorney's fees can be included in damages. Taylor *v.* Morton, 61 Miss. 24.

After a judgment for the defendant

profits from the use of the property should not usually be given.[1] Exemplary damages are rarely allowed in an action of replevin,[2] but they may be given where the taking was accompanied by special circumstances of wrong or outrage.[3] Exemplary damages may also be given to the defendant when the proceedings of the plaintiff are vexatious and oppressive.[4] It is proper to allow the plaintiff damages for the decrease in value of the property while detained by the defendant.[5] In assessing the value of the property, where there has been neither fraud, negligence, nor oppression on the part of the defeated party, the value of the property should be found as of the time the property was taken from the successful party;[6] and as of the place of deten-

in replevin of eight horses, for a return, restoration, and statutory damages of six per cent. per annum, on the penal sum of the bond, which is twice the value, he sued the plaintiff and obtained judgment against the plaintiff on the bond for not returning the property "in like good order as when taken." *Held*, that a second action, brought for the use of the property during its detention would not lie; the six per cent. is full compensation for such use. Davis *v.* Fenner, 12 R. I. 21.

1. Butler *v.* Mehrling, 15 Ill. 488; Aber *v.* Bratton, 60 Mich. 357.

2. Cummings *v.* Gann, 52 Pa. St. 484.

In Cummings *v.* Gann, 52 Pa. St. 484, the court by Thompson, J., said: "It must be a rare case of misconduct on the part of the defendant in an action like this, to authorize them at all. I do not say they may not be justly allowable in this form of action, but I think this was not such a case, if they are ever properly given in replevin."

3. Schofield *v.* Ferrers, 46 Pa. St. 438; M'Donald *v.* Scaife, 11 Pa. St. 381; 51 Am. Dec. 556; Doris *v.* Barboer, 6 S. & R. (Pa.) 426; McCabe *v.* Morehead, 7 W. & S. (Pa.) 513; Arzaga *v.* Villaba, 85 Cal. 191; Lander *v.* Ware, 1 Strobh. (S. Car.) 15; Winstead *v.* Hulme, 32 Kan. 568; Holt *v.* Van Eps, 1 Dak. 206.

Attorneys' fees paid in defending a replevin suit may be recovered. Dably *v.* Campbell, 26 Ill. App. 502.

Where defendant in a replevin suit obtains judgment, but pending an appeal by the plaintiff converts the property, this may be considered in estimating the plaintiff's damages. Deck *v.* Smith, 12 Neb. 389.

4. Cable *v.* Dakin, 20 Wend. (N. Y.) 172; Brizsee *v.* Maybee, 21 Wend. (N. Y.) 144; Herdic *v.* Young, 55 Pa. St. 176; 93 Am. Dec. 739; Heard *v.* James, 49 Miss. 236.

Attorneys' fees cannot be allowed defendant in replevin as damages in the absence of fraud, malice or willful wrong on the part of plaintiff. Cowden *v.* Lockridge, 60 Miss. 385.

In actions where punitive damages are given, no allowance will be made the defendant for any increased value that may be bestowed by skill and labor on the property. Heard *v.* James, 49 Miss. 236.

5. Russell *v.* Smith, 14 Kan. 366; Aber *v.* Bratton, 60 Mich. 357; Young *v.* Willet, 8 Bosw. (N. Y.) 486.

6. **Maine.**—In *Maine* the defendant is entitled to the value of the property replevied at the time of rendition of judgment for a return. Tuck *v.* Moses, 58 Me. 461; Berthold *v.* Fox, 13 Minn. 501, 97 Am. Rep. 43.

Missouri.—The value of the property which the jury must find, is its value at the date of the trial. Schultz *v.* Hickman, 27 Mo. App. 21; Hoester *v.* Teppe, 27 Mo. App. 207; Miller *v.* Bryden, 34 Mo. App. 602.

Pennsylvania.—The measure of damages where property has been enhanced in value, seems to be the value of the improved property, less the cost of making the improvements. Herdic *v.* Young, 55 Pa. St. 176; 93 Am. Dec. 739.

In *Wisconsin*, the value should be found as of the time of the beginning of the action. Brewster *v.* Carmichael, 39 Wis. 456. In replevin, when a recovery of the value of the property is sought, the usual measure of recovery is the value before the property was improved by defendant's labor and skill; and this, even in cases where it was taken knowingly and wilfully without

tion,[1] but where the taking has been wrongful, fraudulent, or negligent, the enhanced value from the time of taking should be assessed.[2] When judgment is for the defendant, and a return ordered, he should have damages for the decrease in value of the goods from the time of their replevin.[3] Where interest on the value of the property is given, damages in gross, also, cannot be recovered.[4] Where the goods have increased in value, the defendant is entitled to damages equal to the value of the increase.[5]

color or claim of right; except where such taking was accompanied by special circumstances which would justify exemplary damages. Single *v.* Schneider, 30 Wis. 570 See Single *v.* Schneider, 24 Wis. 299.

In an action to recover possession of canal boats, evidence of their value a year previous to their conversion is admissible when supplemented by evidence that they were in the same condition when converted. Brewster *v.* Silliman, 38 N. Y. 423.

Where plaintiff had shipped certain property to defendant, at the request of one M., who had falsely represented himself as its agent, from S. to F., at which latter place defendant had purchased the property of M., plaintiffs were entitled to recover the value of the property at F from defendant, less any additional value given to it by labor bestowed upon it in good faith before demand was made; under *Indiana* Rev. Stat. § 572, providing that in actions to recover personal property, judgment may be given for the value thereof, and for damages for detention, and the fact that defendant paid the freight from S did not alter the rule. Peters Box, etc., Co. *v.* Lesh, 119 Ind. 98.

The value as stated in the affidavit is not conclusive. Mills *v.* Mills, 39 Kan. 455.

Where, between the time of taking goods on the replevin writ and the time of trial, a debt from defendant to plaintiff comes due, in rendering judgment against plaintiff the amount of the debt should be deducted from the value of the goods. Dodd *v.* Wilson, 26 Mo. App. 462.

When replevin is brought for written securities they are presumed, in assessing their value, to be worth their face value, and this presumption cannot be rebutted by evidence of their market value when the suit was brought. Holt *v.* Van Eps, 1 Dak. 206.

1. Newton *v.* Brown, 1 Utah 287.

2. Bly *v.* U. S., 4 Dill. (U. S.) 464.

Increased damages may be allowed on appeal, where the property detained has appreciated. Deck *v.* Smith, 12 Neb. 389.

Plaintiff suing to recover a cow, wrongfully taken by the defendant, is entitled to the cow and the increase since the conversion, or its value. Morris *v.* Coburn, 71 Tex. 406.

3. Hooker *v.* Hammil, 7 Neb. 231; Moore *v.* Kepner, 7 Neb. 291; Washington Ice Co. *v.* Webster, 68 Me. 341; 16 Am. Rep. 462; Dalby *v.* Campbell, 26 Ill. App. 502; Hinchey *v.* Koch, 42 Mo. App. 230.

The damages in such case may be assessed up to the time of the judgment whether on nonsuit or on verdict, Washington Ice Co. *v.* Webster, 62 Me. 341; 16 Am. Rep. 462.

Massachusetts.—In *Massachusetts*, the decrease in value from the time of replevin can only be recovered by action on the replevin bond. Citizens' Nat. Bank *v.* Oldham, 136 Mass. 515.

4. Freeborn *v.* Norcross, 49 Cal. 313.

In replevin for bonds, where the verdict awards possession to plaintiff and fixes their value, including damages, at a certain sum, a judgment that plaintiff have delivery of the bonds, or, in default, the sum named in the verdict, and adding a distinct amount as damages for detention, is unauthorized, in respect to this addition. Corn Exch. Bank *v.* Blye, 54 Hun (N. Y.) 312.

5. Washington Ice Co. *v.* Webster, 62 Me. 341; 16 Am. Rep. 462; Buckley *v.* Buckley, 12 Nev. 423.

Where the property advanced in value during the time of its detention by the writ of replevin, but at the time it was ordered to be re-delivered to the defendant it bore the same market value as when it was first taken on the writ; it was held that the defendant could not have damages assessed in his favor for the intermediate advance in

9. Costs.—The general rule with regard to costs in this action is, that the costs follow the judgment, and are given to the successful party;[1] and where the judgment is apportioned and the property divided between the parties, each party will be required to pay his own costs.[2]

XI. Replevin Bond—1. Nature of Bond.—At common law the sheriff was required to take from the plaintiff pledges to prosecute, and afterwards by the statute of Westminster, the sheriff was required to take pledges, not only to prosecute the suit, but also to return the goods in case a return should be adjudged.[3] In this country a bond with sureties is substituted instead of the pledges of record.[4] This bond must be executed before the

price unless he could show that he would have sold it at the advanced price. Meshke *v.* Van Doren, 16 Wis. 339.

1. Smith *v.* Woodleaf, 21 Kan. 717; Asbell *v.* Tipton, 1 B. Mon. (Ky.) 300; Parham *v.* Riley, 4 Coldw. (Tenn.) 5; Merrill *v.* Butler, 18 Mich. 294. See Dearing *v.* Ford, 15 Smed. & M. (Miss.) 269.

Where judgment is for defendant, in replevin by husband and wife, execution for costs should run against both husband and wife. Waterman *v.* Fairbrother, 12 R. I. 195.

Rescinded Sale.—Where goods have been taken on a replevin writ, without the contract having been rescinded by placing the vendee *in statu quo*, a return will not be awarded if plaintiff makes out his claim of fraud, and the consideration is tendered back on the trial, but in such case the costs will be adjudged against the plaintiff. Farwell *v.* Hanchett, 19 Ill. App. 620. See also McCutchin *v.* Platt, 22 Wis. 561.

The expenses of taking and removing the property by the sheriff, constitute part of the disbursement in the action, and should be added to the costs. Young *v.* Atwood, 5 Hun (N. Y.) 234.

The costs of a writ *de retorno habendo* are not part of the recovered costs of the judgment. Langdoc *v.* Parkinson, 2 Ill. App. 136.

2. Dresher *v.* Corson, 23 Kan. 313; Powell *v.* Hinsdall, 5 Mass. 343; Chinn *v.* Russell, 2 Blackf. (Ind.) 171; Field *v.* Post, 38 N. J. L. 346; Johnson *v.* Fellows, 6 Hill (N. Y.) 353; Seymour *v.* Billings, 12 Wend. (N. Y.) 285; Porter *v.* Willet, 14 Abb. Pr. (N. Y.) 319; Summers *v.* Jarvis, 14 Abb. Pr. (N. Y.) 322; Hull *v.* Halstead, 1 How. Pr. (N. Y.) 174. See Wright *v.* Williams, 2 Wend. (N. Y.) 632; Rogers *v.* Arnold, 12 Wend. (N. Y.) 30; Small *v.* Bixley, 18 Wend. (N. Y.) 514; Friend *v.* Green, 43 Kan. 167.

Where the verdict in an action of replevin is for both parties, the judgment must follow the verdict, and the costs must be apportioned according to equity. Poor *v.* Woodburn, 25 Vt. 334. See also Brown *v.* Smith, 1 N. H. 36.

Plaintiff obtained judgment for the greater part of the property, but not for the full amount claimed. *Held*, entitled to all costs incurred under *North Carolina* Code, § 525, providing that "costs shall be allowed of course to the plaintiff upon a recovery . . . in an action to recover possession of personal property." Horton *v.* Horne, 99 N. Car. 219.

Where in an action of replevin each party is found to be entitled to part of the property, but no costs are awarded to either, the judgment will not be disturbed if the court is unable to say that either party is prejudiced thereby, such failure to award costs being virtually an off-set of the costs of one party against those of the other. Lanyon *v.* Woodward, 65 Wis. 543.

3. Caldwell *v.* West, 21 N. J. L. 411, *citing* Gilbert on Rep. 64, 177; Wilkinson on Rep. 12; 3 Mod. 56.

4. Caldwell *v.* West, 21 N. J. L. 411. A replevin bond to prosecute a suit in replevin, in another State, will not be considered as a replevin bond within any of the provisions of our statutes. *Ex parte* Livingston, 10 Wend. (N. Y.) 545.

It must, of course, be a sealed instrument. Lovejoy *v.* Bright, 8 Blackf. (Ind.) 206.

officer can levy on the property under the writ,[1] and is to be in a

1. Kimball *v.* True, 34 Me. 84; Baldwin *v.* Whittier, 16 Me. 33; Garlin *v.* Strickland, 27 Me. 443; Greely *v.* Currier, 39 Me. 516; *Maine* Rev. Stats. 1882, ch. 96, §§ 3, 10; Smith *v.* McFall, 18 Wend. (N. Y.) 421; *New York* Code Civ. Proc., § 1694; Milliken *v.* Selye, 6 Hill (N. Y.) 623; Revision of *New Jersey*, p. 971, § 6; State *v.* Stephens, 14 Ark. 264; Pirani *v.* Barden, 5 Ark. 81; Pool *v.* Loomis, 5 Ark. 110; Wilson *v.* Williams, 52 Ark. 360; Mansfield's Dig. *Arkansas*, § 5575; Rev. Stats. *Illinois*. 1891, ch. 119, § 6, p. 1139; Graves *v.* Sittig, 5 Wis. 219; Williams *v.* Phelps, 16 Wis. 80; Whitney *v.* Jenkinson, 3 Wis. 407; Stats. of *Minnesota*, 1891, § 4971; Luther *v.* Arnold, 7 Rich. (S. Car.) 397; Rev. Stats. of *Ohio*, 1890, § 5819; Rev. Code of *Iowa*, 1888, § 3229; Fleet *v.* Lockwood, 17 Conn. 233; Gen. Stats. of *Connecticut*, § 1326; Cady *v.* Eggleston, 11 Mass. 285; Pub. Stats. of *Massachusetts*, 1882, ch. 184, §§ 3, 12; Pub. Stats. *Rhode Island*, 1882, ch. 235, § 3; Bent *v.* Bent, 43 Vt. 42. See Tripp *v.* Howe, 45 Vt. 523; Rev. Laws. of *Vermont*, §§ 1219, 1226, 1232; Taylor *v.* Adams' Express Co., 9 Phila. (Pa.) 272; Brightly's Purdon's Digest (Pa.) p. 1489, § 3.

It is presumed that an officer who served a writ of replevin took the requisite bond, although his return does not expressly state the fact. Shorey *v.* Hussey, 32 Me. 579; McGuffie *v.* Dervine, 1 Greene (Iowa) 251.

United States Plaintiff—When the *United States* sues as plaintiff, no bond is necessary. U. S. Rev. Stats., § 1001; U. S. *v.* Bryant, 111 U. S. 499.

The officer is not justified in replevying the property without a legal bond, by showing that the plaintiff was a man of abundant property. Harriman *v.* Wilkins, 20 Me. 93; Wilson *v.* Williams, 52 Ark. 360.

In an action on a bond conditioned to prosecute a suit in replevin, the evidence was that the bond was executed by the surety before the service of the writ, but not by the principal until after the return of the writ and the entry of the action, and it was holden good against them both. Cady *v.* Eggleston, 11 Mass. 282.

The provisions of the *Vermont* statutes, relating to the replevin of liquor seized by an officer as intoxicating, do not dispense with the necessity of a replevin bond in such cases. Thurber *v.* Richmond, 46 Vt. 395.

A sheriff took a replevin bond, but his term of office expired and the writ was returned unexecuted. An *alias* writ was issued and his successor executed it without taking a new bond. *Held*, that the bond taken by the former sheriff was sufficient. Petrie *v.* Fisher, 43 Ill. 442.

Indiana.—In *Indiana* the officer may take possession of the property, but he cannot deliver it to the plaintiff until the bond is given. Rev. Stats. *Indiana*, 1888, art. 49, § 1270.

Michigan.—A similar statute exists in *Michigan*. How. Ann. Stats. *Michigan*, 1882, § 8324.

Election for Damages.—If the plaintiff elects to proceed for damages and not for the specific property, no bond is necessary. Whitney *v.* Jenkinson, 3 Wis. 407; Graves *v.* Sittig, 5 Wis. 219; Williams *v.* Phelps, 16 Wis. 80; Hamilton *v.* Clark, 25 Mo. App. 428; Greenwade *v.* Fisher, 5 B. Mon. (Ky.) 167. See Vaiden *v.* Bell, 3 Rand. (Va.) 448.

The plaintiff in replevin is not a trespasser in taking the goods replevied, if he offers sureties satisfactory to the officer, though in fact insufficient. Harriman *v.* Wilkins, 20 Me. 93.

A writ of replevin may be delivered to an officer, and he may commence the service thereof before taking a bond from the plaintiff, but he cannot deliver the property to the plaintiff nor do anything more than is necessary to effect an appraisement of the property, until the plaintiff has given the bond required by statute. Wolcott *v.* Mead, 12 Met. (Mass.) 516; Smith *v.* Whiting, 97 Mass. 316; Morris *v.* Baker, 5 Wis. 389.

Where the defendant in an action of replevin for beasts distrained for unlawfully running at large, which has been appealed from a justice of the peace, pleads issuably in the circuit court, and goes to trial on the merits, after his special appeal, raising jurisdictional questions, has been decided against him, he cannot object to the regularity of the proceedings because the bond on which the property was delivered to plaintiff was given before the appraisal of the property. Pistorius *v.* Swarthout, 67 Mich. 186.

The *Connecticut* Gen. Stats., p. 484,

penalty in double the value of the property.[1] The bond must be conditioned for the prosecution of the action, for the return of the chattel to the defendant, if possession thereof is not adjudged to the plaintiff, and for the payment to the defendants of damages and costs if the judgment be in his favor.[2] This bond

§ 2, require a bond to be given by the plaintiff in all replevin suits to prosecute the suit to effect and pay any judgment that the defendant may recover in the suit. Gen. Stats., p. 397, § 3, require bonds for costs in all suits brought by non-resident plaintiffs. It was held that the special bond required in replevin suits necessarily covered the costs that might be recovered by the defendant as a part of the judgment that might be rendered in his favor, and that it was not necessary for a non-resident plaintiff in such suit to give the ordinary bond for costs. Singer Mfg. Co. *v.* Rhodes, 54 Conn. 48. See Fleet *v.* Lockwood, 17 Conn. 233.

To Whom Given.—The statute naming the sheriff as the party to whom a replevin bond shall be given, means only that it shall be given to the party serving the writ, and a bond given to the coroner may therefore be valid. Speer *v.* Skinner, 35 Ill. 282.

1. *New York* Code Civ. Proc., § 1699; *Massachusetts* Pub. Stats., ch. 184, § 12; Gen. Laws *New Hampshire*, ch. 254, § 6; Pub. Stat. *Rhode Island*, ch. 235, § 3; Greely *v.* Currier, 39 Me. 516. See Plunkett *v.* Moore, 4 Harr. (Del.) 379.

It must be double the true value, and therefore cannot be rated according to the valuation given in the writ. Kimball *v.* True, 34 Me. 84.

Amount Must be Stated.—The penalty of the bond must be for a definite sum. A statement of the penalty as "double the value of the goods to be replevied" is insufficient. Bennett *v.* Allen, 30 Vt. 684; Clark *v.* Connecticut River R. Co., 6 Gray (Mass.) 363; Case *v.* Pettee, 5 Gray (Mass.) 27.

It has been held that the court may permit the plaintiff to file a new or additional bond, so that the security may be double the actual value of the property replevied. Briggs *v.* Wisewell, 56 N. H. 319.

The plaintiff alleged in his writ that the value of the property replevied was $5,000, and filed a bond in the sum of $8,000. *Held*, that he might be permitted to show that the value did not exceed $4,000, or that he might file an additional bond for $2,000 or a new bond for $10,000. Briggs *v.* Wiswell, 56 N. H. 319; Treman *v.* Morris, 9 Ill. App. 237; Moore *v.* Lewis, 76 Mich. 300.

A replevin bond which is erroneous only in amount, is valid until quashed. Hopkins *v.* Chambers, 7 T. B. Mon. (Ky.) 257.

Affidavit Governs Amount.—When the plaintiff's affidavit states the value of the property, the court has no power to require an additional undertaking, on the ground that the value of the property stated in the affidavit is too small. U. S. Land. etc., Co. *v.* Bussey, 53 Hun (N. Y.) 516; Lawrence *v.* Featherston, 10 Smed. & M. (Miss.) 345.

An order of court directed the execution of a bond indemnifying a constable as defendant in an action of replevin without specifying any penal sum in which it shall be conditioned. *Held*, no ground of objection to the bond when the same was executed in a penal sum deemed sufficient by the court accepting it. Carter *v.* Stevens (Supreme Ct.), 15 N. Y. Supp. 142.

2. *New York* Code Civ. Proc., § 1699; Persse *v.* Watrous, 30 Conn. 139; Humphrey *v.* Taggart, 38 Ill. 228.

A return of the goods to the sheriff is no answer to an action on the replevin bond. The return required by the bond is a return to the party from whom they were taken, in pursuance of the judgment of the court, not a mere redelivery to the sheriff. Gould *v.* Warner, 3 Wend. (N. Y.) 54.

Object of Bond.—The object of the replevin bond is the indemnity of the defendant in replevin, and all questions arising upon it should be determined by a due regard to that consideration. Doogan *v.* Tyson, 6 Gill. & J. (Md.) 453; Belt *v.* Worthington, 3 Gill. & J. (Md.) 247.

Under the *Illinois* statute the replevin bond is not intended merely to indemnify the officer executing the replevin writ, but also to furnish an additional remedy to the defendant in case the plaintiff fails to maintain his

must be executed by at least two sureties.[1] Payment of money

suit. Fahnestock *v.* Gilham, 77 Ill. 637; Petrie *v.* Fisher, 43 Ill. 442; Treman *v.* Morris, 9 Ill. App. 237. See also Imel *v.* Van Deren, 8 Colo. 90.

Illinois.—In *Illinois* the bond is conditioned: first, to prosecute the suit with effect; second, to make return of the property, if return thereof be awarded; and third, to save and keep harmless the officer in replevying the same. Langdoc *v.* Parkinson, 2 Ill. App. 136.

It is no objection to the validity of a replevin bond, that it is conditioned to indemnify the sheriff. Lambden *v.* Conoway, 5 Harr. (Del.) 1; Whittemore *v.* Jones, 5 N. H. 362.

Where the condition of the bond was, to prosecute to effect before A B, justice of the peace, and the justice had not final jurisdiction, it was held, that the bond sufficiently complied with the statute which requires a condition to prosecute to effect generally. Persse *v.* Watrous, 30 Conn. 139.

The delivery of a replevin bond to the officer who serves the writ, is a sufficient delivery thereof to the defendant, even if the officer neglects to make due return of it with the writ into court. Smith *v.* Whiting, 97 Mass. 316.

A replevin bond for costs only, is no compliance with the statute. Creamer *v.* Ford, 1 Heisk. (Tenn.) 307.

Montana Civil Code, § 157, requires an undertaking in replevin to be conditioned "for the prosecution of the action without delay and with effect." An undertaking which provided "for the prosecution of the action," omitting the words "without delay and with effect," was held sufficient. Parrott *v.* Scott (Mont.), 12 Pac. Rep. 763.

Warrant to Confess Judgment.—The sheriff may take a replevin bond containing a warrant to confess judgment, if the same is voluntarily offered. Clark *v.* Morss (Pa. 1891), 21 Atl. Rep. 802.

The omission from a replevin bond, which contains all the other statutory provisions, of the provision "to return the property to the defendant, in case judgment for a return of such property is rendered against him" does not render the bond voidable by the parties signing it. Hicklin *v.* Nebraska City Bank, 8 Neb. 463.

Delaware.—The condition of the replevin bond, in cases of distress for rent, is to prosecute the suit and satisfy the judgment; in other cases, it is to prosecute the suit, and make return, if return be awarded. Clark *v.* Adair, 3 Harr. (Del.) 113.

1. Claflin *v.* Thayer, 13 Gray (Mass.) 459; *New York* Code Civ. Proc., § 1699; Whaling *v.* Shales, 20 Wend. (N. Y.) 673; Greely *v.* Currier, 39 Me. 516.

A replevin bond, from a person not the plaintiff, with one surety, is not such a bond "from the plaintiff or from some one in his behalf, with sufficient sureties," as is required by the *Massachusetts* Rev. Stats., ch. 113 § 29; and if objection is made at the return term the action of replevin must be dismissed. Chaflin *v.* Thayer, 13 Gray (Mass.) 459. See Smith *v.* Fisher, 13 R. I. 624.

Maine.—If the name of the plaintiff in a replevin suit be put upon the bond by one having no authority for that purpose from the plaintiff, it is not such a bond as the statute requires, although signed by two sureties. Garlin *v.* Strickland, 27 Me. 443.

Connecticut.—In *Connecticut* one surety is sufficient. Gen. Stats. of *Connecticut*, § 1326.

Vermont.—In *Vermont* one surety in addition to the plaintiff is sufficient. Bent *v.* Bent, 43 Vt. 42. See De Bow *v.* Applegate, 3 McCord (S. Car.) 44.

Nebraska.—The bond must be executed by one or more sufficient sureties, residents of the county in which the action is pending. State *v.* Wait, 23 Neb. 166.

A replevin bond taken according to the repealed statute of *Massachusetts* of 1789, ch. 76, with one surety only, is not void. Simonds *v.* Parker, 1 Met. (Mass.) 508. See also Bigelow *v.* Comegys, 5 Ohio St. 256.

One Surety is sufficient in *Minnesota*, Stats. of *Minnesota*, 1891, § 4971. And in *Kansas*, Stats. of *Kansas*, 1889, § 4261.

It is not necessary that the plaintiff in replevin should sign the bond or that it was given in his behalf, under *Maine* Rev. Stats., ch. 130, in order that the replevin bond should be considered a statute bond. Howe *v.* Handley, 28 Me. 241. See also Cooper *v.* Brown, 7 Dana (Ky.) 333.

It is no ground for dismissing an action of replevin, that in the replevin bond taken by the officer serving the

into court cannot be substituted for the sureties.[1] Though the bond may not comply with every statutory formality, it may still be good as a common law bond.[2] When no bond or an insufficient one is given, the action will be dismissed upon motion made at the proper stage of the cause,[3] unless the defendant offers to

writ, the sureties are described as partners, and sign and seal the same in their partnership names. Judson *v.* Adams, 8 Cush. (Mass.) 556.

If the bond is signed by the surety his name need not appear in the bond, provided it is in the third person plural. Clarke *v.* Bell, 2 Litt. (Ky.) 164; Affeld *v.* People, 12 Ill. App. 502.

The sureties on a bond, in replevin before a justice, failed to justify as required by How. St. *Michigan*, § 6856. Such failure was held not jurisdictional, and to be waived unless objected to. Hatch *v.* Christmas, 68 Mich. 84.

A party who makes himself the principal in a replevin bond, although not the plaintiff in the suit, will be liable to have judgment entered against him as principal. A stranger taking the property out of the hands of the sheriff by an action for the delivery of personal property, will be liable, if he fail to show title for the whole value of the property taken out. Frei *v.* Vogel, 40 Mo. 149.

New York—The defendant may except to the sureties offered by the plaintiff, within three days after the chattel is replevied and a copy of the affidavit, requisition, and undertaking is served. *New York* Code Civ. Proc., § 1703. See also Pardee *v.* Buell, 2 Hill (N. Y.) 357.

A replevin bond signed by the sureties only is sufficient. Philippi Christian Church *v.* Harbaugh, 64 Ind. 240.

Missouri.—A bond in replevin need not be executed by or in the name of the plaintiff, but may be given by a third person in his behalf. South Mo. Land Co. *v.* Jeffries, 40 Mo. App. 360.

Signing Approved Bond.—A surety who signs a bond after it has been approved by the sheriff does so without consideration. Anderson *v.* Bellenger, 87 Ala. 334.

It is no error to permit a new replevin bond to be executed, in order to release a surety on the first bond, whom it is desired to use as a witness. Patterson *v.* Fowler, 22 Ark. 396.

One of several defendants in an execution may replevy property levied on, although his codefendants do not unite with him in executing the forthcoming bond. Sheppard *v.* Melloy, 12 Ala. 561.

Michigan.—A replevin bond signed only by sureties is sufficient, under a statute allowing it to be signed by some one in behalf of the principal. Cahill's Appeal, 48 Mich. 616.

1. Cummings *v.* Gann, 52 Pa. St. 484.

New Jersey.—The statutes of *New Jersey* allow a deposit in lieu of bond. *New Jersey* Laws, 1890, C. 302, p. 494.

2. Tuck *v.* Moses, 54 Me. 115; Claggett *v.* Richards, 45 N. H. 360; Persse *v.* Watrous, 30 Conn. 139; Nunn *v.* Goodlett, 10 Ark. 89; Mitchell *v.* Ingram, 38 Ala. 395; Branch *v.* Branch, 6 Fla. 314; Russell *v.* Locke, 57 Ala. 420.

Though a replevin bond which does not conform to the statute may be good at common law, yet the defendant in replevin is entitled, if he require it in season, to a bond such as is prescribed by statute. Claflin *v.* Thayer, 13 Gray (Mass.) 459.

3. Bennett *v.* Allen, 30 Vt. 684; Tripp *v.* Howe, 45 Vt. 523; Clark *v.* Connecticut River R. Co., 6 Gray (Mass.) 363; Cady *v.* Egleston, 11 Mass. 282; Parker *v.* Hall, 55 Me. 362; Greely *v.* Currier, 39 Me. 516.

The objection that a replevin bond is not for double the value of the property replevied must be pleaded in abatement, or it cannot defeat the action; even though the defendant first learned the fact from evidence elicited at the trial. Douglass *v.* Gardner, 63 Me. 462. See also Spencer *v.* Dickerson, 15 Ind. 368; Tripp *v.* Howe, 45 Vt. 523.

The return term of the action of replevin is the proper time to make this motion. Clark *v.* Connecticut River R. Co., 6 Gray (Mass.) 363; Simonds *v.* Parker, 1 Met. (Mass.) 508; Wolcott *v.* Mead, 12 Met. (Mass.) 516; Claflin *v.* Thayer, 15 Gray (Mass.) 459.

When a replevin bond is conditioned

amend.[1] Replevin cannot be prosecuted in *forma pauperis*.[2] The name of the defendant must appear in the replevin bond,[3] but the property need not be described therein.[4] There should be a description of the action.[5] The obligors in the bond will not be allowed to impeach it in bar of recovery.[6] The bond must be

only for a return of a part of the property, the suit should be dismissed only as to that part for which no bond is given. Eastman *v.* Barnes, 58 Vt. 329.

A motion to dismiss an action of replevin will be overruled upon the filing by the plaintiff of a sufficient bond. Dowell *v.* Richardson, 10 Ind. 573.

The fact that a replevin bond does not correctly state the date of the writ is not ground for dismissing a replevin suit. Graves *v.* Shoefelt, 60 Ill. 462.

Form of Motion.—A motion to dismiss an action of replevin, for want of a sufficient bond, sufficiently states the cause of the motion, by alleging that the officer did not before the service of the writ "take from the plaintiff or some one on his behalf a bond to the defendant with sufficient sureties," etc., enumerating all the requisites of the statute. Claflin *v.* Thayer, 13 Gray (Mass.) 459.

The filing of an affidavit of merits simultaneously with a motion to dismiss is not a waiver of that motion. Claflin *v.* Thayer, 13 Gray (Mass.) 459.

A justice of the peace issued a writ of replevin before any bond had been filed by the plaintiff, and approved it next day under a misapprehension as to a surety's qualifications. *Held*, that *Michigan* Comp. L., § 5294, would not prevent the defendant from excepting to the sureties. Johnson *v.* Stilson, 42 Mich. 541.

Exceptions to Sureties—*New York.*—When the insufficiency of the bond consists of unsatisfactory sureties, the exception to them must be taken by notice served upon the sheriff. *New York* Code Civ. Proc., § 1703. See Cuslick *v.* Cohen, 3 Den. (N. Y.) 267.

1. Smith *v.* Howard, 23 Ark. 203; Hawley *v.* Bates, 19 Wend. (N. Y.) 632. See also De Reguie *v.* Lewis, 3 Robt. (N. Y.) 708.

Where the replevin bond originally given is defective, a new bond may be filed *nunc pro tunc*. Newland *v.* Willetts, 1 Barb. (N. Y.) 20; Whaling *v.* Shalss, 20 Wend. (N. Y.) 673. See Lynch *v.* Bruce, 2 Dougl. (Mich.) 123.

2. Horton *v.* Vowel, 4 Heisk. (Tenn.) 622.

But if bond be given for double the value of the property and the costs accumulate to a larger amount, on a rule for further security, the plaintiff may take the pauper's oath. Horton *v.* Vowel, 4 Heisk. (Tenn.) 622.

3. Arter *v.* People, 54 Ill. 228; Matthews *v.* Storms, 72 Ill. 316; Titus *v.* Berry, 73 Me. 127.

In Green *v.* Walker, 37 Me. 25, a replevin bond was held good, though by clerical error the name of the plaintiff had been inserted where that of the defendant should have been.

A bill in chancery to reform a replevin bond on the ground of the omission to insert the name of the defendant in the body of the instrument, which contains no distinct allegation that it was the intention to fill the blank in the bond with the name of the defendant, and that the omission to do so was the result of mutual mistake, is not sufficient to warrant the interposition of a court of chancery. Arter *v.* Cairo, etc., Co., 72 Ill. 434.

New Hampshire. — In *New Hampshire*, a replevin bond is to be taken in the name of the sheriff. Whittemore *v.* Jones, 5 N. H. 362.

4. Branch *v.* Branch, 6 Fla. 314.

5. The condition of a bond which described the action of replevin as one "to be heard and tried before William M. Richardson, Esq., at Gilford, in our said county of Strafford, on the third Tuesday of August next," was held to describe the action sufficiently, Wm. M. Richardson being at that time chief justice of the superior court of judicature. Chadwick *v.* Badger, 9 N. H. 450.

A replevin bond is not avoided by its erroneous description of the court in which the action is pending. Fuller *v.* Wright, 59 Ind. 333.

6. Claggett *v.* Richards, 45 N. H. 360; Jennison *v.* Haire, 29 Mich. 207; Roman *v.* Stratton, 2 Bibb (Ky.) 199; Williamson *v.* Logan, 1 B. Mon. (Ky.)

delivered to the sheriff,[1] and he is responsible for the sufficiency and solvency of the sureties,[2] and when the bond is insufficient, the defendant may have an action of trespass against him,[3] or an action of debt on his official bond.[4] It has been held in some States that the plaintiff, by giving bond, acquires a title to the property in dispute which he may dispose of before the decision in the replevin action.[5] But this doctrine is held erroneous by the weight

237; Morse *v.* Hodsdon, 5 Mass. 314; Simonds *v.* Parker, 1 Met. (Mass.) 508; Nunn *v.* Goodlett, 10 Ark. 89; Treman *v.* Morris, 9 Ill. App. 237; Hartlep *v.* Cole, 120 Ind. 247; Nichols *v.* Standish, 48 Conn. 321. See Fahnestock *v.* Gilham, 77 Ill. 637; Martin *v.* Gilbert, 119 N. Y. 298; Auerbach *v.* Marks, 10 Daly (N. Y.) 171.

The defendant in an action on the replevin bond cannot set up as a defense, the fact that the penalty named in the replevin bond is less than double the value of the property, especially where the writ of replevin had been issued, and possession of the property obtained upon it. Trueblood *v.* Knox, 73 Ind. 310; Carver *v.* Carver, 77 Ind. 498.

1. *New York* Code Civ. Proc., § 1694; Smith *v.* Whiting, 97 Mass. 316. See Morris *v.* Van Voast, 19 Wend. (N. Y.) 283; Bofil *v.* Russ, 3 Strobh. (S. Car.)98.

2. Armstrong *v.* Burrell, 12 Wend. (N. Y.) 302; Bulmer *v.* Jenkins, 3 How. Pr. (N. Y.) 10; Robinson *v.* People, 8 Ill. App. 279; People *v.* Core, 85 Ill. 248; Kimball *v.* True, 34 Me. 84; Hall *v.* Monroe, 73 Me. 123.

New York.—In *New York*, a sheriff is liable only when the defendant in replevin has excepted to the sufficiency of the sureties, and they, or new sureties, have failed to justify. Westervelt *v.* Bell, 19 Wend. (N. Y.) 531; Bliss' *New York* Ann. Code, § 1703.

The bond in replevin proceedings in district courts must be approved by the justice and not by the marshal. Grotz *v.* Hussey, 61 How. Pr. (N. Y.) 448.

A sheriff who turns over the property to the plaintiffs upon delivery of the bond to him, thereby accepts and approves the bond. Hartlep *v.* Cole, 120 Ind. 247.

Where one of two sureties was sufficient where the bond was executed and is not proved to have become insufficient since, the officer is not liable, though the other was insufficient when the bond was given. Lord *v.* Bicknell, 35 Me. 53.

The court will deny a motion to increase the penalty of a replevin bond; it is a matter of discretion with the officer, under the statute. Bulmer *v.* Jenkins, 3 How. Pr. (N. Y.) 11. See De Regnie *v.* Lewis, 3 Robt. (N. Y.) 708.

3. Parker *v.* Hall, 55 Me. 362; O'Grady *v.* Keyes, 1 Allen (Mass.) 284; Gibbs *v.* Bull, 18 Johns. (N. Y.) 435; Whitney *v.* Jenkinson, 3 Wis. 407. See Harris *v.* Harrison, 40 Ark. 50.

In such action the measure of damages is the value of the goods at the time of the taking, with interest, and the costs up to the time when, by taking advantage of the defect in the bond, the defendant in replevin might have procured a dismissal of the action. O'Grady *v.* Keyes, 1 Allen (Mass.) 284.

The omission to take advantage of a defect in the bond, at the proper time, does not affect the defendants right of action against the officer. O'Grady *v.* Keyes, 1 Allen (Mass.) 284.

A judgment for damages against the officer in a replevin suit is no bar to an action on the indemnifying bond. McAllister *v.* Cloqton, 60 Miss. 207.

4. People *v.* Core, 85 Ill. 248; Robinson *v.* People, 8 Ill. App. 279; Kimball *v.* True, 34 Me. 84; Wilkins *v.* Dingley, 29 Me. 73; Murdock *v.* Will, 1 Dall. (U. S.) 341.

The value of the distress, at the time of the replevin, and not the amount of the rent due, is the proper measure of damages in an action against a sheriff for failure to take sufficient bond in the action of replevin. Murdock *v.* Will, 1 Dall. (U. S.) 341.

In an action against a sheriff, under § 4 of the replevin act of *New York*, for taking insufficient security, it is necessary to aver the issuing of a writ *de retorno habendo*, and a return of *elongata*. Knapp *v.* Colburn, 4 Wend. (N. Y.) 619.

5. **Pennsylvania.**—Stewart *v.* Wolf

of authority, and the title is considered to be in abeyance until the decision of the replevin action, the bond merely giving the right to the party making it to keep the property until judgment.[1]

2. Breach of Condition.—The several conditions of a replevin bond are distinct and separate, and an action lies upon the breach of any one of them.[2] Therefore, evidence of the breach

(Pa. 1886), 7 Atl. Rep. 165; Fisher *v.* Whoollery, 25 Pa. St. 197. See Morris on Replevin 248.

Ohio—In the case of Jennings *v.* Johnson, 17 Ohio 154; 49 Am. Dec. 451, the court by Read, J., said: "The bond takes the place of the property to the extent of the interest of the defendant." While it is true that the bond required by the *Ohio* statutes is diverse in form from that of most of the other States, being conditioned to "pay all costs and damages that may be awarded against" the party giving it, yet it is submitted upon examination of the facts of this and other cases that the broad statement of the law as made in this case cannot be held applicable to all states of facts. In this case the property, an undivided half of a schooner, had been levied on by the sheriff by virtue of an execution, and had been replevied from him by a third party claiming to own the goods. Judgment was rendered in favor of the defendant for the amount due on the execution and on writ of error, prosecuted by the defendant on the ground that the judgment should have been in his favor for the full value of the property, the court made use of the language quoted above with the additional words: "But the judgment debtor is no party to the replevin suit—and we leave him to prosecute such remedies as he may have against any person who wrongfully obtains possession of the property," thus applying the doctrine to those cases where the defendant has only a special property. This case was followed in Williams *v.* West, 2 Ohio St. 82, and the principle applied to a suit in which the defendant was the general owner of the replevied property. See also Smith *v.* McGregor, 10 Ohio St. 461; Crittenden *v.* Lingle, 14 Ohio St. 182; 84 Am. Dec. 370.

In the case of Smith *v.* McGregor, 10 Ohio St. 461, the court by Peck, J., said: "But where . . . the plaintiff only claims a special interest therein, the words not exceeding the title or interest claimed by the plaintiff in replevin or other equivalent words should be added." This statement of the law was followed in Lugenbeal *v.* Lemert, 42 Ohio St. 1.

Section 7 of the *Ohio* Stat. relating to replevin is as follows: "That in all cases upon issue joined where the jury shall find for the defendant, they shall also find whether the defendant had the right of property in the goods and chattels, or the right of possession only at the commencement of suit; and if they shall find either in his favor they shall assess such damages as they may think right and proper for the defendant, for which, with costs of suit, judgment shall be rendered by the court." Williams *v.* West, 2 Ohio St. 83. Under this statute it is hard to see by what means a defendant can be protected from the unjust claim of a party desiring to obtain possession of the property to which he has not even color of title.

1. **Massachusetts.**—Lockwood *v.* Perry, 9 Met. (Mass.) 440; White *v.* Dolliver, 113 Mass. 400; 18 Am. Rep. 502. See, however, Swift *v.* Barnes, 16 Pick. (Mass.) 194; Gordon *v.* Jenney, 16 Mass. 465.

Kansas.—Kayser *v.* Bauer, 5 Kan. 202; Turner *v.* Reese 22 Kan. 319; McKinney *v.* Purcell, 28 Kan. 446.

Vermont.—Farnham *v.* Chapman, 60 Vt. 338.

California.—Hunt *v.* Robinson, 11 Cal. 262.

2. Fisse *v.* Kalzentine. 93 Ind. 490; Brown *v.* Parker, 5 Blackf. (Ind.) 291; Thomas *v.* Irwin, 90 Ind. 557; Langdoc *v.* Parkinson, 2 Ill. App. 136; Humphrey *v.* Taggart, 38 Ill. 228; Vinyard *v.* Barnes, 124 Ill. 346; Imel *v.* Van Deren. 8 Colo. 90; Sopris *v.* Lilley, 2 Colo. 496; Balsley *v.* Hoffman, 13 Pa. St. 603; Lomme *v.* Sweeny, 1 Mont. 584; Perrean *v.* Bevan, 5 B. & C. 284; 11 E. C. L. 230; Pettygrove *v.* Hoyt, 11 Me. 66; Doogan *v.* Tyson, 6 Gill & J. (Md.) 453.

A judgment for the value of property taken in replevin instead of one for its return, which was the proper judgment, does not change the liability of a surety in an action on the

of one condition cannot be held sufficient proof of the breach of all.[1]

a. WHAT CONSTITUTES.—The condition that a party shall prosecute his suit with effect is broken when judgment passes against him,[2] or when the plaintiff dismisses his ac-

replevin bond. Mason *v.* Richards, 12 Iowa 73.

In a suit on a replevin bond for the delivery of the property "in case the return thereof shall be awarded," the breach assigned must be as broad as the condition of the bond, to allege a failure to deliver merely. *Held*, bad on demurrer. Colorado Springs Co. *v.* Hopkins, 5 Colo. 206.

Failure to return the property in accordance with the judgment of the court is a breach of the replevin bond. Schweer *v.* Schwabacher, 17 Ill. App. 78.

1. Vinyard *v.* Barnes, 124 Ill. 346.

2. Gould *v.* Warner, 3 Wend. (N. Y.) 54; Elliott *v.* Black, 45 Mo. 372; Brown *v.* Parker, 5 Blackf. (Ind.) 291; Boom *v.* St. Paul Foundry, etc., Co., 33 Minn. 253; Wheat *v.* Catterlin, 23 Ind. 85; Potter *v.* James, 7 R. I. 312; Lindsay *v.* Blood, 2 Mass. 518; Rankin *v.* Kinsey, 7 Ill. App. 215; Hovey *v.* Coy, 17 Me. 266. See also Gibbs *v.* Bartlett, 2 W. & S. (Pa.) 29; Tibbal *v.* Cahoon, 10 Watts (Pa.) 232; Hogg *v.* Green, 17 Kan. 326.

An action on a replevin bond, based upon a lawful judgment, cannot be defeated on the ground that the judgment was entered by consent. Estey *v.* Harmon, 40 Mich. 645.

If the plaintiff takes a non-suit in an action of replevin, this constitutes a breach of a condition in the replevin bond to prosecute with effect. Berghoff *v.* Heckwolf, 26 Mo. 511.

Where property was taken for rent in arrear and the tenant replevied the property, giving the usual bond, the landlord took no further proceedings in the replevin action, but commenced an action by summons and complaint against the tenant, and recovered judgment against him. *Held*, that an action could not be maintained against the sureties on the replevin bond for the amount of this judgment, as it was not recovered in the proceeding in which the undertaking was given. Cheatham *v.* Morrison, 31 S Car. 326.

If a writ of replevin is improvidently issued and is afterwards quashed without reason, the plaintiff and his security are liable upon a replevin bond conditioned to prosecute with effect. Roman *v.* Stratton, 2 Bibb (Ky.) 199.

Where a writ of replevin after service, is not returned to court through the negligence either of the plaintiff or the officer employed by him, it is a failure to prosecute to effect within the meaning of that term in the condition of the replevin bond. Allen *v.* Woodford, 36 Conn. 143.

Where the plaintiff in replevin has obtained possession of the property under his writ, neither his sureties nor himself can be permitted to allege as a defense to an action on the replevin bond that no writ of summons had been issued, and, consequently, no suit was pending at the time the bond was made. Sammons *v.* Newman, 27 Ind. 508.

The plaintiff, by process issued by a justice of the peace, replevied property in the possession of the defendant, giving the bond prescribed by statute for the prosecution of the action, return of the property, etc. Upon the return day of the process, the parties were present at the office of the justice, but the justice was absent and the suit was no further prosecuted. In an action upon the replevin bond, it was held that the suit was prosecuted as far as the plaintiff therein was able to prosecute, and the abatement of the suit by reason of the absence of the justice was not a breach of the condition in the undertaking to prosecute. Pierce *v.* Hardee, 1 Thomp. & C. (N. Y.) 557.

Where, in consequence of the removal of a justice from the township, a replevin suit commenced before him, abated after the property had been taken upon the writ by the officer, a judgment upon the replevin bond on special findings is not warranted in the absence of any finding that the property had ever been delivered to the plaintiff in replevin, or was detained by him after the abatement of the suit. Kidder *v.* Merryhew, 32 Mich. 470.

The transfer of a replevin suit to some court other than that in which it was commenced by virtue of the

tion.[1] Such a condition, however, is saved by prosecuting the action until the writ is abated by the death of the defendant.[2] In order to make the sureties in a replevin bond liable for a failure to return the property, there must have been judgment for a return upon the verdict.[3] But it is not necessary to aver in the declaration

statute, does not discharge the sureties on the replevin bond. Reusch *v.* Demass, 34 Mich. 95. See Rigg *v.* Parsons, 29 W. Va. 522.

The plaintiff in replevin removed the case from a State to the Federal court. The defendants in the action, proceeded in the State court notwithstanding the removal, and obtained judgment, and brought an action in the State court on the replevin bond against the plaintiff and his sureties. It was held that the plaintiff having obtained judgment in the United States circuit court, that court could upon a bill filed for that purpose, enjoin the defendants from proceeding in the action at law brought by them on the replevin bond in the State court. Dietzsch *v.* Huidekoper, 103 U. S. 494.

It is the duty of the obligor in a replevin bond to take active measures to surrender the property, and it is no defense to an action on the replevin bond that the officer failed to find and seize the property. Jennison *v.* Haire, 29 Mich. 207.

Where, in an action of replevin, judgment was given in favor of the defendant for costs, but not for a return of the property, and execution was issued against the plaintiff in replevin, and he was arrested thereon and committed to prison, and was released therefrom by taking the poor debtor's oath, the replevin bond is forfeited thereby, and on judgment for the penalty, execution is to issue for the amount of the costs and interest. Hovey *v.* Coy, 17 Me. 266.

1. Wiseman *v.* Lynn, 39 Ind. 250; Boom *v.* St. Paul Foundry, etc., Co., 33 Minn. 253; Parrott *v.* Scott, 6 Mont. 340; Schweer *v.* Schwabacher, 17 Ill. App. 78; Manning *v.* Manning, 26 Kan. 98; Smith *v.* Adams, 79 Ga. 802.

Dismissal.—A dismissal of a writ of replevin on an appeal for want of jurisdiction in the court below from which it issued, is a breach of a condition in a replevin bond to prosecute with effect. Pierce *v.* King, 14 R. I. 611; McDermott *v.* Isbell, 4 Cal. 113; Wardell *v.* Bradway, 84 Ind. 537. *Compare* Sherry *v.* Foresman, 6 Blackf. (Ind.) 56; Caffrey *v.* Dudgeon, 38 Ind. 512; 10 Am. Rep. 126. It is also a breach when the action is dismissed on the defendant's motion for a defect in the writ. Waddell *v.* Bradway, 84 Ind. 537.

The plaintiff may dismiss the action with the consent of the defendant, but such consent when given does not waive the defendant's right to maintain an action on the replevin bond. Hall *v.* Smith, 10 Iowa 45.

A replevin suit the condition of which is that the plaintiff shall prosecute his replevin suit to effect or return the goods, is broken by the withdrawal of the writ of replevin from the hands of the officer by the plaintiff before the return day, and the discontinuance of the suit. Persse *v.* Watrous, 30 Conn. 139.

When the plaintiff does not enter his suit, an action lies on the bond, without obtaining judgment for a return. Gardiner *v.* McDermott, 12 R. I. 206.

2. Badlam *v.* Tucker, 1 Pick. (Mass.) 84; Burkle *v.* Luce, 1 N. Y. 163.

3. Thomas *v.* Irwin, 90 Ind. 557; Foster *v.* Bringham, 99 Ind. 505; Vinyard *v.* Barnes, 124 Ill. 346; Ladd *v.* Prentice, 14 Conn. 109; Clary *v.* Rolland, 24 Cal. 148; Chambers *v.* Waters, 7 Cal. 390; Mitchum *v.* Stanton, 49 Cal. 302; Cowden *v.* Pease, 10 Wend. (N. Y.) 333; Davis *v.* Harding, 3 Allen (Mass.) 302; Clark *v.* Norton, 6 Minn. 412. See Ernst *v.* Hogue, 86 Ala. 502.

If, in an action of replevin commenced in a justice's court, the liability upon the undertaking is limited to a judgment for a return of the property rendered by the justice, and such judgment is not recovered in the justice's court, a recovery cannot be had upon the undertaking, even if, on appeal, such judgment is rendered by the county court. Mitchum *v.* Stanton, 49 Cal. 302.

When no return is awarded in the judgment for defendant, it will be presumed that it was made to appear that the plaintiff had become entitled to the

that such judgment has been had—the fact that it has been entered is matter of proof.[1]

possession of the property. Vinyard *v.* Barnes, 124 Ill. 346.

Missouri.—In *Missouri* the doctrine seems to be that no judgment for the return of the property or for damages is necessary in order to make the sureties on a replevin bond liable. Berghoff *v.* Heckwolf, 26 Mo. 511; Hansard *v.* Reed, 29 Mo. 472; Elliott *v.* Black, 45 Mo. 372.

In an action of replevin where the plea was *non cepit* and judgment for defendant there was not such a failure to prosecute with effect as entitled the defendant in the action of replevin to maintain an action of debt on the bond, because, upon such an issue there was no judgment for a return. Ladd *v.* Prentice, 14 Conn. 109.

The one hundred and seventy-seventh section of the Practice Act of *California* and the decisions under it, to the effect that the sureties upon the undertaking given by the plaintiff in an action of replevin to procure a delivery of the property, are not responsible for a return of the property or its value, unless a return was claimed in the answer and awarded by the judgment, do not apply to cases where the action is dismissed by the plaintiff before trial. Mills *v.* Gleason, 21 Cal. 274.

Minnesota.—An action will lie on a replevin bond for a breach of a condition to prosecute with effect, although no judgment was awarded for a return of the property to the defendant. Boom *v.* St. Paul Foundry, etc., Co., 33 Minn. 253.

Rhode Island.—An action will lie on a replevin bond conditioned to prosecute with effect without first obtaining judgment for return and restoration of the property as provided by *Rhode Island* Gen. Stat. Ch. 224, § 5; Gardiner *v.* McDermott, 12 R. I. 206.

Pennsylvania.—The entering of a judgment *de retorno habendo* in a replevin suit is not necessary in order to maintain an action on a replevin bond. Pittsburg Nat. Bank *v.* Hall, 107 Pa. St. 583; Gibbs *v.* Bartlett, 2 W. & S. (Pa.) 29. In Gibbs *v.* Bartlett, 2 W. & S. (Pa.) 29, the court by Rogers, J., said: "The judgment *de retorno habendo* is not intended for the benefit of the defendant, but of the plaintiff in the replevin bond, who in some cases, perhaps, might prefer a return of the goods to the damages assessed by the jury. It would be anything but an act of justice to permit a person who has wrongfully deprived another of his goods and retained them in his possession until they were nearly destroyed by time and use, afterwards, when judgment was rendered against him for his wrongful act, to save a forfeiture of the bond by an offer to return the article in its depreciated condition, nor can the sureties be placed in any better condition than the principal."

In an action of replevin, where the defendant has required the return of the property, and given an undertaking for such purpose, a judgment for plaintiff, in order to hold the sureties on the undertaking must be in the alternative, as required by §§ 104, 177 and 210 of the Practice Act of *California*. Nickerson *v.* Chatterton, 7 Cal. 568; Clary *v.* Rolland, 24 Cal. 148.

Where the defendant in a replevin suit failed to claim a return of the property in his answer, and on the trial, the jury found a verdict for the defendant, on which the court rendered judgment against plaintiffs, for costs, which was paid, it was held that the payment of the judgment as taken was a complete discharge of plaintiff's sureties on the undertaking. Chambers *v.* Waters, 7 Cal. 390. See Ginica *v.* Atwood, 8 Cal. 446.

The surety in a replevin bond cannot set up as a defense that the judgment in replevin was not in the alternative. Robertson *v.* Davidson, 14 Minn. 554.

Before the trial in replevin the property had been replevied from the plaintiff by a third person, who turned it over to the defendant as his agent. They were stolen from the defendant. *Held*, in an action by the defendant, on the replevin bond, based on a judgment for a return in the original action, that the fact that he reacquired possession pending the suit, defeated a recovery on the replevin bond. Rinker *v.* Lee, 29 Neb. 783.

1. McFarland *v.* McNitt, 10 Wend. (N. Y.) 329; Cowden *v.* Pease, 10 Wend. (N. Y.) 333; Smith *v.* Pries, 21 Ill. 655.

It is error to refuse to allow the plaintiff to prove that the property has not been returned as the condition of

b. DEFENSES.—The delivery of the property to the sheriff is a sufficient compliance with a judgment for a return, and saves the condition to make return of the property[1] contained in the replevin bond. An amendment of the record, changing the word "executors" to "heirs-at-law," does not release the surety.[2] Nor can the invalidity of attachments under which an officer holds goods, be pleaded by way of defense to an action by the officer upon the replevin bond.[3] The sureties on a replevin bond are not discharged by a reasonable delay in prosecuting the action of replevin.[4]

3. Actions on Bond.—In most of the States, the mode of proceeding upon replevin bonds is regulated by statute, and it will be necessary to consult the statutes of each State in order to ascertain the mode of procedure in that State.[5] In some States, it is by action of debt on the bond,[6] or by *scire facias.*[7] Where the defendant in replevin was successful, and thereupon brought suit on the bond and obtained judgment, and in the mean time, the plaintiff had, without giving a *supersedeas* bond, taken the replevin case to the Supreme court and reversed it, it was held that it was proper for the trial court to vacate the judgment on the bond.[8] When judgment is given for the defendant in an action of replevin, he may maintain an action on the replevin bond for

the bond and the judgment of the court required. Smith *v.* Pries, 21 Ill. 655.

1. Carrico *v.* Taylor, 3 Dana (Ky.) 33; Hunt *v.* Robinson, 11 Cal. 262.

2. Jamieson *v.* Capron, 95 Pa. St. 15.

3. Farnham *v.* Moor, 21 Me. 508.

Other Defenses.—For other cases on this subject, see Carlon *v.* Dixon, 12 Oregon 144; Hartlep *v.* Cole, 120 Ind. 247; Thomas *v.* Wilson, 6 Blackf. (Ind.) 203; Richards *v.* Rape, 3 Ill. App. 24; Harrison *v.* Wilkin, 78 N. Y. 390; Wyman *v.* Robinson, 73 Me. 384; 40 Am. Rep. 360; Cordaman *v.* Malone, 63 Ala. 556; Wright *v.* Hake, 38 Mich. 525; Hall *v.* Tillman, 103 N. Car. 276; Tousey *v.* Bishop, 21 Iowa 178.

4. Daniels *v.* Patterson, 3 N. Y. 48. This is true, though the prosecution was deferred with the assent of the defendant, and without the knowledge of the sureties. Daniels *v.* Patterson, 3 N. Y. 47.

5. Wait's Acts & Def., vol. 5, p. 504.

6. Thompson *v.* Raymon, 7 How. (Miss.) 186; Humphrey *v.* Taggart, 38 Ill. 228; Manning *v.* Pierce, 3 Ill. 4; Dixon *v.* Niccolls, 39 Ill. 372; 89 Am. Dec. 312. See Nunn *v.* Goodlett, 10 Ark. 89; Thomas *v.* Wilson, 6 Blackf. (Ind.) 203.

Nebraska.—Section 196 of the *Nebraska* Code declares "that no suit can be instituted on an undertaking in replevin given under section 186 of the code until an execution issued on a judgment in favor of the defendant in the action shall have been returned, that sufficient property whereon to levy and make the amount of such judgment cannot be found in the county. Hershiser *v.* Jordan, 25 Neb. 275.

The surety on a replevin bond let judgment go by default, in an action of debt on a replevin bond against the principal and surety; the principal pleaded an absolute release, and, on demurrer to his plea, obtained judgment. *Held*, that the plaintiff could not have damages assessed against the surety. Thomas *v.* Wilson, 6 Blackf. (Ind.) 203.

Where a replevin bond contains a warrant to confess judgment, it may be confessed after verdict in the replevin suit, and before final judgment is entered thereon. Clark *v.* Morss (Pa. 1891), 21 Atl. Rep. 802.

7. Thompson *v.* Raymon, 7 How. (Miss.) 186. See also Snyder *v.* Norris, 6 Blackf. (Ind.) 33; SCIRE FACIAS.

8. McMillan *v.* Baker, 20 Kan. 50. See Higbee *v.* McMillan, 18 Kan. 133.

a failure of the plaintiff to return the property without a previous demand,[1] or suing out a writ of return.[2] Or if the defendant has judgment for the costs of suit he may maintain an action of debt on the bond without making a demand of payment[3] or suing out a writ of execution.[4] A replevin bond is not assignable, except where the goods replevied were taken from the possession of the plaintiff in replevin, by way of distress for rent.[5] The proceedings by *scire facias* on a replevin bond cannot be used, unless a writ *pro retorno habendo* be issued and returned *elongata*.[6] An action can not be brought on the bond by a person who was neither a party to the original action nor an obligee in the bond.[7]

a. DECLARATION IN ACTIONS ON REPLEVIN BONDS.—The material facts to be alleged in a declaration on a replevin bond are the termination of the replevin suit, and judgment for costs in the defendant's favor, the order for the writ *de retorno habendo*,[8]

1. Wright *v.* Quirk, 150 Mass. 44; Sweeney *v.* Lomme, 22 Wall. (U. S.) 208; Cushenden *v.* Harman, 2 Tyler (Vt.) 431.

2. Wright *v.* Quirk, 105 Mass. 44; Parker *v.* Simonds, 8 Met. (Mass.) 205; Peck *v.* Wilson, 22 Ill. 205; Robertson *v.* Davidson, 14 Minn. 554; Gould *v.* Warner, 3 Wend. (N. Y.) 54; Knapp *v.* Colburn, 4 Wend. (N. Y.) 616; McFarland *v.* McNitt, 10 Wend. (N. Y.) 329; Lomme *v.* Sweeney, 1 Mont. 584; Whitney *v.* Lehmer, 26 Ind. 503; Jennison *v.* Haire, 29 Mich. 207. See Mason *v.* Richards, 12 Iowa 73.

Compare Cornish *v.* Keesee, 17 Ark. 391; Cowden *v.* Pease, 10 Wend. (N. Y.) 333; Cowdin *v.* Stanton, 12 Wend. (N. Y.) 120; Scott *v.* Scott, 50 Mich. 372.

3. Cook *v.* Lothrop, 18 Me. 260.

4. Cook *v.* Lothrop, 18 Me. 260; Robertson *v.* Davidson, 14 Minn. 554; *Compare* Phillips *v.* Waterhouse, 40 Mich. 273.

5. Knapp *v.* Colburn, 4 Wend. (N. Y.) 616.

6. Pemble *v.* Clifford, 2 McCord (S. Car.) 31. See also Cowden *v.* Pease, 10 Wend. (N. Y.) 333.

7. Ripher *v.* Johnson, 108 Ind. 401. See City Council *v.* Price, 1 McCord (S. Car.) 299.

Joint Suit.—Holders of separate judgments, whose executions have been levied on personal property which has been taken from the sheriff by replevin, may unite as plaintiffs in a suit for breach of the replevin bond, and the assignee of one of the judgments, the assignment of which is technically defective, is a real party in interest as plaintiff. Thomas *v.* Irwin, 90 Ind. 557. See also Kaufman *v.* Wessel, 14 Neb. 161.

Severance of Parties.—Where a replevin bond is executed to a sheriff and execution plaintiff jointly, and an action thereon is subsequently brought by the execution of plaintiff alone, the defect of plaintiff's will be waived by the failure of defendants to demur therefor. Foster *v.* Bringham, 99 Ind. 505.

The obligee of a replevin bond may bring suit upon it in the name of the sheriff for his use. Humphrey *v.* Taggart, 38 Ill. 228. See Lomme *v.* Sweeney, 1 Mont. 584.

A suit brought by a sheriff on a replevin bond given under the 4th section of the act of 1795, need not be in his name of office; brought in his individual name is sufficient. Caldwell *v.* West, 21 N. J. L. 411.

Delivery of a forthcoming bond in replevin to the defendant's attorney is not an assignment to the defendant, and will not enable him to maintain an action on it. Green *v.* Kindy, 43 Mich. 279.

8. Stevison *v.* Earnest, 80 Ill. 513; Hunter *v.* Sherman, 3 Ill. 539; Manning *v.* Pierce, 3 Ill. 4; Keyes *v.* McNulty, 14 Iowa 484; Barr *v.* McGary, 131 Pa. St. 401. See Gould *v.* Warner, 3 Wend. (N. Y.) 54; Dugan *v.* England, Harp. (S. Car.) 215; Fisse *v.* Katzentine, 93 Ind. 490.

California.—In an action against the sureties on an undertaking given in a replevin suit, where there has been a trial and judgment in the replevin suit,

and that the property replevied was delivered to the plaintiff in the replevin action.[1] It is not necessary to aver who are sureties and who are principals in the bond, nor to file with the declaration, copies of the writ of replevin, and the return of the officer thereon.[2] Neither is it necessary to aver that a writ of *retorno habendo* had been issued.[3] An allegation in the declaration of merely a failure to deliver, is not sufficient. Judgment for delivery must be alleged. The breach assigned must be as large as, but no larger, than the condition of the bond.[4] The

the complaint does not state facts sufficient to constitute a cause of action, unless it aver that the value of the property was found by the jury, and that an alternative judgment was rendered, as provided in § 200 of practice act. Clary *v.* Rolland, 24 Cal. 148.

Oregon.—In an action on a replevin bond, facts were alleged showing the commencement of the action, the undertaking for the immediate delivery of the property in suit, its delivery, and the failure to prosecute the action of replevin, or redeliver the property. The complaint then alleged, that by reason of the premises aforesaid, said undertaking had become forfeited to the plaintiff in the suit on the bond, and an action had accrued to the said plaintiff. *Held*, that the facts so stated were sufficient to constitute a cause of action. Cooper *v.* McGrew, 8 Oregon 327.

Nebraska.—Section 196 of the *Nebraska* Code provides "that no suit can be instituted on an undertaking in replevin given under § 186 of the code, until an execution issued on a judgment in favor of the defendant in the action shall have been returned that sufficient property whereon to levy and make the amount of such judgment cannot be found in the county." A petition which does not contain these allegations does not state a cause of action. Hershiser *v.* Jordan, 25 Neb. 275.

The tenor of the bond declared on, if *oyer* is claimed, is considered as forming part of the declaration, and the defendant may avail himself of any defect apparent upon the face of the bond, or variance between its terms and the allegations in the declaration, after *oyer* by demurrer. Matthews *v.* Storms, 72 Ill. 316.

A plaintiff in replevin gave bond "to prosecute his writ with effect and without delay, and return the negroes, if a return thereof shall be adjudged." The writ was quashed for errors upon its face but no judgment for return was rendered. The plaintiff in the suit upon the replevin bond, assigned for breach only, that the obligor did not prosecute his action with effect and without delay. *Held*, that under this assignment of breach, the value of the slaves, or damages for failing to return them, could not be recovered, and so no evidence could be received of their value. Wall *v.* Humphreys, 4 Dana (Ky.) 209.

A complaint in an action on a replevin bond, which alleges that the suit of replevin was commenced against A and B, and that the property replevied was in the possession of both of them, and that judgment was rendered in favor of the defendants, shows a cause of action in favor of B. although it avers further that the lumber belonged to A. Story *v.* O'Dea, 23 Ind. 326.

The complaint in an action on a replevin bond need not aver the bond to be in force. That is matter of defense, the complaint averring that defendant has failed to pay the judgment in the replevin suit. Blackburn *v.* Crowder, 108 Ind. 238.

1. Nickerson *v.* Chatterton, 7 Cal. 568. See Coburn *v.* Pearson, 57 Cal. 306.

2. Shappendocia *v.* Spencer, 73 Ind. 133.

3. Hunter *v.* Sherman, 3 Ill. 539; Peck *v.* Wilson, 22 Ill. 205; Knapp *v.* Colburn, 4 Wend. (N. Y.) 619; Wetherbee *v.* Colby, 6 Vt. 647.

Where the terms of a replevin bond, given to indemnify a sheriff for taking property claimed by a person other than the defendant, agree to save him from all damages, costs, suits, judgments and executions, held, that in an action by the sheriff on the bond for a judgment recovered against him, he must aver the payment of the judgment in order to entitle him to maintain the action. Lott *v.* Mitchell, 32 Cal. 23.

4. Colorado Springs Co. *v.* Hopkins,

material conditions contained in the bond should be set forth.[1] It is not necessary to allege a demand of the property replevied,[2] or notice to the obligor in the bond.[3] The declaration must allege the delivery of the bond to the person for whose benefit it was made.[4] When there is a copy of the bond filed with the declaration in the action, and there is a variance between the recitals in the complaint and those in the bond, the recitals in the bond will control, and the variance will not avail on demurrer.[5] The declaration need not allege that the court before whom the action was tried had jurisdiction.[6]

b. PLEA IN ACTIONS ON REPLEVIN BONDS.—The plea must state a complete defense to the plaintiff's action,[7] and must not contain repugnant counts.[8]

5 Colo. 206; Peck *v.* Wilson, 22 Ill. 205; Hunter *v.* Sherman, 3 Ill. 539; Manning *v.* Pierce, 3 Ill. 4.

The condition of a bond was to prosecute the suit with effect, or return the goods, or pay the value. Breach assigned, that the plaintiff in replevin had not prosecuted his suit to effect. It was held on demurrer, that the breach assigned was insufficient, though the bond was not void. Dugan *v.* England, Harp. (S. Car.) 214.

1. Mills *v.* Gleason, 21 Cal. 274.

It is unnecessary to prove the execution of a replevin bond, unless it has been denied by plea verified by affidavit, where the declaration states the legal effect of the bond. Horner *v.* Boyden, 27 Ill. App 573.

Where the declaration, in stating the bond payable three months after date, says nothing of interest, and *oyer* is given of a bond bearing interest from date, the variance is fatal. Salter *v.* Richardson, 3 T. B. Mon. (Ky.) 204.

When the only description of the bond in the complaint, is that it corresponds with the form given by statute is rather a defect of form than of substance, and to avail the defendant should be demurred to before the trial. Mills *v.* Gleason, 21 Cal. 274.

It was alleged, in an action on a replevin bond, that "an undertaking was entered into as provided by law, and that said undertaking was lost or mislaid." *Held*, sufficient after judgment to show that the undertaking was in writing and would sustain the judgment. Donington *v.* Myer, 8 Neb. 211.

2. Wetherbee *v.* Colby, 6 Vt. 647; Cushenden *v.* Harman, 2 Tyler (Vt.) 431.

3. Wetherbee *v.* Colby, 6 Vt. 647.

4. Parrott *v.* Scott, 6 Mont. 340; See Hedderick *v.* Pontet, 6 Mont. 345.

5. Blackburn *v.* Crowder, 108 Ind. 238.

6. Bates *v.* Schoonover, 43 Ill. 494.

7. Wright *v.* Card, 16 R. I. 719; O'Neal *v.* Wade, 3 Ind. 410; Humphrey *v.* Taggart, 38 Ill. 228; Morehead *v.* Yeazel, 10 Ill. App. 263. See Sherry *v.* Foresman, 6 Blackf. (Ind.) 56; Sartin *v.* Weir, 3 Stew. & P. (Ala.) 421.

Where several breaches are assigned in the declaration on a replevin bond, a plea of *nul tiel record* which attempts to answer the whole declaration, but which in fact answers only part of it, is demurrable. Larson *v.* Laird, 36 Ill App. 402. See Doogan *v.* Tyson, 6 Gill & J. (Md.) 453, with regard to pleadings generally.

If a live animal be replevied, and there is judgment of *retorno habendo*, it is a good plea to a suit on the replevin bond, that the animal died without the defendant's default. Carpenter *v.* Stevens, 12 Wend. (N. Y.) 589.

8. Wright *v.* Card, 16 R. I. 719.

Under the plea of payment, and *non est factum*, to debt on a bond given by a defendant in replevin, on claim of property, the defendant cannot object that the bond is void in part. Chaffee *v.* Sangston, 10 Watts (Pa.) 265.

In an action on a replevin bond, the defendant may, under the *Illinois* act of March 1, 1847, "concerning practice," plead specially that the plaintiff ought not to recover more than nominal damages, for that the merits of

c. DAMAGES.—In an action upon a replevin bond, the defendant's liability is limited to the damage actually sustained by the plaintiff in the suit,[1] and upon a condition in the bond to return the property replevied if a return thereof shall be awarded, only

the case were not tried in the action of replevin, and also the defendant's title to property in question. Chinn *v.* McCoy, 19 Ill. 604. See King *v.* Ramsay, 13 Ill. 619.

1. Stevens *v.* Tuite, 104 Mass. 328; Wright *v.* Quirk, 105 Mass. 44; Hunt *v.* Robinson, 11 Cal. 262; Pearl *v.* Garlock, 61 Mich. 419; Tuck *v.* Moses, 58 Me. 461; Bradford *v.* Taylor, 74 Tex. 175; Watts *v.* Overstreet, 78 Tex. 571; Elliott *v.* Long, 77 Tex. 467; Safford *v.* Gallup, 53 Vt. 291.

A defendant in a suit on a replevin bond, where a breach is admitted or shown, may prove the real amount of the damages which the plaintiff has suffered to be less than the value of the goods. Nowell *v.* Gilbert, 49 Hun (N. Y.) 489; Jackson *v.* Emmons, 59 Conn. 493; Green *v.* Barker, 14 Conn. 431; Vinton *v.* Mansfield, 48 Conn. 474; Hulman *v.* Benighof, 125 Ind. 481; Leonard *v.* Whitney, 109 Mass. 265; Lindner *v.* Brock, 40 Mich. 618; People *v.* Lee, 71 Mich. 493.

The defendant in an action on a replevin bond may show in mitigation of damages that since the taking by the replevin writ, the plaintiff's interest, in whole or in part, has ceased to exist. Tuck *v.* Moses, 58 Me. 461, or that the property replevied belonged to the plaintiff in the replevin suit. Ernst *v.* Hogue, 86 Ala. 502; Allen *v.* Woodford, 36 Conn. 143; Davis *v.* Harding, 3 Allen (Mass.) 302; Pearl *v.* Garlock, 61 Mich. 419; Rankin *v.* Kinsey, 7 Ill. App. 215; Chinn *v.* McCoy, 19 Ill. 603; Stevison *v.* Earnest, 80 Ill. 513; Morehead *v.* Yeazel, 10 Ill. App. 263; Holler *v.* Coleson, 23 Ill. App. 324; Belt *v.* Worthington, 3 Gill & J. (Md.) 247; Jones *v.* Smith, 79 Me. 452; Wallace *v.* Clark, 7 Blackf. (Ind.) 298; Consolidated Tank Line Co. *v.* Bronson (Ind. 1891), 28 N. E. Rep. 155. See also Ringgenberg *v.* Hartman, 124 Ind. 186.

But where the issues present the question of the ownership of the property, and that question is decided in favor of the plaintiff, the judgment on that issue will estop the defendant and his sureties from asserting, in an action on the replevin bond, that the defendant was the owner of the property. McFadden *v.* Fritz, 110 Ind. 1. See Smallwood *v.* Norton, 20 Me. 83; 37 Am. Dec. 39.

In an action upon a replevin bond for failure to make return of the goods, the damages not having been assessed in the replevin suit, may be assessed at the actual value of the goods at the time of the replevin. Pittsburg Nat. Bank *v.* Hall, 107 Pa. St. 583.

The liability upon a replevin bond is measured by the value of the property at the time it was replevied, limited by the debt still due on the attachment creditor's judgment and the penalty of the replevin bond. Sweeney *v.* Lomme, 22 Wall. (U. S.) 208.

Tennessee.—In *Tennessee*, the proper decree in an action upon a replevin bond, is for the penalty of the bond, which may be satisfied by paying the value of the property with interest from the date of the bond. Muhling *v.* Ganeman, 4 Baxt. (Tenn.) 88. See also Caldwell *v.* West, 21 N. J. L. 411.

Michigan.—The plaintiff in replevin suffered judgment by default, and the defendant waived return and had his damages assessed. *Held*, that in suing on the replevin bond, the defense could not introduce evidence in reduction of the judgment in replevin as allowed by *Michigan* Comp. Laws, § 6766, in cases where judgment had been taken for a return. Ryan *v.* Akeley, 42 Mich. 516.

Property in the hands of a party, to whom it was transferred in fraud of creditors, was levied upon by them, and he brought an action of replevin to recover it. *Held*, that he could not, after suffering judgment in replevin, enjoin a suit on the replevin bond, on the ground that the debtor had made a composition with creditors and thereby recovered his assets. Jacobson *v.* Metzgar, 43 Mich. 403. See also Williams *v.* Vail, 9 Mich. 162; 80 Am. Dec. 76.

The measure of damages in a suit upon a replevin bond, where the value of the property is greater at a time a return is ordered than at the time it was replevied, is the value at the time

nominal damages can be allowed in the absence of evidence showing the value of such property and the value of its use since judgment was given in the replevin suit.[1] The failure of the plaintiff in replevin to prosecute the suit to final judgment, entitles the defendant to nominal damages in an action on the replevin bond even though he has no title to the property.[2] The plaintiff in such an action is entitled to recover nominal damages and costs for a failure of the plaintiff in replevin to return the goods in accordance with the judgment of the court, even though the original action was not tried on its merits.[3] The costs of a writ of *retorno habendo* are not the recovered costs in a judgment, but the costs occurring afterwards in enforcing the judgment, and they are recoverable under a breach of condition in a replevin bond to make return of the property if a return be awarded.[4] The recital in a replevin bond, of the value of the property is

of the order for a return. Treman *v.* Morris, 9 Ill. App. 237.

The fact that goods are destroyed by fire while in the plaintiff's possession does not release him from liability. Suppiger *v.* Gruaz, 36 Ill. App. 60; *affirmed* in 27 N. E. Rep. 22.

The defendant in a replevin suit disclaimed any interest in the property, and on motion another was substituted. *Held*, that he could not have judgment on the bond. Williams *v.* St. Louis, etc., R. Co., 8 Mo. App. 135.

Evidence of Damages.—In an action on a replevin bond, the papers in the replevin suit are proper evidence. McGinnis *v.* Hart, 6 Iowa 204; Karthaus *v.* Owings, 2 Gill & J. (Md.) 430.

A plaintiff in replevin was nonsuited and the court ordered a return of the property, and damages were assessed for its detention. *Held*, that evidence of such assessment was not admissible in an action subsequently brought on the replevin bond. Shepard *v.* Butterfield, 41 Ill. 76.

In *scire facias* against replevin bail entered on the docket of a justice of the peace, the pleas were: first, no execution issued against the goods of the principal; second, *non est factum*. *Held*, that the issues on the plaintiff's part must be proved not by a transcript from the justice's docket, but by producing the execution or a certified copy thereof, and proving the execution of the entry of bail, as the execution of other instruments of writing is required to be proved. Snyder *v.* Norris, 6 Blackf. (Ind.) 33.

Reviewal of Judgment.—The amount of the money judgment in replevin cannot be reviewed in an action on the bond. Cantril *v.* Babcock, 11 Colo. 458. See also Cantril *v.* Babcock, 11 Colo. 143.

1. Sopris *v.* Lilley, 2 Colo. 496; Phenix *v.* Clark, 2 Mich. 3.8. See Myers *v.* Williams, 1 Duv. (Ky.) 356; Levy *v.* Moog, 69 Ala. 63.

Where the defendant had judgment for a return of the property in an action of replevin, but the value of the property was not ascertained by the verdict of the jury, as the statute requires, the defendant may still have his action on the bond to recover the value of the property. Whitney *v.* Lehmer, 29 Ind. 503.

2. Smith *v.* Whiting, 100 Mass. 122; Capen *v.* Bartlett (Mass. 1891), 26 N. E. Rep. 873; Miller *v.* Cheney, 88 Ind. 466; Crabbs *v.* Koontz, 69 Ind. 59.

3. Schweer *v.* Schwabacher, 17 Ill. App. 78; Webber *v.* Mackey, 31 Ill. App. 369.

Where the submission of a replevin suit to arbitration, stipulates that the award shall be final, the obligors on the replevin bond are estopped to deny that the action was determined on the merits. Lee *v.* Grimes, 4 Colo. 185.

Costs.—Costs incurred in defending a replevin suit are recoverable by defendant in an action on the replevin bond, but costs made by the plaintiff are not so recoverable. Kellar *v.* Carr, 119 Ind. 127. See also Morrill *v.* Daniels, 47 Ark. 316.

4. Langdoc *v.* Parkinson, 2 Ill. App. 136; Schweer *v.* Schwabacher, 17 Ill. App. 78.

sufficient evidence of the value in an action on the bond,[1] and estops the plaintiff and his sureties from denying the same.[2] When the value of the property is fixed by the judgment in the original action, the sureties on the replevin bond cannot be made liable for more than the amount so fixed.[3] A replevin bond covers the costs of the original suit.[4]

1. Wiseman *v.* Lynn, 39 Ind. 250; Carver *v.* Carver, 77 Ind. 498.

The sum named in a replevin bond as the value of the property is competent but not conclusive evidence of its value, against the obligors in an action on the replevin bond. Wright *v.* Quirk, 105 Mass. 44.

2. Wiseman *v.* Lynn, 39 Ind. 250; Carver *v.* Carver, 77 Ind. 498; Rankin *v.* Kinsey, 7 Ill. App. 215. See also McFadden *v.* Fritz, 110 Ind. 1. *Compare* Wright *v.* Quirk, 105 Mass. 44.

3. Nickerson *v.* Chatterton, 7 Cal. 568; Young *v.* Green, 45 Miss. 553; Ringgenberg *v.* Hartman (Ind. 1889), 20 N. E. Rep. 637. See JUDGMENTS, vol. 12, p. 98.

In *California*, to enable a plaintiff in an action on a replevin bond to recover, the jury in the original action must fix the value of the property. Clary *v.* Rolland, 24 Cal. 148; Ginica *v.* Atwood, 8 Cal. 446.

Sureties in Court.—During the pendency of a replevin suit, the sureties to the replevin bond are treated as in court; and, not objecting, they are concluded by the judgment in that action. Hershler *v.* Reynolds, 22 Iowa 152; Wells *v.* Griffin, 2 Head (Tenn.) 568.

A surety in replevin is so far a party to the cause that a law providing that the judgment may be at once entered against him without notice, does not deprive him of a trial, and is constitutional. Pratt *v.* Donovan, 10 Wis. 378.

4. Monroe *v.* Heintzman, 46 Mich. 12; Larson *v.* Laird, 36 Ill. App. 402; Phillips *v.* Cooper, 59 Mississippi 17.

It covers the costs even though the case be removed on *certiorari* from before a justice. Monroe *v.* Heintzman, 46 Mich. 12.

In an action of replevin, the case was submitted by rule of court to a referee, who rendered an award for the return of the property with damages for detention and costs of the reference and of court, on which award judgment was entered, but the plaintiff then refused to return the property on demand. In an action on the replevin bond, it was held that judgment should be entered for the penal sum and interest thereon from the time of such demand and refusal; and execution issue for the value of the property at that time, and interest thereon since, and also for the amount of the judgment for damages and costs awarded by the referee, with interest thereon from the date thereof, if the sum had not been paid; provided that the sum thus computed should not exceed the amount of the judgment on the bond, in which event execution should issue for the exact amount thereof. Leighton *v.* Brown, 98 Mass. 515.

Authorities.—The following works on the law of replevin have been consulted in the preparation of this article: Gilbert on Replevin; Wilkinson on Replevin; Morris on Replevin; Wells on Replevin; Cobbey on Replevin. These works are cited in the chronological order in which they have been written.

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